

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JAMAION WILSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 24-10633

United States Court of Appeals
Fifth Circuit

FILED

January 12, 2026

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JAMAION WILSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:24-CR-27-1

Before WIENER, WILLETT, and HO, *Circuit Judges.*

DON R. WILLETT, *Circuit Judge:*

After being duped into buying a fake firearm, Jamaion Wilson retaliated—shooting the seller dead with a handgun modified to fire like a machinegun. Wilson later confessed and pleaded guilty to unlawful possession of a machinegun under 18 U.S.C. § 922(o). At sentencing, the district court applied the Sentencing Guidelines cross-reference to second-degree murder, concluding that offense most closely reflected Wilson’s conduct.

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On appeal, Wilson raises two challenges: (1) that his conviction violates the Second Amendment, and (2) that the district court misapplied the cross-reference in calculating his Guidelines range. We reject both arguments and AFFIRM.

I

On May 9, 2023, Wilson and two friends met D.J. in a Valero gas station parking lot to purchase a firearm for \$300.¹ As they left, they discovered the firearm was fake. Angered, Wilson drew a Palmetto State Armory Dagger pistol outfitted with a Glock switch—a device that converts a semiautomatic handgun into a fully automatic weapon—and retrieved an extended magazine capable of holding 31 rounds from his vehicle. The three men then walked to the rear of the station to confront D.J. After a brief exchange, Wilson fired multiple rounds, striking D.J. repeatedly until he fell. Wilson and his friends then robbed D.J. of cash and a gun before fleeing.

Investigators arrived soon after and found D.J. lying in the parking lot in a pool of blood. They transported him to a nearby hospital, where he was later pronounced dead. Officers interviewed a witness to the shooting and secured surveillance footage of the incident. They then located Wilson, who admitted firing the shots but claimed he acted in self-defense. Wilson also confirmed that the firearm he used was equipped with a “machinegun conversion device” and described it as a “tactical Glock.”

Wilson was charged with unlawful possession of a machinegun, in violation of 18 U.S.C. § 922(o). He moved to dismiss the indictment, arguing

¹ These facts are taken from the Presentence Investigation Report, which was adopted by the district court with three clarifications requested by Wilson.

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that § 922(o) violates the Second Amendment, but the district court denied the motion. Wilson then pleaded guilty without a written plea agreement.

Wilson's Presentence Investigation Report (PSR) identified U.S.S.G. § 2K2.1 as the applicable Guideline. Because the offense resulted in a death, the PSR applied the cross-reference to § 2A1, which governs homicide. The PSR determined that § 2A1.2—second-degree murder—was the most analogous offense. Applying that cross-reference, and incorporating other adjustments, the PSR calculated an offense level of 35. Combined with Wilson's criminal history, this produced a Guidelines range of 188–235 months' imprisonment. But because § 922(o) carries a statutory maximum of 10 years—below the Guidelines range—the PSR recommended a 120-month sentence.

Wilson objected, arguing that the second-degree murder cross-reference failed to account for his self-defense claim. The district court overruled Wilson's objection, adopted the PSR's findings, and imposed a 120-month sentence.

II

We review preserved constitutional challenges *de novo*² and unpreserved sentencing objections for plain error.³ To establish plain error, a defendant must show “(1) error, (2) that is plain, and (3) that affects substantial rights.”⁴ If the defendant makes that showing, we may exercise our discretion “to notice a forfeited error but only if (4) the error seriously

² *United States v. Diaz*, 116 F.4th 458, 462 (5th Cir. 2024).

³ *United States v. Martinez-Rodriguez*, 821 F.3d 659, 662 (5th Cir. 2016).

⁴ *Id.* (citation omitted).

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affects the fairness, integrity, or public reputation of judicial proceedings.”⁵

“Meeting all four prongs is difficult, ‘as it should be.’”⁶

III

Wilson presses two arguments on appeal. First, he argues that his conviction is unconstitutional because § 922(o) violates the Second Amendment. Second, he contends that the district court erred by applying the Guidelines cross-reference to second-degree murder instead of voluntary manslaughter, which produced a higher Guidelines range. We take each argument in turn.

A

We begin with Wilson’s Second Amendment challenge.

Section 922(o) makes it unlawful—with exceptions not relevant here—“for any person to transfer or possess a machinegun.” Wilson contends that this ban violates the Second Amendment’s guarantee of an individual right to keep and bear arms.⁷

⁵ *Id.* at 663.

⁶ *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

⁷ Wilson claims to bring both a facial and as-applied constitutional challenge. But his arguments collapse into one. His as-applied challenge alleges that § 922(o) is unconstitutional “as applied to the possession of machineguns.” But machinegun possession is all the statute prohibits. Indeed, Wilson’s arguments focus exclusively on whether the government may facially ban machineguns; he never suggests that the statute is only unconstitutional as applied to his specific conduct. *See United States v. Morgan*, 147 F.4th 522, 526 (5th Cir. 2025) (“An as-applied challenge asks whether a law—though constitutional in some circumstances—is nonetheless unconstitutional as applied to a defendant’s activity.” (cleaned up)).

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This is not an issue of first impression for us. In *Hollis v. Lynch*, we rejected a constitutional challenge to § 922(o) and held that machineguns “do not receive Second Amendment protection.”⁸ And under our rule of orderliness, “one panel of our court may not overturn another panel’s decision.”⁹ Because Wilson offers no reason to depart from that rule, *Hollis* remains binding precedent.

1

We begin with an overview of *Hollis*. Eight years after the Supreme Court decided *District of Columbia v. Heller*,¹⁰ the panel in *Hollis* was asked to apply that landmark decision to § 922(o)’s ban on machinegun possession.

Hollis distilled three guiding principles from *Heller*. First, the Second Amendment protects only weapons that are “in common use at the time,” and “[i]f a weapon is dangerous and unusual, it is not in common use.”¹¹ Second, the Court “took it as a given that M-16s are dangerous and unusual weapons and not protected by the Second Amendment.”¹² And third, even though today’s ordinary military weapons far outpace those typically kept at home for defense, that “cannot change our interpretation of the right.”¹³

Guided by these principles, *Hollis* concluded that machineguns are not in “common use” and thus fall outside the Second Amendment. It emphasized that “both the *Heller* majority and dissent identified the M-16 to

⁸ 827 F.3d 436, 451 (5th Cir. 2016).

⁹ *Acosta v. Hensel Phelps Construction Co.*, 909 F.3d 723, 742 (5th Cir. 2018) (cleaned up).

¹⁰ 554 U.S. 570 (2008).

¹¹ *Hollis*, 827 F.3d at 446 (citing *Heller*, 554 U.S. at 627).

¹² *Id.*

¹³ *Id.* (citing *Heller*, 554 U.S. at 627–28).

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be a dangerous and unusual weapon.”¹⁴ Although recognizing that these passages from *Heller* were dicta, *Hollis* observed that “we are generally bound by Supreme Court dicta, especially when it is ‘recent and detailed.’”¹⁵ Still, because this was ultimately dicta, *Hollis* undertook an “independent inquiry” into whether machineguns are in fact “in common use”—that is, whether they are dangerous and unusual.¹⁶

Hollis had little difficulty concluding that “machineguns are dangerous weapons.”¹⁷ On unusualness, it noted the “wide variety in methodological approaches” other courts use to distinguish “common from uncommon.”¹⁸ Yet under any approach, the result was the same: “it does not matter which set of numbers we adopt . . . [n]one of them allow a conclusion that a machinegun is a usual weapon.”¹⁹ *Hollis* pointed to the raw number of pre-1986 civilian-owned machineguns—175,977—as far below what other circuits had deemed sufficient to “show[] common use.”²⁰ It distinguished that number from the 200,000 stun guns two Justices had deemed enough to render stun guns “common,” noting that while stun guns were lawful in 45 states, machineguns were totally banned in 34 states and heavily restricted in

¹⁴ *Id.* at 447.

¹⁵ *Id.* at 448 (citing *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 449 (quotation omitted).

¹⁹ *Id.*

²⁰ *Id.* (noting that the Second Circuit found 50 million large-capacity magazines sufficient for a showing of common use, and that the Fourth Circuit found the same for 8 million AR- and AK-platform semi-automatic rifles).

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the rest.²¹ *Hollis* also declined to perform a percentage analysis because the record contained no such data, though it observed “the percentages would be quite low.”²² Thus, “irrespective of the metric used,” the numbers failed to establish that machineguns are usual.²³

Declaring that “[m]achineguns are dangerous and unusual and therefore not in common use,” *Hollis* concluded they fall outside the Second Amendment.²⁴

2

Wilson asks us to set aside our rule of orderliness and ignore *Hollis*’s unmistakable holding because “175,000 is no longer a reasonable estimate of the number of machineguns in the country.” He argues that, according to reports from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), there are roughly 740,000 registered machineguns, and when illegally owned machineguns are included, they “now likely number in the millions.” That argument fails on several fronts.

Most straightforwardly, Wilson’s numbers have no bearing on *Hollis*’s precedential force. Our caselaw is clear: the rule of orderliness applies unless a previous decision “is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc.”²⁵ Wilson cites no authority—neither in his briefs nor when directly

²¹ *Id.* at 449–50 (discussing *Caetano v. Massachusetts*, 577 U.S. 411, 419–20 (2016) (ALITO, J., concurring)).

²² *Id.* at 450.

²³ *Id.*

²⁴ *Id.* at 451.

²⁵ *Stewart v. Entergy Corp.*, 35 F.4th 930, 935 (5th Cir. 2022); *see also United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013) (“Under our rule of orderliness, *only* an

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questioned during oral argument—suggesting that we may disregard a panel decision based solely on evolving facts. If Wilson believes *Hollis* is factually outdated, his recourse is to seek en banc review.²⁶

But even if we could revisit *Hollis*, Wilson’s “updated” statistics are misleading at best. Recently published ATF data show that the 740,000 figure includes machineguns registered to state and local government entities as well as to licensed dealers selling exclusively to government agencies.²⁷ Those firearms are not in the hands of private citizens for the core lawful purpose of self-defense;²⁸ they are possessed by the government—not “possessed at home”—and are used primarily for law-enforcement purposes—not personal “self-defense.”²⁹ Firearms held by police and military entities are irrelevant to the “common use” inquiry.

Fortunately, ATF data provides a more telling figure: about 234,718 machineguns “registered . . . [and] transferable to a private individual or between private individuals.”³⁰ That number is far below Wilson’s claimed

intervening change in the law (such as by a Supreme Court case) permits a subsequent panel to decline to follow a prior Fifth Circuit precedent.” (emphasis added) (citation omitted)).

²⁶ *Gjetani v. Barr*, 968 F.3d 393, 397 n.2 (5th Cir. 2020) (“And of course, only our en banc court can overrule the decision of a prior panel unless such overruling is unequivocally directed by controlling Supreme Court precedent.” (cleaned up)).

²⁷ See ATF.gov, *Data & Statistics, Machineguns Registered in the National Firearms Registration and Transfer Record*, <https://www.atf.gov/resource-center/data-statistics>.

²⁸ *Hollis*, 827 F.3d at 447 (“The Second Amendment protects the class of weapons that enable ‘citizens to use them for the core lawful purpose of self-defense . . .’” (quoting *Heller*, 554 U.S. at 630)).

²⁹ *Id.* (internal quotations and citation omitted).

³⁰ See ATF.gov, *Data & Statistics, Machineguns Registered in the National Firearms Registration and Transfer Record*, <https://www.atf.gov/resource-center/data-statistics>. Indeed, even this number may be too high. The ATF notes that “these machineguns may

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740,000 and roughly matches the 175,000 figure cited in *Hollis*. So even on Wilson’s own terms, there are no “new facts” warranting departure from *Hollis*.

Finally, even if Wilson’s number were accurate, those figures would hardly alter *Hollis*’s outcome. *Hollis* understood *Heller* to identify machineguns as “the quintessential example” of unprotected arms and to treat “M-16s are dangerous and unusual weapons.”³¹ And while recognizing this as dicta, *Hollis* emphasized that “we are generally bound by Supreme Court dicta, especially when it is ‘recent and detailed.’”³² Thus, even apart from its independent inquiry into common use, *Hollis* had already anchored its holding in binding Supreme Court guidance.

In short, Wilson’s “updated” statistics give us no license to disturb *Hollis*’s unambiguous holding: machineguns are not protected by the Second Amendment.

3

A second argument for ignoring *Hollis* rests on the claim that it was abrogated by *New York State Rifle & Pistol Association, Inc. v. Bruen*.³³ Unlike a change in facts, an intervening Supreme Court decision may permit one panel to depart from another—but only where “such overruling is unequivocally directed by controlling Supreme Court precedent.”³⁴ As already discussed, *Hollis* held that machineguns are not covered by the

no longer function, or they may be actually possessed by government entities, licensed entities, or individuals outside of the United States.” *Id.* (citations omitted).

³¹ *Hollis*, 827 F.3d at 445–56.

³² *Id.* at 448 (citing *Gearlds*, 709 F.3d at 452).

³³ 597 U.S. 1 (2022).

³⁴ *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (quotation omitted).

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Second Amendment because they are dangerous and unusual, and therefore not in common use.³⁵ Nothing in *Bruen* “unequivocally” overrules that core holding.

On the contrary, *Bruen* reinforces the portion of *Heller* on which *Hollis* relied. In *Hollis*, the court cited dicta from *Heller* for the proposition that the Second Amendment does not protect dangerous and unusual weapons.³⁶ And in *Bruen*, the Supreme Court reiterated that portion of *Heller*, observing that it is “fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons that the Second Amendment protects the possession and use of weapons that are in common use at the time.”³⁷ Far from abrogating *Hollis*, *Bruen* confirmed its major premise—that prohibitions on dangerous and unusual weapons are consistent with our historical tradition of firearm regulation. And because *Bruen* said nothing about the scope of that tradition, it did not displace *Hollis*’s minor premise—that § 922(o) is consistent with that historical tradition.

To be sure, *Bruen* modified the framework for analyzing Second Amendment challenges. Prior to *Bruen*, we employed a two-step inquiry:³⁸ first, whether a law impinged upon a right protected by the Second Amendment; and second, if so, whether the law survived “means-end scrutiny.”³⁹ *Bruen* eliminated that second step but retained the first as “broadly consistent with *Heller*, which demands a test rooted in the Second

³⁵ *Hollis*, 827 F.3d at 451.

³⁶ *Id.* at 446 (citing *Heller*, 554 U.S. at 627).

³⁷ *Bruen*, 597 U.S. at 21 (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 627).

³⁸ *See id.* at 18; *Diaz*, 116 F.4th at 463.

³⁹ *Diaz*, 116 F.4th at 463.

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Amendment’s text, as informed by history.”⁴⁰ Thus, while cases decided under the second step were categorically abrogated by *Bruen*, that does not mean that *Bruen* swept the entire slate clean. Rather, if a case decided under the first step does not conflict with *Bruen* in a more concrete way, we cannot say that it was unequivocally rejected by *Bruen*.

That conclusion is also consistent with our decision in *United States v. Diaz*.⁴¹ True, *Diaz* stated that our circuit’s pre-*Bruen* precedent was obsolete under the “new historical paradigm for analyzing Second Amendment claims.”⁴² But *Diaz* swept away only those cases that relied on means-end scrutiny. Indeed, when the government tried to salvage certain precedents by labeling them step-one cases, *Diaz* rejected the attempt—not because *Bruen* had wiped clean the entire universe of Second Amendment caselaw, but because those specific precedents were “based on the means-ends scrutiny that *Bruen* renounced.”⁴³

Not so with *Hollis*. *Hollis* was decided exclusively at step one—the step *Bruen* found “broadly consistent with *Heller*.”⁴⁴ Relying directly on *Heller*’s historical analysis, *Hollis* explained “that a law that regulates a class of weapons that are not in common use will be upheld at step one.”⁴⁵ *Hollis* never invoked—let alone relied upon—the now-discarded means-end scrutiny. It rested on *Heller*’s “dangerous and unusual weapons” language,

⁴⁰ *Bruen*, 597 U.S. at 19, 24.

⁴¹ 116 F.4th 458.

⁴² *Id.* at 465.

⁴³ *Id.*

⁴⁴ *Bruen*, 597 U.S. at 19.

⁴⁵ *Hollis*, 827 F.3d at 447; *see also id.* at 451 (“[W]e uphold Section 922(o) at step one of our framework.”).

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which *Bruen* reaffirmed. Therefore, overruling *Hollis* is not “unequivocally directed” by *Bruen*.⁴⁶

The Sixth Circuit agrees. Facing a similar challenge, that court recently reaffirmed its precedent upholding § 922(o) under *Heller*,⁴⁷ holding that *Bruen* “did nothing to displace those aspects of *Heller* on which [its precedent] relied.”⁴⁸ So too here: *Bruen* leaves *Hollis* intact.

* * *

In sum, *Hollis* continues to bind us. And because *Hollis* controls, Wilson’s Second Amendment challenge to his § 922(o) conviction must fail.

B

Wilson next argues that the district court applied the wrong cross-reference in calculating his Guidelines offense level. Wilson concedes that he did not preserve this objection, so plain-error review applies.⁴⁹ And under that standard, Wilson’s challenge fails because he cannot show plain error.

⁴⁶ *Martin*, 254 F.3d at 577 (quotation omitted).

⁴⁷ *United States v. Bridges*, --- 150 F.4th ---, 2025 WL 2250109, at *4517, 522 (6th Cir. Aug. 7, 2025).

⁴⁸ *Id.*

⁴⁹ Wilson cites *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), for the proposition that “[c]loser scrutiny” of his unpreserved challenge is warranted because he objected to the cross-reference on related grounds—namely, that it failed to account for his self-defense claim. But *Lopez* ultimately applied the plain-error standard because the defendant “had ample opportunity to raise this matter below,” “was at that time aware of all information the district court considered relevant to his sentence,” “was also fully apprised of how the district court intended to apply the relevant guidelines to that information,” and made “no attempt to excuse his failure to call this matter to the district court’s attention.” *Id.* at 50–51 (citation omitted). The same conditions are present here. Moreover, Wilson doesn’t explain how his self-defense would have done anything to “alert the district court to the error of which he . . . complains on appeal.” *United States v. Brooks*,

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The Guidelines section for unlawful machinegun possession directs that if the defendant used the firearm in connection with another offense in which “death resulted,” the district court should apply “the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that [for the instant offense].”⁵⁰ In doing so, district courts must “determine what federal homicide offense was most analogous to the conduct” of the defendant.⁵¹

Under federal law, murder “is the unlawful killing of a human being with malice aforethought.”⁵² A murder involving certain statutorily defined elements is considered first-degree murder, while “[a]ny other murder is murder in the second degree.”⁵³ Voluntary manslaughter, by contrast, is the “unlawful killing of a human being without malice” but “[u]pon a sudden quarrel or heat of passion.”⁵⁴ The difference between second-degree murder and voluntary manslaughter therefore “turns on whether the defendant committed the killing with ‘malice’ or with a reduced level of culpability.”⁵⁵ And malice aforethought “encompasses three distinct mental states: (1)

33 F.4th 734, 739 (5th Cir. 2022) (cleaned up). Ordinary plain-error review is therefore the correct standard.

⁵⁰ U.S.S.G. § 2K2.1(c)(1)(B).

⁵¹ *United States v. Hicks*, 389 F.3d 514, 530 (5th Cir. 2004).

⁵² 18 U.S.C. § 1111(a).

⁵³ *Id.*

⁵⁴ 18 U.S.C. § 1112(a).

⁵⁵ *Hicks*, 389 F.3d at 530 (citing *United States v. Browner*, 889 F.2d 549, 551–52 (5th Cir. 1989)).

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intent to kill; (2) intent to do serious bodily injury; and (3) extreme recklessness and wanton disregard for human life ('depraved heart')."⁵⁶

The facts of this case, as described in the PSR and adopted by the district court, support a finding that Wilson acted with malice. After discovering that D.J. had sold him a fake firearm, Wilson drew his own handgun equipped with a machinegun conversion device, retrieved a 31-round magazine from his vehicle, walked to the back of the gas-station parking lot, confronted D.J., pointed the firearm directly at him, and fired multiple shots until D.J. fell. We have previously found similar facts sufficient to support a finding of second-degree murder.⁵⁷

Indeed, Wilson does not meaningfully dispute that these facts align with second-degree murder. Instead, he seizes on a single sentence in the PSR: "When determining the applicable guideline for the cross reference, the details of D.J.'s murder indicates a 'crime of passion' in which the defendant acted against D.J. because of a sudden strong impulse such as anger with minimal planning and within a short period of time." Wilson highlights the phrases "crime of passion" and "sudden strong impulse," noting their similarity to the statutory language "heat of passion" and

⁵⁶ *Id.* (quoting *Lara v. United States Parole Comm'n*, 990 F.2d 839, 841 (5th Cir. 1993)).

⁵⁷ *See id.* at 531 (finding second-degree murder when defendant intentionally fired his gun at a police cruiser, which he likely knew to be occupied); *United States v. White*, No. 23-10194, 2024 WL 4987350, at *5 (5th Cir. Dec. 5, 2024) (finding that "pointing a gun at someone and firing it shows a specific intent to kill") (unpublished), *cert. denied*, 145 S. Ct. 1910 (2025); *cf. United States v. Bell*, No. 23-50168, 2023 WL 7549508, at *1 (5th Cir. Nov. 13, 2023) (unpublished) (finding no error when the district court applied the cross-reference for attempted first-degree murder when the defendant, after getting in a physical altercation with his ex-girlfriend, "returned to the residence and began shooting a handgun in her general direction"); *Frascarelli v. U.S. Parole Comm'n*, 857 F.3d 701, 708 (5th Cir. 2017) (finding malice, in part, because the defendant walked down and up a flight of stairs to obtain a hammer, which showed "that the heat of passion had time to 'cool'").

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“sudden quarrel” in the voluntary-manslaughter statute.⁵⁸ He then argues that because the district court adopted the PSR’s findings—including this sentence—it “effectively found” that Wilson committed voluntary manslaughter and thus erred in applying the second-degree murder cross-reference.

Contrary to Wilson’s claim that the district court “effectively found” voluntary manslaughter, the court expressly and unambiguously determined that the most analogous offense was second-degree murder. This is therefore not a case where the court found voluntary manslaughter but mistakenly applied the second-degree murder cross-reference—a scenario that could well amount to plain error. The real question here is whether the district court’s conclusion that Wilson’s conduct was most analogous to second-degree murder was unreasonable given its factual findings that D.J.’s killing involved a “crime of passion” and “sudden strong impulse.”

It was not. True, those phrases evoke voluntary manslaughter. But they do not tell the whole story. Wilson overlooks that the district court adopted the PSR in its entirety, not just one sentence. And as explained above, the specific details of Wilson’s conduct—arming himself with a machinegun-conversion device, retrieving a high-capacity magazine, confronting D.J., and firing multiple rounds—easily support second-degree murder. At most, the PSR is ambiguous: its general description evokes voluntary manslaughter, but its specifics point to second-degree murder. When the facts cut both ways, we cannot say the district court plainly erred in concluding that second-degree murder was the more analogous offense.⁵⁹

⁵⁸ 18 U.S.C. § 1112(a).

⁵⁹ Cf. *United States v. Hebert*, 813 F.3d 551, 560 (5th Cir. 2015) (“[U]nder clear error review, even ‘[w]here there are two permissible views of the evidence, the

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Nor has Wilson cited any authority to the contrary.⁶⁰ Accordingly, the district court did not commit a “clear or obvious” error in applying the second-degree murder cross-reference.⁶¹

Because Wilson has not shown plain error, we need not address the remaining prongs of plain-error review.⁶²

IV

In conclusion, both of Wilson’s arguments fail. The district court did not err in rejecting Wilson’s Second Amendment challenge to § 922(o) or in its application of the second-degree murder cross-reference.

Accordingly, we AFFIRM the district court’s judgment.

factfinder’s choice between them cannot be clearly erroneous.’” (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

⁶⁰ *United States v. McGavitt*, 28 F.4th 571, 577 (5th Cir. 2022) (“In this circuit, a lack of binding authority is often dispositive in the plain error context.” (quotation marks and citation omitted)); see also *United States v. Lainez Garcia*, No. 22-40455, 2023 WL 2733473, at *2 (5th Cir. Mar. 31, 2023) (unpublished) (“And without on-point, binding precedent, the defendant normally cannot show that an error was plain.” (citation omitted)).

⁶¹ *Puckett*, 556 U.S. at 135.

⁶² *United States v. Russell*, 136 F.4th 606, 609 n.4 (5th Cir. 2025).

DON R. WILLETT, *Circuit Judge*, concurring:

The Constitution's enduring genius lies less in its promises than in its design. As Justice Scalia once reminded a Senate committee, even the most oppressive regimes profess liberty, but only a government of divided powers can give life to parchment guarantees.¹ That design—the Constitution's Madisonian architecture of separated powers, divided sovereignty, and enumerated authority—was shrewdly crafted to restrain government even as it empowers it. And each generation must decide whether to honor those structural limits as boundaries to uphold—or to treat them as obstacles to outwit.

The Framers understood those limits not as impediments to progress but as the architecture of freedom itself—liberty's scaffolding, built to confine power within its rightful bounds. That insight remains the lifeblood of our constitutional order, the reason ours endures as the oldest written national constitution on earth. And nowhere is fidelity to that design more vital than in the criminal sphere, where the consequences of unbounded power are most acute, and where federal authority must both begin and end with enumerated power.

Congress's power to define and punish crimes—like all federal authority—must therefore rest on a specific constitutional grant. Not every act that may be rightly condemned may also be federally criminalized. The statute before us, 18 U.S.C. § 922(o), brings that principle into sharp relief. It embodies the perennial tension between legitimate national aims and the

¹ *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Hon. Antonin Scalia, Assoc. Just., Sup. Ct. of the U.S.) (“[I]f you think that the Bill of Rights is what sets us apart, you are crazy. Every banana republic has a bill of rights. Every president for life has a bill of rights.”).

Constitution’s structural restraints, and it requires us to ask whether, in the name of public safety, Congress has remained within its enumerated bounds—or pressed beyond them.

I. CONSTITUTIONAL RESTRAINTS ON FEDERAL CRIMINAL LAW

Two hundred and fifty years ago, the Continental Congress approved the great charter of American independence. It proclaimed that “certain unalienable Rights” flow from the “Creator,” and that government’s purpose is “to secure these rights.”² A decade later, in 1787 and 1788, “We the People” ratified the great charter of American union, establishing a system of government anchored by four interlocking mechanisms designed to secure those rights: representative government, separation of powers, federalism, and—eventually—a Bill of Rights.³

These foundational pillars undergird three bedrock principles of federal criminal law. First, representative government and separation of powers together dictate that only Congress—not the Executive and not the

² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³ See FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 333 (John Lobb ed., 1882) (describing “the elective franchise as the one great power by which all civil rights are obtained, enjoyed, and maintained under our form of government”); *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 75 (2015) (THOMAS, J., concurring in the judgment) (“At the center of the Framers’ dedication to the separation of powers was individual liberty.” (citation omitted)); *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“In the tension between federal and state power lies the promise of liberty.”); *United States v. Guest*, 383 U.S. 745, 771 (1966) (HARLAN, J., concurring in part and dissenting in part) (noting that the Bill of Rights was “designed to protect personal liberties”); cf. *United States v. Rahimi*, 602 U.S. 680, 777 (2024) (THOMAS, J., dissenting) (“The Framers and ratifying public understood that the right to keep and bear arms was essential to the preservation of liberty.” (cleaned up)).

Judiciary—may define conduct as criminal.⁴ Second, federalism requires that every federal criminal statute “rest on one of Congress’s ‘few and defined’ powers.”⁵ And third, the Bill of Rights forbids any federal law—including a criminal statute—from transgressing protected individual rights.⁶

II. THE MACHINEGUN BAN & THE COMMERCE POWER

Jamaion Wilson challenges 18 U.S.C. § 922(o)—the federal machinegun ban—under only the last of these principles. As the majority explains, that challenge is foreclosed by our decision in *Hollis v. Lynch*.⁷ I write separately to express concern that § 922(o) may also be inconsistent with the second tenet of federal criminal law: the Constitution’s principle of enumerated powers.

That principle—no less than the explicit prohibitions in the Bill of Rights—is essential to the preservation of liberty.⁸ “Congress has no power

⁴ See, e.g., *Bousley v. United States*, 523 U.S. 614, 620–21 (1998) (“[I]t is only Congress, and not the courts, which can make conduct criminal.” (citations omitted)); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (holding that federal courts lack common-law criminal jurisdiction); see also *United States v. Pheasant*, 157 F.4th 1119, 1120 (9th Cir. 2025) (BUMATAY, J., dissenting from the denial of rehearing en banc) (“[T]o satisfy the non-delegation doctrine that our separation of powers demands, Congress must—at a minimum—define both the actus reus and the penalty for any criminal offense.”).

⁵ *United States v. Bonner*, 159 F.4th 338, 340 (5th Cir. 2025) (WILLETT, J., concurring) (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

⁶ See *id.* (“Like all congressional enactments, federal criminal statutes must . . . respect the many constitutional provisions that secure individual rights against government intrusion.”).

⁷ 827 F.3d 436 (5th Cir. 2016); see *supra*, at 5.

⁸ See, e.g., *Gregory*, 501 U.S. at 459; *Bond v. United States*, 564 U.S. 211, 222 (2011) (“[F]ederalism protects the liberty of the individual from arbitrary power.”); *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (HARLAN, J., dissenting) (“The Constitution is an

to enact a comprehensive criminal code,”⁹ and thus § 922(o), like every other federal statute, “must be based on one or more of [Congress’s] powers enumerated in the Constitution.”¹⁰

Because the commerce power has been interpreted so expansively, the natural first place to look is the Interstate Commerce Clause¹¹—perhaps in concert with the Necessary and Proper Clause.¹² The power “[t]o regulate Commerce . . . among the several States,”¹³ the Supreme Court has explained, is not—contrary to what one might expect—“confined to the regulation of commerce among the states.”¹⁴ But neither is it boundless. The Court has “identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the *channels* of interstate commerce. Second, Congress has authority to regulate and protect the *instrumentalities* of interstate commerce,

instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens.”); *Ex parte Siebold*, 100 U.S. (10 Otto) 371, 394 (1879) (“State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties . . .”).

⁹ *Bonner*, 159 F.4th at 340 (WILLETT, J., concurring).

¹⁰ *United States v. Morrison*, 529 U.S. 598, 607 (2000).

¹¹ U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . .”).

¹² *Id.* art. I, § 8, cl. 18 (“The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . .”).

¹³ *Id.* art. I, § 8, cl. 3.

¹⁴ *United States v. Darby*, 312 U.S. 100, 118 (1941).

and persons or things in interstate commerce. Third, Congress has the power to regulate activities that *substantially affect* interstate commerce.”¹⁵

“Mere possession of a firearm fits uneasily within any of these categories.”¹⁶ Nor does the fact that the firearm happens to be a machinegun make a regulation of simple possession any more compatible with them.¹⁷ Section 922(o), in fact, has been described as “a clone”¹⁸ and “the closest extant relative”¹⁹ of the provision invalidated in *United States v. Lopez*.²⁰ “Both are criminal statutes that regulate the purely intrastate possession of firearms.”²¹ Both “lack a jurisdictional element, that is, they do not require federal prosecutors to prove that the firearms were possessed in or affecting interstate commerce.”²² And in enacting both laws, “Congress made no findings regarding the link between the intrastate activity regulated by these laws and interstate commerce.”²³

¹⁵ *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (emphasis added) (internal citations omitted).

¹⁶ *Bonner*, 159 F.4th at 341 (WILLET, J., concurring).

¹⁷ See *United States v. Kirk*, 105 F.3d 997, 1010–16 (5th Cir. 1997) (separate opinion of JONES, J.); *United States v. Rybar*, 103 F.3d 273, 287–94 (3d Cir. 1996) (ALITO, J., dissenting).

¹⁸ *Kirk*, 105 F.3d at 1010 (separate opinion of JONES, J.).

¹⁹ *Rybar*, 103 F.3d at 287 (ALITO, J., dissenting).

²⁰ 514 U.S. 549 (1995).

²¹ *Rybar*, 103 F.3d at 287 (ALITO, J., dissenting).

²² *Id.*; see also *Kirk*, 105 F.3d at 1013 (separate opinion of JONES, J.) (“In comparison to § 922(o), which lacks any reference to interstate commerce, Congress specifically tied other regulations enacted concurrently with § 922(o) to interstate commerce.”); *United States v. Branch*, 91 F.3d 699, 711 (5th Cir. 1996) (“There is no requirement that the machinegun have been in interstate commerce.”).

²³ *Rybar*, 103 F.3d at 287 (ALITO, J., dissenting).

III. *KNUTSON*'S EXPANSIVE LOGIC & THE STATES' ROLE

Nevertheless, nearly thirty years ago, we upheld § 922(o) in *United States v. Knutson*.²⁴ In a brief per curiam opinion, we concluded that § 922(o) validly regulated activities with a substantial effect on interstate commerce.²⁵ The *Knutson* court pointed to “the federal government’s longstanding record of regulating machineguns,” which it believed reflected a “historic federal interest in the regulation of machine guns.”²⁶

Knutson’s logic, however, has no limiting principle. The two prior regulations on which it relied—a tax on machineguns and a licensing regime for federal firearms dealers²⁷—cannot bear the constitutional weight placed upon them. Under modern doctrine, Congress’s taxing power is not subject to pretext review, allowing it to regulate indirectly on virtually *any* subject.²⁸

²⁴ 113 F.3d 27 (1997) (per curiam).

²⁵ *Id.* at 30–31.

²⁶ *Id.* (quoting *United States v. Kenney*, 91 F.3d 884, 890–91 (7th Cir. 1996)). The *Knutson* court also suggested that “[i]t is obvious ‘to the naked eye’ that the transfer and possession of machineguns has a substantial effect on interstate commerce.” *Id.* at 30. Yet the court deemed it unnecessary to “delve into” such “considerations,” relying instead on the “extensive legislative histories that accompanied each prior incarnation of what has been a durable line of federal machinegun regulations.” *Id.*

But it is difficult to see how a substantial commercial effect from mere possession of a machinegun is “obvious to the naked eye”—unless one means to aggregate the effects of all such possession nationwide. As I have previously explained, however, aggregation is misplaced in this context because firearm possession is not an economic activity. *Bonner*, 159 F.4th at 342 (WILLETT, J., concurring).

²⁷ See *Knutson*, 113 F.3d at 30–31.

²⁸ See *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (“[I]t has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to restrict or suppress the thing taxed. Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts.” (internal citations omitted)).

And courts routinely uphold regulations of those engaged in interstate commerce even when the rule also sweeps in *intra*-state economic activity.²⁹ Taken together, these premises mean that, under *Knutson*'s reasoning, there is no subject beyond Congress' reach—so long as it proceeds step by step: first taxing, then licensing, then prohibiting outright. But far from viewing this sort of incremental, frog-boiling expansion of federal power as legitimate, the Founding generation saw it as the more insidious threat—a quiet, gradual erosion of liberty rather than a sudden seizure of it.³⁰

Even if Congress lacks the power to criminalize machinegun possession, it does not follow that *no one* possesses that authority. The Constitution draws that line clearly: while “[t]he powers delegated . . . to the federal government are few and defined,” those “remain[ing] in the State governments are numerous and indefinite.”³¹ Indeed, thirty-four states have exercised those “numerous and indefinite”³² powers to prohibit machinegun

²⁹ See *Darby*, 312 US. at 121 (collecting cases).

³⁰ See, e.g., Federal Farmer, Letter X (Jan. 7, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 281, 285 (Herbert J. Storing ed., 1981) (“It is not supposed that congress will act the tyrant immediately, and in the face of the day light. It is not supposed congress will adopt important measures, without plausible pretences, especially those which may tend to alarm or produce opposition. . . . [P]robably, they will be wise enough never to alarm, but gradually prepare the minds of the people for one specious change after another, till the final object shall be obtained.”); Brutus, Essay XV (Mar. 20, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 441 (expressing concern that the Judiciary “will be able to extend the limits of the general government gradually, and by insensible degrees”); see also Centinel, Letter VIII (Dec. 27, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 177 (describing “attack[ing] the citadel of liberty by sap, and gradually undermin[ing] its outworks” as “the refined policy of successful despots”); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (JACKSON, J., concurring) (noting the “[v]ast accretions of federal power, eroded from that reserved by the States”).

³¹ THE FEDERALIST NO. 45, *supra*, at 292.

³² *Id.*

possession.³³ Of course, such regulations must still comport with the Second Amendment.³⁴ But as the majority notes, *Hollis* remains good law—holding that a ban on machinegun possession is consistent with the Second Amendment.³⁵ Under *Hollis*, then, the states remain free to enforce their own machinegun bans, even if Congress may not.

IV. A CALL FOR RECONSIDERATION—BUT NOT IN THIS CASE

Shortly after *Lopez*—but before *Knutson*—we granted en banc review to consider whether § 922(o) is a valid exercise of Congress’s commerce power. But we divided evenly, leaving the question unresolved.³⁶

In an appropriate case, I would be open to revisiting *Knutson* en banc. But because Wilson did not raise an enumerated-powers challenge, this is not that case. For now, I simply note my doubts about *Knutson*’s reasoning and result.

³³ *Hollis*, 827 F.3d at 450.

³⁴ See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (plurality opinion) (holding that the right to bear arms applies to the states via the Fourteenth Amendment).

³⁵ *Supra*, at 5.

³⁶ See *Kirk*, 105 F.3d 998 (per curiam).

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JAMES C. HO, *Circuit Judge*, dubitante:

The same Second Amendment issue that the panel majority decides today was previously argued before our court in an earlier case before a different panel. *See Sealed Appellee v. Sealed Juvenile*, No. 24-60348 (argued Apr. 28, 2025). And when that happens—when the same legal issue is presented to two different panels of our court—we typically defer to the first panel as a matter of court practice, if not common sense.

Here, however, the *Sealed Appellee* panel did precisely the opposite. On December 3, 2025, that panel placed their (earlier) case in abeyance, pending decision in our (later) case.

I don't intend to question or criticize that abeyance decision. But it is unexpected. And I don't wish to delay this case further. With *Sealed Appellee* now in abeyance, this case becomes the oldest pending appeal on our criminal docket.

To avoid further delay, I am content to simply await a petition for rehearing en banc. After all, the panel majority acknowledges that the Second Amendment issue presented here can ultimately be resolved by having our en banc court revisit *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016). And there's good reason for concern that our precedent misapplies the “dangerous and unusual” test. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 47 (2022) (noting that weapons which were once “dangerous and unusual” can cease to be so). I also share the federalism concerns expressed by the concurring opinion, as I noted in *United States v. Seekins*, 52 F.4th 988, 988 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing en banc).

APPENDIX B

United States Court of Appeals
for the Fifth Circuit

No. 24-10633

United States Court of Appeals
Fifth Circuit

FILED

April 30, 2026

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JAMAION WILSON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:24-CR-27-1

ON PETITION FOR REHEARING EN BANC

Before WIENER, WILLETT, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 40 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 40 and 5TH CIR. R. 40).

In the en banc poll, seven judges voted in favor of rehearing: JUDGES JONES, SMITH, GRAVES, HO, DUNCAN, ENGELHARDT, and

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OLDHAM. Ten voted against rehearing: CHIEF JUDGE ELROD, and JUDGES STEWART, RICHMAN, SOUTHWICK, HAYNES, HIGGINSON, WILLETT, WILSON, DOUGLAS, and RAMIREZ.

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DON R. WILLETT, *Circuit Judge*, joined by ELROD, *Chief Judge*, and DUNCAN, *Circuit Judge*, respecting the denial of rehearing en banc:

By enumerating both powers and rights, the Framers embraced “a belt-and-suspenders Constitution.”¹ They denied Congress the “power to enact a comprehensive criminal code.”² And, for added security, they hardcoded some liberties—including the “right of the people to keep and bear Arms”³—into the Constitution itself.⁴ The design was straightforward: if the enumerated-powers belt slipped, the enumerated-rights suspenders would still hold.⁵

Often, they have.⁶ But not here. Jamaion Wilson was convicted under 18 U.S.C. § 922(o), and two of our precedents leave little work for either safeguard to do. In *United States v. Knutson*, we let the enumerated-powers belt slip, holding that Congress may ban the mere possession of a machinegun pursuant to its commerce power.⁷ And in *Hollis v. Lynch*, we cast aside the Second Amendment suspenders too, holding that machineguns are not just

¹ *United States v. Hembree*, 165 F.4th 909, 919 (5th Cir. 2026) (WILLETT, J., concurring).

² *United States v. Bonner*, 159 F.4th 338, 340 (5th Cir. 2025) (WILLETT, J., concurring); see *United States v. Morrison*, 529 US. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 428 (1821) (“It is clear, that Congress cannot punish felonies generally . . .”).

³ U.S. CONST. amend. II.

⁴ See generally *id.* amend. I–VIII. Cf. *id.* amend. IX (prohibiting “constru[ing]” “[t]he enumeration in the Constitution, of certain rights . . . to deny or disparage others retained by the people”); *id.* amend. X (“reserv[ing]” certain “powers not delegated” “to the people”).

⁵ *Hembree*, 165 F.4th at 920 (WILLETT, J., concurring).

⁶ See *id.*

⁷ 113 F.3d 27, 30–31 (5th Cir. 1997) (per curiam).

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“dangerous” but also “unusual”⁸—and thus may be prohibited under our “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁹

Both holdings are dubious. As I explained in my panel concurrence, “[m]ere possession of a firearm fits uneasily” within the Supreme Court’s three recognized categories of commerce regulation, and “the fact that the firearm happens to be a machinegun” does not “make a regulation of simple possession any more compatible” with the Commerce Clause.¹⁰ Likewise, although the Supreme Court has offered only “minimal guidance” for determining whether a weapon is dangerous and unusual,¹¹ it is hard to see how the millions of machineguns registered with the Bureau of Alcohol, Tobacco, Firearms, and Explosives¹² make them, in any ordinary sense, unusual.¹³

⁸ 827 F.3d 436, 448–51 (5th Cir. 2016).

⁹ *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (citation omitted); *see Hollis*, 827 F.3d at 451.

¹⁰ *United States v. Wilson*, 164 F.4th 380, 392 (5th Cir. 2026) (WILLETT, J., concurring); *see Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) (recognizing that the Supreme Court’s modern Commerce Clause cases “have identified three general categories of regulation in which Congress is authorized to engage under its commerce power”).

¹¹ *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of THOMAS, J.).

¹² *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, DATA & STATISTICS, <https://perma.cc/KTN4-3Y9V> (last visited Apr. 20, 2026) (“As of June 2025, the total number of machineguns in the [National Firearms Registration and Transfer Record] is approximately 2,382,403.”).

¹³ *Cf. Harrel*, 144 S. Ct. at 2492 (statement of THOMAS, J.) (observing that AR-15s are protected by the Second Amendment because they have been “selected by millions of Americans for self-defense and other lawful purposes”); *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (ALITO, J., concurring in the judgment) (“The more relevant statistic is that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 states.” (cleaned up)).

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Under our rule of orderliness, however, future panels—including the panel here—remain bound by *Knutson* and *Hollis*.¹⁴ The en banc court does not.¹⁵ So in an appropriate case, I would welcome en banc review to determine whether § 922(o) exceeds constitutional limits—under the Commerce Clause, the Second Amendment, or both.

There is, however, a countervailing danger: in faulting Congress for exceeding its constitutional limits, we must not exceed our own. We do not sit as a “roving commission[] assigned to pass judgment on the validity of the Nation’s laws”¹⁶ whenever a provocative question presents itself. We sit instead as a “passive instrument[] of government,” charged with deciding the case the parties actually brought.¹⁷ And in my view, two features of this case prevent us from passing on § 922(o)’s constitutionality without exceeding that role.

First, Wilson never argued—either in the district court or before us—that § 922(o) exceeds Congress’s enumerated powers. We cannot make that argument for him.¹⁸ To do so would take us beyond adjudicating (“call[ing] balls and strikes”) and into advocating (taking our own “turn at bat”).¹⁹

¹⁴ See *United States v. Taylor*, 933 F.2d 307, 313 (5th Cir. 1991) (“[I]t is the firm rule of this circuit that one panel may not overrule the decisions of another.”).

¹⁵ See *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020) (en banc) (“An opinion of a panel does not bind the en banc court.”).

¹⁶ *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

¹⁷ *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (citation omitted).

¹⁸ See *Clark v. Sweeney*, 607 U.S. 7, 9 (2025) (per curiam) (summarily reversing the Fourth Circuit for “granting relief on a claim that [the habeas petitioner] never asserted and that the State never had the chance to address”).

¹⁹ *Id.* (cleaned up).

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Second, although Wilson labels his claim an as-applied Second Amendment challenge, he argues only that § 922(o) is unconstitutional “as applied to the possession of machineguns.” But possession of machineguns is all that § 922(o) regulates. So whatever the label, the claim is facial.²⁰ And that choice “comes at a cost.”²¹ Wilson can prevail only if “no set of circumstances exists under which [§ 922(o)] would be valid.”²² That is a demanding standard—and here, likely a fatal one. The statutory definition of “machinegun” sweeps in not just handheld firearms, but also weapons such as the “massive guns mounted on military aircraft and anti-aircraft batteries.”²³ If even one such weapon falls outside the Second Amendment’s protection—or otherwise lies within Congress’s regulatory authority—Wilson’s facial challenge fails.

* * *

The en banc court should, in an appropriate case, consider whether § 922(o) comports with Congress’s enumerated powers and the individual right secured by the Second Amendment. But Wilson’s appeal is not the right vehicle. It presents no enumerated-powers challenge at all. Nor does it

²⁰ See *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) (“A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications.”); *Wilson*, 164 F.4th at 383 n.7 (majority op.) (explaining that Wilson did not raise a genuine as-applied challenge).

²¹ *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024).

²² *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (citation omitted).

²³ *United States v. Bridges*, 150 F.4th 517, 530 (6th Cir. 2025) (NALBANDIAN, J., concurring in part and concurring in the judgment); see 26 U.S.C. § 5845(b) (defining “machinegun” as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger”); 18 U.S.C. § 921(a)(24) (incorporating § 5845(b)’s definition by reference). See also *United States v. Charles*, 159 F.4th 545, 547–48 (8th Cir. 2025) (rejecting a facial challenge to § 922(o) because it covers weapons systems mounted on warships, military helicopters, and armored military vehicles).

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present a genuine as-applied Second Amendment challenge. We should save those questions for a case that properly presents them. For now, I concur in the denial of rehearing en banc.²⁴

²⁴ One of our learned colleagues suggests that, vehicle problems aside, we should have granted rehearing en banc to “get our court’s reasoning back on track by granting rehearing en banc to revisit errant circuit precedent.” *Infra*, at 10 (HO, J., dissenting from the denial of rehearing en banc). I agree with the premise, but not the conclusion. The en banc court may of course revisit old circuit precedent. But the question is not whether we have authority to reconsider *Hollis*. We do. The question is whether *Hollis* is cleanly presented here. It is not.

Festeryga does not prove otherwise. That case had a precedent problem; this case has a presentation problem. There, *Weaver* was the obstacle: it required dismissal, and once the en banc court overruled it, relief became available. See *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, 109 F.4th 810, 817 (5th Cir. 2024), *on reh’g en banc*, 138 F.4th 252 (5th Cir. 2025) (en banc); *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, 155 F.4th 456, 462 (5th Cir. 2025). Here, by contrast, *Hollis* is not what makes Wilson’s case a poor vehicle. Take *Hollis* away, and the same defects remain: Wilson raised no enumerated-powers challenge, and his Second Amendment claim is facial in substance rather than genuinely as-applied.

That is the critical distinction. *Hollis* may have bound the panel, but it does not follow that Wilson’s case cleanly presents the questions needed to overrule *Hollis*. En banc review should resolve questions the parties have properly presented, not abstract disagreements with precedent. A cited precedent is not the same thing as a properly presented question.

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JAMES C. HO, *Circuit Judge*, dissenting from the denial of rehearing en banc:

“Our analysis of the Second Amendment must be guided by history—not hoplophobia.” *United States v. Cockerham*, 162 F.4th 500, 502 (5th Cir. 2025).

I recognize that some citizens associate certain firearms with violent crime—just as some citizens regard speech as violence. *See, e.g., Oliver v. Arnold*, 19 F.4th 843, 853 (5th Cir. 2021) (Ho, J., concurring in the denial of rehearing en banc) (“In some quarters . . . [s]peech is violence—not just metaphorically, but ‘literally.’”) (quoting Lisa Feldman Barrett, *When is Speech Violence?*, N.Y. TIMES (July 14, 2017)); Zach Goldberg et al., *Americans’ Troubling Views on Speech, Harm, and Violence*, Florida State University (Nov. 2025) (59% of Americans “think some speech can be as damaging as physical violence”).

But other citizens associate firearms with self-defense, not violence—just as other citizens regard free speech as enlightening, not frightening. *See, e.g., John R. Lott Jr., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* (1998). They agree that “[v]iolent criminals should be prosecuted, convicted, disarmed, and incarcerated.” *United States v. Kersee*, 86 F.4th 1095, 1100 (5th Cir. 2023) (Ho, J., concurring). But they respect law-abiding citizens—and presume innocence, not violence. *Id.*

And the job of a judge is not to take sides in political controversies, but to enforce the rights guaranteed to every American by our Constitution.

Our Founders were not afraid of firearms. To the contrary, they required all able-bodied men between the ages of 18 and 45 to obtain a firearm. *See Act of May 8, 1792*, 1 Stat. 271.

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And they made the conscious and deliberate decision to secure the right to keep and bear arms—not just for themselves, but for posterity, by agreeing to ratify the Constitution, but only on the assurance that such rights would be protected by subsequent amendment. *See, e.g.*, Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* xi, 17, 19, 22 (1991).

Consistent with these Founding principles, the Supreme Court has made clear that we must not treat the Second Amendment as “a second-class right.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 70 (2022) (quotations omitted). Fear isn’t supposed to change the First Amendment. *See, e.g., Dr. A v. Hochul*, 142 S. Ct. 552, 558 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (“[I]t is this Court’s duty to ‘apply the limitations of the Constitution with no fear.’”) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943)). It shouldn’t change the Second Amendment, either.

We all agree that the law before us, 18 U.S.C. § 922(o), is consistent with our circuit precedent in *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016). The question is whether *Hollis* is consistent with the Second Amendment and governing Supreme Court precedent. As I’ve previously noted in this case, “there’s good reason for concern that our precedent misapplies the ‘dangerous and unusual’ test” established by the Supreme Court. *United States v. Wilson*, 164 F.4th 380, 394 (5th Cir. 2026) (Ho, J., dubitante). *See also id.* (citing *Bruen*, 597 U.S. at 47 (weapons which were once “dangerous and unusual” can cease to be so)).

In addition, the law at issue here raises the same federalism concerns that I examined in *United States v. Seekins*, 52 F.4th 988, 988 (5th Cir. 2022) (Ho, J., dissenting from the denial of rehearing en banc).

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* * *

Although I would have reheard this case en banc, I am grateful for the opinion defending the denial of en banc review. Two of our dearest colleagues go out of their way to express avowed agreement that our circuit precedent is indeed out of step with the Constitution and Supreme Court precedent and needs to be revisited. Their concern is simply that this case may not be the right vehicle to do so. (A third distinguished member of the court joins them in their vehicle concerns, after voting for rehearing en banc.)

So nine members of the court appear to acknowledge difficulties with our circuit precedent. The only issue is whether this case is the right vehicle.

As I’ve previously expressed in dissenting from the denial of rehearing en banc in cases like *Voice of the Experienced v. LeBlanc*, 168 F.4th 339 (5th Cir. 2026)—and that our en banc court implicitly embraced in granting rehearing en banc in *Spectrum WT v. Wendler*, 157 F.4th 673 (5th Cir. 2025): Whatever the right result in a particular case, we have the power to get our court’s reasoning back on track by granting rehearing en banc to revisit errant circuit precedent.

Our colleagues acknowledge that we have the authority to take this case en banc to revisit *Hollis*. They express only a prudential concern that *Hollis* may not be “cleanly presented” here.

Prudence can certainly be a virtue. But I don’t see any prudential problems here. To the contrary, the issue is just as “cleanly presented” here as it was when we granted en banc review in *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, 138 F.4th 252 (5th Cir. 2025).

In *Abraham Watkins*, the panel was “bound” by circuit precedent. See, e.g., *id.* at 254 (“Bound by *Weaver* . . . a panel of this court ‘reluctantly’ dismissed Festeryga’s appeal.”). So we went en banc to revisit that

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precedent. *See id.* (“Today, we do what only this court sitting en banc can: we correct course and ‘unweave *Weaver*.’”).

The exact same thing is true here. Here too the panel was “bound” by circuit precedent. *See, e.g., Wilson*, 164 F.4th at 383 (“*Hollis* remains binding precedent”). So we may now go en banc to revisit that precedent as well. If the issue was cleanly presented in *Abraham Watkins*, then it’s likewise cleanly presented here.

The concurrence tries to distinguish *Abraham Watkins* by observing that there are additional issues presented here—namely, that *Wilson* failed to present a “genuinely” as-applied claim.

But additional issues were presented in *Abraham Watkins*, too. Yet that didn’t hold us back. To the contrary, we made clear how we would handle those separate issues: “The parties raise additional issues on appeal. But our central task was to correct the flawed *Weaver* precedent—a task only this en banc court could undertake.” 138 F.4th at 263.

So we revisited our errant circuit precedent—and then returned the case back to the original panel “to resolve the remaining issues.” *Id. See also id.* at 263 (Ho, J., concurring) (praising this approach as “a basic principle of en banc rehearing”).

We could have done the exact same thing here. We could have gone en banc to reconsider *Hollis*—and then returned the case back to the original panel to resolve the remaining issues.

At the end of the day, I don’t see how we can claim that we’re “bound” by a particular precedent at the panel stage—but then claim that we can’t go en banc to revisit that precedent in that very same case. If *Hollis* was “binding” at the panel stage, then surely the issue is presented at the en banc stage as well—just as it was in *Abraham Watkins*.

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* * *

The only way to revisit and reconsider our circuit precedent is rehearing en banc. But the court declines to do so. I respectfully dissent from the denial of rehearing en banc.

By denying rather than granting en banc review, despite our manifest agreement that our precedent contains fatal defects on matters of fundamental import, we are only delaying our court from getting the Constitution right. That's regrettable. Time will tell whether the court will seize the opportunity to get things on a proper footing in a future case.

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ANDREW S. OLDHAM, *Circuit Judge*, joined by HO, *Circuit Judge*, dissenting from the denial of rehearing en banc.

Our Court’s approach to the Second Amendment is historically bankrupt.

As far as I am aware, there is no historical justification for banning machine guns. To the contrary, repeating arms have existed since the fifteenth century. David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223, 232 (2024) (“The first known repeating firearms were ten-shot matchlock arquebuses that date to between 1490 and 1530.”). And numerous different repeating arms existed at the American Founding. *See id.* at 255–57 (collecting examples). Meriwether Lewis famously carried one—the Girardoni air rifle—on the Lewis and Clark Expedition. *See* 2–8 MERIWETHER LEWIS & WILLIAM CLARK, *THE JOURNALS OF THE LEWIS & CLARK EXPEDITION* (Gary E. Moulton & Thomas Dunlay eds., Neb. ed. 1986–1993) (2002). And despite the prevalence of repeating arms, literally no jurisdiction banned them: “There were no prohibitions on any particular type of arm, ammunition, or accessory in any English colony that later became an American state. The only restriction in the English colonies involving specific arms was a handgun and knife carry restriction enacted in Quaker-owned East New Jersey in 1686.” Kopel & Greenlee, *supra*, at 238.

Our court’s approach to categorical bans on classes of weapons cannot be reconciled with Supreme Court precedent. As the Supreme Court held: “Far from banning the carrying of any class of firearms, [laws at the Founding] merely codified the existing common-law offense of bearing arms to terrorize the people[.]” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 47 (2022). In *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016), however, we held that certain classes of weapons—including repeating

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arms—fall entirely outside the Second Amendment’s scope. We had no historical support for that in 2016.

While distinguished jurists have reached different conclusions about the constitutionality of this statute, *see United States v. Alsenat*, No. 24-14058, 2026 WL 1078057, at *1 (11th Cir. Apr. 21, 2026), our precedent’s lack of historical support conflicts with *Bruen*’s requirement that courts focus on history and tradition. So, unless the Supreme Court changes the governing standard, our precedent cannot justify a ban on entire classes of weapons.

Because our court refuses to reconsider *Hollis*, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.
JAMAION WILSON

Case Number: 4:24-CR-00027-P(01)
U.S. Marshal's No.: 89081-510
Frank Gatto, Assistant U.S. Attorney
John Stickney, Attorney for the Defendant

On March 20, 2024 the defendant, JAMAION WILSON, entered a plea of guilty as to Count One of the Indictment filed on February 14, 2024. Accordingly, the defendant is adjudged guilty of such Count, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 922(0) and 924(a)(2)	Unlawful Machinegun Possession	5/09/2023	One

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$100.00 as to Count One of the Indictment filed on February 14, 2024.

The defendant shall notify the United States Attorney for this district within thirty 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.

Sentence imposed July 11, 2024.



MARK T. PITTMAN
U.S. DISTRICT JUDGE

Signed July 15, 2024.

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Defendant: JAMAION WILSON
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IMPRISONMENT

The defendant, JAMAION WILSON, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of **One Hundred Twenty (120) months** as to Count One of the Indictment filed on February 14, 2024. This sentence shall run concurrently with any future sentence which may be imposed in Case No. 1782983D in the 213th District Court, Tarrant County, Texas as this offense is related to the instant offense. This sentence shall run consecutively with any future sentence which may be imposed in Case No. 1799382 in Tarrant County Criminal Court No. 9 as this offense is unrelated to the instant offense.

The Court recommends to the Bureau of Prisons that the defendant be incarcerated at the FMC Fort Worth facility, or as close to the Dallas, Fort Worth, TX area as possible.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **Three (3) years** as to Count One of the Indictment filed on February 14, 2024.

While on supervised release, in compliance with the standard conditions of supervision adopted by the United States Sentencing Commission, the defendant shall:

- 1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame;
- 2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed;
- 3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer;
- 4) The defendant shall answer truthfully the questions asked by the probation officer;
- 5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;
- 6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observed in plain view;

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- 7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation excuses the defendant from doing so. If the defendant does not have full-time employment, he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her employment (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change;
- 8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer;
- 9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours;
- 10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed , or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers);
- 11) The defendant shall not act or make an agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court;
- 12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk; and,
- 13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not possess illegal controlled substances;

not possess a firearm, destructive device, or other dangerous weapon;

cooperate in the collection of DNA as directed by the U.S. probation officer;

submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

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pay the assessment imposed in accordance with 18 U.S.C. § 3013;

not communicate, or otherwise interact, with any known member of the Crips gang, without first obtaining the permission of the probation officer; and,

participate in outpatient mental health treatment services as directed by the probation officer until successfully discharged, which services may include prescribed medications by a licensed physician, with the defendant contributing to the costs of services rendered (copayment) at a rate of at least \$25 per month.

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: an olive-green colored, Palmetto State Armory, Palmetto Dagger, 9-millimeter caliber firearm.

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RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY _____
Deputy Marshal