

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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JOSE REYNA,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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**APPENDIX**

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In the  
United States Court of Appeals  
for the Seventh Circuit

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No. 23-1231

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*v.*

JOSE REYNA,

*Defendant-Appellant.*

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Appeal from the United States District Court for the  
Northern District of Indiana, South Bend Division.  
No. 3:21-CR-41 — **Robert L. Miller, Jr.**, *Judge.*

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ARGUED NOVEMBER 1, 2023 — DECIDED JANUARY 28, 2026

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Before SYKES, ST. EVE, and LEE, *Circuit Judges.*

SYKES, *Circuit Judge.* Jose Reyna pleaded guilty to possessing a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k). Just before sentencing he moved to dismiss the indictment, arguing that § 922(k) is an unconstitutional infringement of his Second Amendment right to keep and bear arms under the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

*Bruen* established a new standard for assessing the constitutionality of restrictions on weapons-related conduct: “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” 597 U.S. at 24.

The Court issued *Bruen* before Reyna pleaded guilty, and his motion was otherwise untimely under the district court’s scheduling order. But the judge found good cause to entertain the belated motion and denied it on the merits. He rejected Reyna’s claim at *Bruen*’s first step, holding that the Second Amendment’s text does not cover possession of a deserialized firearm. Reyna asks us to reverse that decision.

We affirm the judgment, though on somewhat different reasoning. *Bruen*’s first step is explicitly framed as a plain-text inquiry. Like most other provisions in the Bill of Rights, the Second Amendment is expressed in broad and highly general language; we’re not confident that the text alone resolves this case. Still, we agree that § 922(k) is not unconstitutional. The Court clarified *Bruen* in *United States v. Rahimi*, 602 U.S. 680 (2024), explaining that the new decision method should not be misunderstood to mean that modern regulations are invalid unless a close analogue in founding-era legal history can be identified. Instead, “the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 602 U.S. at 692.

Under *Rahimi*’s refinement of *Bruen*, § 922(k) is a valid firearm regulation. Although the modern requirement of serialization lacks a precise analogue in our early history, it

is loosely but relevantly similar to founding-era laws and practices requiring firearms to be marked or stamped, inventoried, and inspected in furtherance of military service or militia readiness. We hold that § 922(k) is consistent with the principles underlying this tradition.

### **I. Background**

Reyna was arrested in the early morning hours of February 17, 2021, during a traffic stop in South Bend, Indiana. A police officer stopped him at around 2 a.m. for a headlight violation and smelled marijuana in his vehicle. Reyna did not have a driver's license, so the officer detained him and searched the car, recovering several bags of marijuana, distribution quantities of methamphetamine, and a loaded handgun with an obliterated serial number. Reyna admitted that he was dealing drugs from his car and kept the gun to protect his business. He also told the police that he had scratched off the gun's serial number and fired it on two occasions to scare off would-be robbers.

A grand jury returned an indictment charging Reyna with a single crime: possession of a firearm with a removed, altered, or obliterated serial number in violation of § 922(k). He pleaded guilty without a plea agreement. Two days before sentencing, he moved to dismiss the indictment, arguing that § 922(k) is an unconstitutional restriction on the Second Amendment right to keep and bear arms. His motion raised a facial challenge to the statute under the Supreme Court's decision in *Bruen*.

*Bruen* was already on the books when Reyna pleaded guilty, and his eleventh-hour motion was untimely under the district court's scheduling order. *See* FED. R. CRIM.

P. 12(c)(1). But the judge found good cause to consider the late motion, explaining that if the constitutional challenge was successful, it would give Reyna a just reason to withdraw his plea. *See id.* r. 12(c)(3) (providing that the court may consider an untimely pretrial motion on a showing of good cause); *id.* r. 11(d)(2)(B) (providing that a guilty plea may be withdrawn for a fair and just reason). The government has not challenged that procedural ruling.

The judge then denied Reyna’s motion on the merits, rejecting the constitutional claim at step one of the *Bruen* framework. He agreed with the government’s position that possessing a firearm with an obliterated serial number is not covered by the plain text of the Second Amendment because deserialized firearms are not typically used by law-abiding citizens for lawful purposes. The judge expressly declined to address the government’s argument at step two of *Bruen* that § 922(k) is consistent with our nation’s historical tradition of firearm regulation.

With that, the case moved forward to sentencing, and this appeal followed.

## II. Discussion

The sole issue before us is Reyna’s Second Amendment challenge to § 922(k). He maintains, as he did in the district court, that the statute is unconstitutional on its face. A facial challenge is the most difficult kind of constitutional claim to raise successfully: to prevail Reyna must establish that “no set of circumstances exists” under which § 922(k) is valid. *Rahimi*, 602 U.S. at 693 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). We review the constitutionality of

the statute de novo. *United States v. Johnson*, 42 F.4th 743, 746 (7th Cir. 2022).

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. In its foundational decision in *District of Columbia v. Heller*, the Supreme Court confirmed that the Amendment secures an individual right to keep and bear arms, not merely a collective right limited to military or militia service. 554 U.S. 570, 592–95 (2008).

“Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense.” *Rahimi*, 602 U.S. at 690. Like other individual rights, however, “the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626.

*Heller* did not, of course, “undertake an exhaustive historical analysis” of the limits on the scope of the Second Amendment right or the extent of the government’s authority to regulate it where it applies. *Id.* After examining the Amendment’s text and history, the Court held that it codifies a preexisting individual right not limited to militia service, then turned to the specific law in question in the case: the District of Columbia’s ban on the possession of handguns, even in the home. The Court found the handgun ban incompatible with the original meaning of the right. *Id.* at 628–30.

Since *Heller* the Supreme Court’s Second Amendment cases have centered on the Amendment’s text and history to resolve additional questions about the nature and scope of the right and the constitutionality of specific restrictions on it. See *Bruen*, 597 U.S. at 20–24. In *Bruen* the Court made this adjudicative method exclusive, holding that the text and history of the right—not means-end scrutiny or any form of interest balancing—control the entire analysis in all Second Amendment challenges to weapons-related regulations. *Id.* at 22–24.

The Court framed the new standard as follows: “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 24.

As we’ve noted, the district judge resolved Reyna’s challenge to § 922(k) at step one of the *Bruen* framework, accepting the government’s position that the text of the Second Amendment does not cover possession of deserialized firearms. Reyna contests that conclusion, arguing that it misunderstands the Court’s instructions in *Bruen*. And because the judge did not address *Bruen*’s second step, Reyna asks us to reverse and remand the case for the judge to consider the government’s historical justification in the first instance.

As expected, the government defends the judge’s decision to reject Reyna’s claim at *Bruen*’s first step. If we disagree, however, the government argues in the alternative that a remand is unnecessary because the parties briefed the full *Bruen* inquiry below, giving us an adequate record to pro-

ceed to step two. The government maintains, as it did below, that § 922(k) is compatible with our historical tradition of firearm regulation.

The government's historical argument is persuasive, especially after *Rahimi*. We begin, however, by explaining our hesitation that Reyna's claim can be rejected at *Bruen*'s first step based solely on the Second Amendment's text.

### **A. Step One of the *Bruen* Framework**

The government's position at step one of *Bruen* rests on an assumption that *Heller* conclusively marked the boundaries of the Second Amendment right as a definitional matter, limiting it to only those weapons in common use by law-abiding, responsible citizens for lawful purposes, such as self-defense. From this premise, the government reasons as follows: only criminals possess firearms with obliterated serial numbers; there is no compelling reason for law-abiding, responsible citizens to do so; therefore, because deserialized firearms are not in common use by law-abiding citizens for lawful purposes, possession of a firearm with an obliterated serial number is not covered by the text of the Second Amendment.

The problem with this argument is its underlying assumption, which reads *Heller* as having decided more than it did. *Heller*'s references to weapons "in common use" by "law-abiding citizens" originate in the section of the opinion addressing the stare decisis question—that is, whether any of the Court's precedents foreclosed the conclusion that the Second Amendment codifies a preexisting individual right rather than a narrower collective right limited to militia service. *See Heller*, 554 U.S. at 619–26.

As relevant here, this section of *Heller* responds to Justice Stevens’s dissenting view that the Court’s 70-year-old decision in *United States v. Miller*, 307 U.S. 174 (1939), authoritatively determined that the Second Amendment protects only a collective right to possess arms in connection with militia service. *Heller*, 554 U.S. at 621–25. Refuting that reading, the *Heller* majority explained that *Miller* was a narrow decision that did not address the nature of the right *at all*. *Id.* at 622–24.

*Miller* involved a challenge to an indictment for possession of a short-barreled shotgun in violation of the National Firearms Act. The district court had quashed the indictment, holding that the statute violated the Second Amendment, but the Supreme Court reversed. *Miller*, 307 U.S. at 177, 183. In a short opinion, the Court focused primarily on the connection between the right and service in the militia or military, noting that “it is not within judicial notice that this weapon [a short-barreled shotgun] is any part of the ordinary military equipment or that its use could contribute to the common defense.” *Id.* at 178. The Court held that

[i]n the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*.

*Id.* (emphasis added).

After tracing this background, the *Heller* majority explained that the Court’s decision in *Miller* was quite limited

and did *not* hold—indeed, “cannot possibly be read to have held”—that the Second Amendment right is limited to militia service. *Heller*, 554 U.S. at 621. Rather, “*Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.” *Id.* at 623. Nor did *Miller* suggest that the Amendment protects only weapons useful in military service or, conversely, that restrictions on the personal possession of military weapons—machineguns, for example—might be unconstitutional. *Id.* at 624–25. Instead, as the *Heller* majority explained, *Miller* simply took note of the historical fact that “ordinarily when called for [militia] service[,] [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Id.* at 624 (alterations in original) (quoting *Miller*, 307 U.S. at 179). Reinforcing this point, the *Heller* majority explained that “[t]he traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense.” *Id.* (internal quotation marks omitted).

The *Heller* majority’s response to Justice Stevens continued with a litany of reasons not to overread *Miller*: the government’s brief had contained only “scant discussion of the history of the Second Amendment”; there had been no adversarial presentation in the case—the defendants did not file a brief or appear at oral argument—so “the Court was presented with no counterdiscussion”; and the decision said “[n]ot a word (*not a word*) about the history of the Second Amendment.” *Id.* at 623–24. All this, the *Heller* majority explained, made it unwise to “read *Miller* for more than it said, because the case did not even purport to be a thorough examination of the Second Amendment.” *Id.* at 623.

After issuing these cautions and qualifications, the *Heller* majority went on to offer a few observations about generalizations that might fairly be drawn from *Miller*. One such observation was this:

We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right, see Part III, *infra*.

*Id.* at 625.

The cross-reference to Part III of the opinion sends the reader to a brief discussion explaining that the Second Amendment right has limits (like most other rights) and mentioning a few. *Id.* at 626–27. This part of *Heller* is quite short: just three paragraphs. The first paragraph contains a much-scrutinized passage that has proved vexing for the lower courts.<sup>1</sup>

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<sup>1</sup> In its brief discussion of limits on the Second Amendment right, the Court said this:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

*District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

The second paragraph returns to *Miller* with this brief comment:

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.”

*Id.* at 627 (citation omitted).

The Court’s acknowledgement that the Second Amendment right is not unlimited was unsurprising and leaves much for future consideration—a self-evident point that the Court made explicit at the end of its opinion:

[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field ... . [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

*Id.* at 635.

We’ve unpacked these parts of *Heller* to explain our uncertainty that this case can be resolved at *Bruen*’s first step. The Court’s commentary about weapons “in common use” by “law-abiding citizens” rests on its review of precedent (*Miller*), history, and tradition, and it came with significant cautionary qualifications. The Court made clear that its observations about the limits on the right were (1) prelimi-

nary; (2) not based on a comprehensive historical analysis; (3) subject to further exploration in future cases; and (4) unnecessary to its holding.

Indeed, earlier in *Heller*, in the heart of its exploration of the meaning of the Second Amendment right—specifically, the meaning of the term “arms”—the Court explained that the Amendment “extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. *Rahimi* and *Bruen* repeat this point. *Rahimi*, 602 U.S. at 691; *Bruen*, 597 U.S. at 28 (explaining that “even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense”).

In short, absent further signals from the Court about the *Bruen* step-one inquiry, it’s hard to say with confidence that the conduct regulated by § 922(k) is categorically outside the prima facie scope of the right. For these reasons, we do not share the government’s certainty that Reyna’s challenge to § 922(k) can be resolved at *Bruen*’s first step without consulting founding-era legal history.

The *Bruen* standard is still in its early days. It’s no surprise that difficult theoretical questions remain about how to evaluate its dual components of constitutional text and history. For present purposes, we think it’s best to assume that possession of a serialized firearm is not categorically excluded from the scope of the right and consider whether § 922(k) is consistent with our historical tradition of firearm regulation. We forge ahead to that question.

## B. Step Two of the *Bruen* Framework

*Bruen*'s second step requires the government to demonstrate that § 922(k) is consistent with the Nation's historical tradition of firearm regulation. As we've noted, in *Rahimi* the Court clarified that the *Bruen* standard should not be misunderstood to mean that modern firearm regulations require close founding-era comparators. 602 U.S. at 691–92. The Court punctuated the point this way: *Heller* and *Bruen* “were not meant to suggest a law trapped in amber.” *Id.* at 691. Rather, “the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.” *Id.* at 692. The analysis examines “whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit.” *Id.* (quoting *Bruen*, 597 U.S. at 29).

Although systemic firearm serialization as it exists today was not in use when the Second Amendment was ratified, founding-era regulations established various measures to inventory and track firearms. For example, starting in the early seventeenth century, Virginia required plantation commanders to take a yearly account of “arm[']s and munition.” Virginia Act of Mar. 2, 1631, Act. LVI, reprinted in 1 THE STATUTES AT LARGE, BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 174–75 (William Waller Hening ed., N.Y., R. & W. & G. Bartow 1823); see Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55, 76 (2017). Similarly, in the mid-seventeenth century, Rhode Island required by governor's order a lieutenant to go from house to house “tak[ing] a precise and exact account of all the

arm[']s, am[m]unition[,] and weapons ... each person is furnished with." 2 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 196 (John Russell Bartlett ed., Providence, R.I., A. Crawford Greene & Brother 1857).

By the time the Second Amendment was ratified, it was common practice for states to conduct musters to keep track of firearms for militia purposes. See Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 161 (2007). In the mid-eighteenth century, South Carolina adopted a law authorizing its military officers to go door to door to view and inspect any arms and ammunition with a penalty of three pounds for refusing inspection or possessing noncompliant arms. An Act for the Better Regulating the Militia of this Province, § 10 (1747), reprinted in 9 THE STATUTES AT LARGE OF SOUTH CAROLINA app. at 647 (David J. McCord ed., Columbia, S.C., A.S. Johnston 1841). New Jersey similarly required militia officers to go door to door at militiamen's homes three times a year to report on the "[s]tate of [their] arms ... and [a]mmunition"; it separately required its militia to assemble twice a year to likewise report the state of arms and ammunition. An Act for the Regulating, Training, and Arraying of the Militia, and for Providing More Effectually for the Defence and Security of the State, ch. 242, §§ 13, 15 (1781), reprinted in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 169–70 (Trenton, Isaac Collins 1784).

Massachusetts similarly required an annual assembly to "examin[e] and tak[e] an exact account of every man[']s arms and equipment[]" with a fine for militiamen who were

absent. An Act for Regulating and Governing the Militia of the Commonwealth of Massachusetts, ch. 14 (1793), *reprinted in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 394–95 (Boston, Wright & Potter Printing Co. 1895). The early Congress enacted a law requiring state militia officers to report the “situation of the arms, accoutrements, and ammunition of the several corps”; those reports were collected and sent to the President of the United States. Act of May 8, 1792, ch. 33, 1 Stat. 271, 273–74.

Meanwhile, our early regulatory tradition also required the marking of firearms. For example, during the Revolutionary War, George Washington required all military equipment, including firearms, to be stamped with an insignia to keep track of firearms and prevent theft. E. WAYNE CARP, *TO STARVE THE ARMY AT PLEASURE* 67 (1984).

By the early 1800s, some states required gun barrels to be proved and marked (and penalized obliterating the marks). For example, an 1805 Massachusetts law established an inspection process (called “proving”) for “all [m]usket [b]arrels and [p]istol barrels” manufactured in the Commonwealth and required inspectors to stamp compliant firearms with their initials, the year of the inspection, and the letters “P” and “M.” An Act to Provide for the Proof of Fire Arms Manufactured Within this Commonwealth, ch. 81 (1805), *reprinted in* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 111–12 (Boston, Wright & Potter Printing Co. 1898). These markings were to be “so deeply impressed” that they “[could] not be erased or disfigu[red].” *Id.* at 112. Anyone who manufactured or sold a firearm without having it inspected and stamped (or “proved,” in the language of the statute) was subject to a 10-dollar fine, and anyone who

falsely forged or altered the stamp was subject to a fine of 20 to 50 dollars. *Id.* at 112–13.

Maine enacted a similar law in 1821, requiring “provers” to “mark and number every barrel” in a “permanent manner” and to provide a certificate attesting to the proof with their initials and the date. 1821 Me. Laws 685. Anyone who sold an unproved firearm was subject to a 10-dollar fine, and anyone who falsely altered the stamp or mark on the certificate was subject to a fine of 20 to 100 dollars. *Id.* at 685–86.

These founding-era laws and practices show that marking, inventorying, or otherwise publicly tracking firearms is part of our historical tradition of firearm regulation. Of course, our modern system of firearm serialization is far more sophisticated and comprehensive, but it fits comfortably within this tradition. It follows that § 922(k), which punishes the knowing possession of a deserialized firearm, is likewise consistent with this tradition—in principle, if not specifics. In *Bruen*’s framing, as refined by *Rahimi*, § 922(k) is “relevantly similar” to founding-era regulations requiring firearms to be inventoried, inspected, or marked to promote militia readiness and permit public tracking of firearms. *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29).

*Rahimi* confirmed that a closer match to a historical precursor is not necessary. 602 U.S. at 691. The founding-era laws establishing public inventory and inspection regimes and rudimentary forms of firearm marking ensured that the relevant governing authority could monitor and track firearms within its jurisdiction, penalizing those who did not comply. It’s true that some of the historical regulations were linked to militia preservation and readiness. But “the Second Amendment permits more than just those regulations iden-

tical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers.” *Rahimi*, 602 U.S. at 691–92. Accordingly, we hold that § 922(k) is compatible with the Second Amendment.

In closing, we note that two of our sister circuits have also upheld the validity of § 922(k) since *Bruen*, though their reasoning differs from ours. The Second and Fourth Circuits have rejected challenges to § 922(k) at step one of *Bruen*, agreeing with the government’s position that possession of a deserialized firearm is not covered by the Second Amendment’s text. See *United States v. Gomez*, 159 F.4th 172, 177–78 (2d Cir. 2025); *United States v. Price*, 111 F.4th 392, 402–08 (4th Cir. 2024) (en banc). Though our analysis diverges, our conclusion is the same.

AFFIRMED

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

UNITED STATES OF AMERICA )  
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 v. ) CAUSE NO. 3:21-CR-41 RLM-MGG  
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 JOSE REYNA )

OPINION AND ORDER

Jose Reyna was indicted with one count of possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k). Mr. Reyna entered a guilty plea and moved to dismiss the criminal case just before sentencing. He argues that § 922(k) violates the Second Amendment to the U.S. Constitution in light of New York State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022). After briefing from the parties, the court held oral arguments on December 5. The court denies Mr. Reyna’s motion to dismiss [Doc. 28] because the plain text of the Second Amendment doesn’t reach a handgun without a serial number.

BACKGROUND<sup>1</sup>

St. Joseph County Police Department officers pulled Jose Reyna over on February 17, 2021, because of a defective headlight. Mr. Reyna presented the

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<sup>1</sup> The court takes these facts from the presentence investigation report prepared by the U.S. Probation Office for Mr. Reyna’s sentencing. [Doc. 22]. Mr. Reyna pleaded guilty to the offense and later filed a notice of no objection to the presentence investigation report. [Doc. 21].

officers with a picture ID but not a driver's license. His car smelled of marijuana. The officers searched his car and found a handgun with the serial number scratched off as well as marijuana and other supplies suggestive of marijuana distribution.

Mr. Reyna was arrested and agents of the Bureau of Alcohol, Tobacco, Firearms and Explosives eventually interviewed him. Mr. Reyna told the ATF officers that he sells marijuana and carried the handgun to protect himself. He admitted to having scratched off the handgun's serial number with a knife and described instances when he fired the gun to scare of adversaries when drug deals had gone sour.

A grand jury indicted Mr. Reyna on one count of possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k). The indictment charged Mr. Reyna with unlawful possession on or about February 17, 2021. At that time, he had one adult misdemeanor conviction and one juvenile misdemeanor adjudication. Mr. Reyna was in state custody when indicted and was arrested on the federal warrant about one year later in May 2022. He pleaded guilty without a plea agreement and was to be sentenced on October 19.

Mr. Reyna filed this motion to dismiss on October 17. Mr. Reyna argues that his case should be dismissed because § 922(k) violates the Second Amendment. He contends that § 922(k) regulates possession of firearms, which is covered by the Second Amendment's plain text, and that the government hasn't shown, and can't show, that such a regulation is consistent with our

nation's history and tradition of firearm regulation. See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

#### STANDARD OF REVIEW

A defendant ordinarily must move to dismiss an indictment for failure to state an offense in a pretrial motion, Fed. R. Crim. P. 12(b)(3)(B)(v), but a court can consider an untimely motion if the defendant shows good cause. Fed. R. Crim. P. 12(c)(3). A defendant can withdraw a guilty plea after entering a guilty plea and before sentencing if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Guilty pleas "should not lightly be withdrawn," but can be withdrawn for factual or legal innocence or if the defendant didn't enter a plea knowingly and voluntarily. United States v. Brown, 973 F.3d 667, 715 (7th Cir. 2020).

#### ANALYSIS

Mr. Reyna argues that his entire case must be dismissed because the statute he was charged with and to which he pleaded guilty impermissibly burdens the Second Amendment right to keep and bear arms. He raises this argument in light of New York State Rifle & Pistol Assoc'n v. Bruen, 142 S. Ct. 2111 (2022), which was decided shortly before he entered a guilty plea, and which clarified how courts are to evaluate Second Amendment challenges to gun regulations. If his argument is correct and § 922(k) violates the Second Amendment, his claim to legal innocence is fair and just reason for him to

withdraw his guilty plea and for the court to grant his motion to dismiss the indictment. The government argues that because N.Y. State Rifle was decided before Mr. Reyna entered his guilty plea, this isn't the sort of case in which constitutional law changes between a guilty plea and sentencing. See United States v. Mays, 593 F.3d 603, 607 (7th Cir. 2010). This is no reason to dismiss Mr. Reyna's motion without reaching the merits: successfully showing that § 922(k) is unconstitutional would show that his guilty plea wasn't knowing or voluntary, which is itself good reason to grant a motion to withdraw his guilty plea and then dismiss the case.

Before N.Y. State Rifle, courts coalesced around a two-step test for Second Amendment challenges to gun regulations. Id. at 2125–2126. This two-step test first asked whether the regulated conduct was within the Second Amendment's scope. Id. If so, courts applied some form of means-ends scrutiny to the challenged regulation. Id.

The N.Y. State Rifle decision eliminated means-ends scrutiny and clarified that Second Amendment challenges are based on the Second Amendment's text as well as history and tradition. Id. at 2129–2130. A regulation doesn't offend the Second Amendment if the Second Amendment's plain text doesn't cover the regulated conduct. Id. If the Second Amendment's plain text covers the regulated conduct, the conduct is presumptively protected, and the government bears a burden of showing that the regulation is consistent with history and tradition. Id. Only if the government affirmatively shows that the regulation is equivalent

or analogous to well-established historical regulations can the regulation survive Second Amendment scrutiny. Id. at 2127, 2130.

Mr. Reyna argues that § 922(k)'s regulated conduct is presumptively protected because the Second Amendment's plain text covers it, and that the government hasn't shown that § 922(k) is consistent with history and tradition. The government responds that § 922(k)'s regulated conduct isn't covered by the Second Amendment's plain text, for a few different reasons, and that if § 922(k) regulates protected conduct, the regulation is justified by various laws regulating guns and gunpowder.

The parties raise as a threshold issue whether Mr. Reyna can bring a facial challenge to § 922(k). To succeed on a facial challenge, a party must show that a statute is unconstitutional in all applications. City of L.A. v. Patel, 576 U.S. 409, 415, 418 (2015). Mr. Reyna contends that “§ 922(k) is unconstitutional in all of its applications because it cannot satisfy the Bruen test.” [Doc. 37]. The government argues that Mr. Reyna is barred from bringing a facial challenge, relying on Baer v. Lynch, 636 F. App'x 695, 697 (7th Cir. 2016). The defendant in Baer argued that statutes banning firearm possession by felons who are no longer dangerous facially violated the Second Amendment. Id. The court rejected this argument, explaining that “Second Amendment claims cannot rest on a facial overbreadth challenge . . . . [Defendant] cannot challenge the federal and state statutes on the ground that they ‘may conceivably be applied unconstitutionally to others, in other situations.’” Id. (citing United States v.

Skoiien, 614 F.3d 638, 645 (7th Cir. 2010) (en banc); Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973)).

Unlike the defendant in Baer v. Lynch, Mr. Reyna’s facial argument doesn’t depend on whether applying the law to some subset of people other than him might violate the Second Amendment, so it’s not a facial overbreadth argument. His facial challenge requires showing that every application of the law is unconstitutional. That’s the sort of argument Mr. Reyna can bring, so Mr. Reyna’s motion doesn’t fail for being a facial challenge. See City of L.A. v. Patel, 576 U.S. at 415 (explaining that a Second Amendment facial challenge was allowed in District of Columbia v. Heller, 554 U.S. 570 (2008)).

*Whether the Second Amendment’s Plain Text Covers § 922(k)’s Regulated Conduct.*

The first step of a Second Amendment challenge is deciding whether the regulated conduct falls within the scope of the Second Amendment’s plain text. N.Y. State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. at 2129–2130.

The Second Amendment reads in full, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. The Second Amendment’s plain meaning depends on how voters at the time of ratification would understand the normal meaning of words and phrases, as well as the idiomatic meaning of words and phrases. District of Columbia v. Heller, 554 U.S. 570, 576–577 (2008).

The text, read as a whole, “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” Id. at 592. Keeping arms means the right to possess arms for self-defense in the home, id. at 628–629, and carrying arms means the right to possess arms for self-defense in public. N.Y. State Rifle, 142 S. Ct. at 2122. Second Amendment rights are individually held, as indicated most clearly by the text’s reference to “the people,” District of Columbia v. Heller, 554 U.S. at 579–581. But the plain text also reveals that the Second Amendment has limits; the very same phrase that indicates an individual right — “the people” — also limits the Second Amendment right to members of the political community and excludes criminals. Id. at 580; Range v. Att’y Gen. U.S., 53 F.4th 262, 266, 284 (3d Cir. 2022) (per curiam) (citing N.Y. State Rifle, 142 S. Ct. at 2131); *see also* United States v. Yancey, 621 F.3d 681, 684–685 (7th Cir. 2010). The Second Amendment’s text doesn’t protect keeping and bearing any weapon in every way possible. District of Columbia v. Heller, 554 U.S. at 626–627. A weapon generally is covered if a person can carry it, N.Y. State Rifle v. Bruen, 142 S. Ct. at 2132, but not if the weapon is uncommon or unusually dangerous or not typically used by law-abiding people for lawful purposes. Id. at 2128. (citing District of Columbia v. Heller, 554 U.S. at 626, 627; United States v. Miller, 307 U.S. 174, 179 (1939)).

The first step under N.Y. State Rifle asks about the regulated conduct, so the court must determine how specifically or generally to define § 922(k)’s regulated conduct: is it mere “possession of a firearm” or “possession of a firearm *with an obliterated serial number*”?

Mr. Reyna argues that § 922(k) regulates mere possession. He relies on United States v. Price, No. 2:22-cr-00097, 2022 U.S. Dist. LEXIS 186571 (S.D. W. Va. Oct. 12, 2022), which sustained a Second Amendment challenge to § 922(k). The Price court reasoned that § 922(k) regulated mere possession because a person could lawfully purchase or transfer a firearm, but that person suddenly becomes a criminal under § 922(k) if the serial number is destroyed. Id. at \*7–8. The court used the example of a father who lawfully purchases a firearm and then destroys the serial number. The example continues with the daughter, who lawfully receives the gun from her father and displays it in his memory. She, too, unlawfully possesses the gun because its serial number is obliterated. Neither of them was made a criminal for destroying a serial number or for an unlawful purchase or transfer, so it’s their possession that’s regulated.

The government objects to this line of reasoning, arguing that such a reading is artificially narrow. The government relies on part on United States v. Holton, No. 3:21-CR-0482-B, 2022 U.S. Dist. LEXIS 200327, at \*9 (N.D. Tex. Nov. 3, 2022). The Holton court focused on how a serial number doesn’t relate to the conduct protected in Heller and N.Y. State Rifle — a serial number is unrelated to handgun possession in the home and handgun possession in public. The government further argues that Mr. Reyna could possess other guns with serial numbers under § 922(k), so mere possession of a firearm can’t be the regulated conduct.<sup>2</sup>

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<sup>2</sup> Although it plays no role in today’s decision, it’s worth remembering that Mr. Reyna’s possession of this particular firearm was, at least when he wasn’t

Reading § 922(k)'s regulated conduct as mere possession is inconsistent with how the Supreme Court evaluates Second Amendment challenges. In Heller, the challenged regulation prohibited handgun possession in the home, so the Court defined the regulated conduct as handgun possession in the home. District of Columbia v. Heller, 554 U.S. at 628. In N.Y. State Rifle, the challenged regulation prohibited publicly carrying a handgun, so the Court defined the regulated conduct as publicly carrying a handgun. N.Y. State Rifle v. Bruen, 142 S. Ct. at 2134. In neither case did the Supreme Court distill the challenged regulation to so abstract a level as mere possession or mere carrying of a firearm.

Nor would it make sense to define regulated conduct as mere possession in light of the comparator — the Second Amendment's plain text. If § 922(k)'s regulated conduct is mere possession, any number of other challenged regulations would similarly boil down to mere possession, then promptly and automatically proceed to Step Two. For Step One to have any meaning, the regulated conduct must be defined specifically enough that it can meaningfully compare to the Second Amendment's plain text — a plain text that is more complex than mere possession. To do otherwise would be to compare the regulated conduct to the Second Amendment's bare and oversimplified text — keeping and bearing arms, without the original public meaning emphasized in Heller and N.Y. State Rifle.

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dealing marijuana, perfectly legal. It was his own obliteration of the serial number that turned the firearm into something else.

Having concluded that § 922(k)'s regulated conduct is "possession of a firearm with an obliterated serial number" and not "mere possession," the court turns its inquiry to whether the Second Amendment's plain text covers that conduct. Mr. Reyna argues that possession of a gun with an obliterated serial number is protected because such a gun can still be used for self-defense. Prohibiting possession of deserialized guns reduces his access to the universe of guns that can be used for self-defense. The government argues that the only purpose of a deserialized gun is to evade the law; law-abiding citizens ordinarily don't use deserialized guns for lawful purposes, keeping a serial number doesn't reduce a gun's usefulness for self-defense, and obliterating a serial number doesn't make a gun more useful for self-defense. "With or without a serial number, a pistol is still a pistol." United States v. Marzzarella, 614 F.3d 85, 94 (3d Cir. 2010).

The Heller Court made clear that the Second Amendment excludes "those weapons not typically possessed by law-abiding citizens for lawful purposes." District of Columbia v. Heller, 554 U.S. at 625 (discussing short-barreled shotguns in United States v. Miller, 307 U.S. 174 (1939)); *see also id.* at 623 ("Miller stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons."). This limit on the Second Amendment right arises from the Second Amendment's text; the Heller Court explained that the plain meaning of "militia" and the relationship between the Second Amendment's operative clause and prefatory clause show that the Second Amendment protects common weapons used for lawful purposes. Id. at

624–625. This limitation comes from the text of the Second Amendment, so whether a particular type of gun is typically used by law-abiding citizens for lawful purposes is a proper question at the first step of the N.Y. State Rifle analysis.<sup>3</sup>

Guns with obliterated serial numbers belong to “those weapons not typically possessed by law-abiding citizens for lawful purposes” so possession of such guns isn’t within the Second Amendment’s scope. District of Columbia v. Heller, 554 U.S. at 625. Guns with obliterated serial numbers are useful for criminal activity because identifying who possessed a firearm is more difficult when the serial number is destroyed. United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010). By using a gun without a serial number, a criminal ensures he has a greater higher likelihood of evading justice. Id. Mr. Reyna might be right that a deserialized gun is just as useful for self-defense as a gun with its serial number intact, but that doesn’t suggest that deserialized guns are typically used by law-abiding citizens for lawful purposes. A law-abiding citizen who uses a gun for self-defense has no reason to prefer a deserialized gun to a gun with serial

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<sup>3</sup> Nothing in N.Y. State Rifle undermines Heller’s discussion of textual limits on types of firearms. The N.Y. State Rifle Court applied Heller and purported to clarify, not change, its methodology. N.Y. State Rifle v. Bruen, 142 S. Ct. at 2128–2129; id. at 2131 (“The test that we set forth in Heller and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.”); id. at 2134 (“Having made the constitutional standard endorsed in Heller more explicit, we now apply that standard to New York’s proper-cause requirement.”); id. at 2138 (“Under Heller’s text-and-history standard, the proper-cause requirement is therefore unconstitutional.”); *see also id.* at 2161 (Kavanaugh, J., concurring) (“The Court employs and elaborates on the text, history, and tradition test that Heller and McDonald require for evaluation whether a government regulation infringes on the Second Amendment.”).

number intact. That a law-abiding citizen could use a gun with an obliterated serial number for lawful self-defense isn't evidence that guns with obliterated serial numbers are *typically* used by law-abiding citizens for lawful self-defense.

Mr. Reyna's objection that § 922(k) reduces the pool of guns available to him for self-defense doesn't change the outcome. Prohibiting possession or use of a particular type of gun might bring a regulation within the Second Amendment's scope if the class of firearms is defined by its functionality. For instance, in Heller, the government argued that banning all handguns was permissible because a would-be gun owner could still possess some other type of gun, like a rifle. District of Columbia v. Heller, 554 U.S. at 629. The Court rejected that argument because of handguns' characteristics that make them helpful and common for lawful self-defense:

It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

District of Columbia v. Heller, 554 U.S. at 629.

While the prohibition in Heller applied to a class of guns defined by characteristics that brought them within the Second Amendment's scope (they are useful and common for lawful self-defense), the § 922(k) prohibition applies to a class of guns defined solely by a nonfunctional characteristic: the serial

number. See United States v. Marzzarella, 614 F.3d at 94 (“Furthermore, it also would make little sense to categorically protect a class of weapons bearing a certain characteristic wholly unrelated to their utility. Heller distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality.”) (citing District of Columbia v. Heller, 554 U.S. at 629).

That § 922(k)’s regulated conduct is outside scope of the Second Amendment is enough to decide Mr. Reyna’s challenge to his indictment and guilty plea. Mr. Reyna’s motion to dismiss must be dismissed on this basis so the court declines to consider whether the government’s evidence of historical gun and gunpowder regulations justify § 922(k).

#### CONCLUSION

The Second Amendment right to keep and bear arms doesn’t extend to arms that aren’t typically possessed by law-abiding citizens for lawful purposes. Law-abiding citizens don’t typically possess firearms with obliterated serial numbers for lawful purposes, so Mr. Reyna’s indictment and guilty plea don’t offend the Second Amendment. Accordingly, the court DENIES Mr. Reyna’s motion to dismiss. [Doc. 28]. The court will schedule Mr. Reyna’s sentencing hearing by separate order.

SO ORDERED.

ENTERED: December 15, 2022

/s/ Robert L. Miller, Jr.  
Judge, United States District Court

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA

Plaintiff,

vs.

JOSE REYNA

Defendant.

CASE NUMBER: 3:21CR41-001

USM Number: 01734-510

CHAD PENNINGTON - FCD  
DEFENDANT'S ATTORNEY

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT pleaded guilty to count 1 of the Indictment on 7/11/2022.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense:

<u>Title, Section &amp; Nature of Offense</u>	<u>Date Offense Ended</u>	<u>Count Number(s)</u>
18:922(k) POSSESSION OF A FIREARM WITH AN OBLITERATED SERIAL NUMBER AND FORFEITURE ALLEGATION	February 17, 2021	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Final order of forfeiture filed on 1/30/2023.

**IT IS ORDERED** that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances.

January 30, 2023

Date of Imposition of Judgment

s/ Robert L. Miller, Jr.

Signature of Judge

Robert L. Miller, Jr., United States District Judge

Name and Title of Judge

January 30, 2023

Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **28 months**.

The Court makes the following recommendations to the Bureau of Prisons:

The court notes that Jose Reyna spent three and a half months in state custody on a related charge.

The defendant is remanded to the custody of the United States Marshal.

**RETURN**

I have executed this judgment as follows:

Defendant delivered \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_,  
with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By: \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

## **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years** subject to the following conditions:

### **CONDITIONS OF SUPERVISION**

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must not unlawfully use any controlled substance, including marijuana, and must submit to one drug test within 15 days of the beginning of supervision and at least 2 periodic tests after that for use of a controlled substance.
4. You must cooperate with the probation officer with respect to the collection of DNA.
5. You must be lawfully employed full-time (at least 30 hours per week). If you are not employed full-time, you must try to find full-time employment under the supervision of the probation officer. If you become unemployed, or change your employer, position, or location of employment, you must tell the probation officer within 72 hours of the change. If after 90 days you do not find employment, you must complete at least 10 hours of community service per week until employed or participate in a job skills training program approved and directed by your probation officer.
6. You must report in person to the probation office, in the district which you are released, within 72 hours of release from the custody of the Bureau of Prisons. You must report to the probation officer in the manner and as frequently as the court or the probation officer directs; and you must notify the probation officer within 48 hours of any change in residence, and within 72 hours of being arrested or questioned by a police officer.
7. You must not travel knowingly outside the federal judicial district without the permission of the court. Alternatively, the probation officer will grant such permission when doing so will reasonably assure the probation officer's knowledge of your whereabouts and that travel will not hinder your rehabilitation or present a public safety risk.
8. You must truthfully answer any inquiry by the probation officer and must follow the instruction of the probation officer pertaining to your supervision and conditions of supervision. This condition does not prevent you from invoking the Fifth Amendment privilege against self-incrimination.
9. You must permit a probation officer to meet at your home or any other reasonable location and must permit confiscation of any contraband the probation officer observes in plain view. The probation officer will not conduct such a visit between the hours of 11:00 p.m. and 7:00 a.m. without specific reason to believe a visit during those hours would reveal information or contraband that wouldn't be revealed through a visit during regular hours.

10. You must not possess a firearm, ammunition, destructive device, or any other dangerous weapon (meaning an instrument designed to be used as a weapon and capable of causing death or serious bodily harm).
  
11. Unless an assessment at the time of release from imprisonment or commencement of probation indicates to the court that participation is unnecessary, you must participate in a (substance abuse) and/or (mental health) and/or (anger management) treatment program or aftercare program. The court will receive notification of such assessment. You must abide by all treatment program requirements and restrictions, consistent with the conditions of the treatment provider. You will be required to participate in drug and/or alcohol testing, not to exceed 85 drug and/or alcohol tests per year. At the request of a treatment provider, probation officer, or you, the court may revise these conditions. While under supervision, you must not consume alcoholic beverages. You must pay all or a part of the costs for participation in the program, not to exceed the sliding fee scale as established by the Department of Health and Human Services and adopted by this court. Failure to pay these costs will not be grounds for revocation unless the failure is willful.

### CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$100.00	NONE	NONE

The defendant shall make the special assessment payment payable to Clerk, U.S. District Court, 102 Robert A. Grant Courthouse, 204 South Main Street, South Bend, IN 46601. The special assessment payment shall be due immediately.

#### FINE

No fine imposed.

#### RESTITUTION

No restitution imposed.

## FORFEITURE

The defendant shall forfeit the defendant's interest in the following property to the United States:

- **CZ USA UNKNOWN Pistol CAL: SN: Unknown**
- **10 Rounds REMINGTON Ammunition CAL:22**

Name: JOSE REYNA  
Docket No.: 3:21CR41-001

**ACKNOWLEDGMENT OF SUPERVISION CONDITIONS**

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I have reviewed the Judgment and Commitment Order in my case and the supervision conditions therein. These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

\_\_\_\_\_

Defendant

\_\_\_\_\_

Date

\_\_\_\_\_

U.S. Probation Officer/Designated Witness

\_\_\_\_\_

Date