
In the
Supreme Court of the United States

DELBERT TYLER TREVINO
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition Appendix

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FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

May 21, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DELBERT TYLER TREVINO,

Defendant - Appellant.

No. 24-2170
(D.C. No. 2:23-CR-00066-RB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **EBEL**, and **EID**, Circuit Judges.

Delbert Tyler Trevino was federally indicted for firearm and ammunition offenses. The most serious charge was for his knowing possession of an unregistered rifle whose barrel was less than sixteen inches long. The others were for his willful receipt of ammunition while under felony indictment.

At trial, Trevino testified about an earlier interaction with the El Paso police. The police had seized two firearms from his car during a shoplifting arrest. When he later asked for the firearms back, the police obliged, despite his then being on probation and prohibited from possessing firearms and

* Except under the doctrines of law of the case, res judicata, and collateral estoppel, this order and judgment is not binding precedent. But it may be cited for its persuasive value, consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

ammunition. One of the firearms was a modified, thirty-inch rifle with a barrel measuring just over ten inches long. The police returned it with a property-release form marked “LONG RIFLE, AMERICAN TACTICAL.”

With little explanation, Trevino contended that because the El Paso police returned his rifle and described it as a “LONG RIFLE,” he was less likely to have known that the rifle’s barrel was shorter than sixteen inches. And if the jury found that he hadn’t known the barrel’s length, the government would have failed to prove the knowledge element of his short-barreled-rifle charge. Separately, he contended that the police’s returning his firearms justified a belief that his probation conditions—a mix of rules imposed by Texas and New Mexico—had been lifted, allowing him once again to lawfully possess firearms and ammunition. And if the jury found that he hadn’t known that it was unlawful to receive ammunition, the government would have failed to prove the “willfulness” element of his ammunition charges.

The government objected to the introduction of the release form and the testimony about the El Paso police’s returning the firearms. It argued that Trevino was using the evidence to assert the affirmative defense of public authority. Under that defense, a defendant prevails if he proves that a government official authorized him to do something the defendant knew was illegal. The government pointed out that Trevino had failed to provide pretrial notice of any public-authority-style affirmative defenses under Rule 12.3 of the Federal Rules of Criminal Procedure.

At first, the district court declined to admit the evidence, ruling that it contained hearsay and wasn't relevant. But during Trevino's direct examination, the court admitted the release form as relevant to his knowledge of the rifle's barrel length. The court also allowed Trevino to testify that the El Paso police's returning the firearms made it more likely that he thought he could lawfully receive ammunition. The court continued to bar him from using the evidence to support an affirmative defense.

During closing argument, Trevino's counsel recounted the evidence about the El Paso police without objection until he implored the jury, "The police gave [the firearms] back to him. And if we can't trust that, what can we trust in the United States?" R. vol. I at 813. That sparked a government objection for straying into a public-authority defense, or one "by some other name." *Id.*

At the ensuing bench conference, the court explained how Trevino's counsel had exceeded the court's earlier limits: "You're arguing now that the police gave it to him; it must have been okay. That's Public Authority. And we had this discussion time and again." *Id.* The court repeated that "[y]ou're taking the position here that they told him he could, so it was okay, so it must have been okay." *Id.* at 814.

After the government requested that the court strike counsel's comments, the court did so. Referring to counsel's "suggestion" that "because the police in El Paso gave [Trevino] the guns, it was okay for him to have the guns relative

to this entire proceeding,” the court instructed the jury that counsel’s comments were “not an accurate statement of the law.” *Id.*

On appeal from his conviction, Trevino argues that the court mistook his remarks as asserting a public-authority defense rather than negating the mens rea elements of the charged offenses. But the court never stopped Trevino from arguing that the evidence somehow made it less likely that he knew either that his rifle’s barrel length was less than sixteen inches or that he unlawfully received ammunition. Though the court mistakenly understood him as making a public-authority defense, it correctly prohibited him from arguing that because the El Paso police returned his firearms, the jury could acquit him no matter what he knew. His counsel had already made proper mens rea arguments and was free to make them again. But he instead chose to “move on.” *Id.*

The district court didn’t err in sustaining the government’s objection and striking parts of Trevino’s closing argument. We affirm.

BACKGROUND

I. Factual Background

A. Texas

In late 2020, a Texas state grand jury indicted Trevino for three felony offenses: car theft, drug possession, and possessing identifying information of others with intent to harm or defraud. Trevino was released on bond pending trial.

Sometime the next year, Trevino was arrested in El Paso for shoplifting. During the arrest, El Paso police saw a Glock handgun and an American Tactical AR-15 rifle inside Trevino's car. The police confiscated the firearms "for safekeeping." *Id.* at 687.

In early 2022, Trevino pleaded guilty to the three Texas felonies. The court deferred adjudication on the guilty pleas subject to Trevino's completing five years' probation. His terms of supervision included a ban on his possessing or transporting "any type of firearm, prohibited weapon, or body armor." Supp. R. vol. II at 17.

Trevino and his Texas probation officer eventually decided that El Paso wasn't the best place for Trevino "to get back on [his] feet." *See* R. vol. I at 683–84. So a few months after pleading guilty, he transferred his supervision to New Mexico, where his then-girlfriend lived. On June 13 and 17, he agreed to New Mexico's probation conditions, including one that prohibited him from possessing "firearms, ammunition, or other deadly weapons." Supp. R. vol. II at 45–46, 48–50. His New Mexico probation officer told him that Texas's conditions would remain in effect as well.

But Trevino wanted to reclaim his firearms from the El Paso police. And the police had given him a property receipt stating that he would forfeit the

firearms if he didn't reclaim them soon. So on June 22, he called the officer who had seized the firearms and asked for permission to reobtain them.¹

After running a background check, the officer okayed Trevino's request, apparently not knowing about Texas's and New Mexico's prohibitions. On June 29, Trevino showed up at the El Paso police station and reobtained the firearms. As with all property returned by the police, the firearms came with release forms. One form listed the rifle as a "LONG RIFLE, AMERICAN TACTICAL."² *Id.* at 1; R. vol. I at 691.

Trevino transported the firearms to his new home in Las Cruces, New Mexico. According to his then-girlfriend, Trevino "wanted to [drive] in separate vehicles" on the way back "so, that way, if there was an issue with the state lines, [they] wouldn't get in trouble." R. vol. I at 746. She also testified that Trevino disassembled the firearms before transporting them in his own car. For his part, Trevino testified that he hadn't worried about moving the firearms across state lines, nor disassembled them before doing so.

B. New Mexico

By mid-August 2022, Trevino had settled in Las Cruces. He twice purchased ammunition from a local sporting-goods store—first on July 22, and

¹ At Trevino's request, his then-girlfriend also tried unsuccessfully to retrieve the firearms for him.

² "American Tactical" is the trade name of the company that assembled the rifle's components. Nothing in the record explains the "long rifle" designation. The entire rifle was 30.37 inches long.

again on August 12. Both times, he used his own name, debit card, and loyalty-account number.

Trevino had also landed a job as a surgical technologist at a veterinary hospital. There he met Alice Baumann, a semi-retired veterinarian. Baumann and her husband, Henry Kopp, were planning a vacation and needed someone to tend their pecan farm and pets while they were away. Kopp would also need a ride to and from the airport when he returned from vacation to fly to Houston for medical treatment. The couple asked Trevino if he would help, and he agreed to do so. So they showed Trevino their property and left him the keys to their house and truck.

Upon Kopp's return from vacation, Trevino picked him up at the airport. After Kopp stowed his luggage in the back of the truck, Trevino said, "I guess you noticed my rifle?" *Id.* at 428–29. Kopp saw the rifle resting behind the driver's seat.

After arriving back at the house, Trevino "really wanted to show [Kopp] the gun" and said he was "really proud" of it. *Id.* at 429. According to Kopp, Trevino explained that "he had made modifications to it," like installing a "more sensitive trigger," a "flash arrester,"³ and an "offset scope." *Id.* Trevino also mentioned that he had shortened the barrel. Later that morning, Trevino and Kopp fired the rifle for target practice.

³ Kopp was likely referring to a flash suppressor, also known as a "muzzle break" or "flash hider."

A couple of days later, Kopp flew to Houston for what he expected would be a month-long medical stay. But he returned almost immediately after testing positive for COVID-19. The next morning, September 2, he saw local law-enforcement officers outside his house.⁴ The officers soon obtained and executed search warrants for the house and Kopp's truck.

During the search, officers seized Trevino's rifle from the guest bedroom. Trevino was present and told one officer that he had built the rifle himself. A different officer measured the rifle's barrel at about thirteen inches, which included the attached flash suppressor. That officer notified his supervisor, who contacted the ATF.

A few days later, an ATF agent measured the rifle's barrel at thirteen inches, again by including the attached flash suppressor. That agent then sent the rifle to an ATF lab. At the lab, a different agent detached the suppressor and, sliding a cylindrical ruler down the rifle's barrel, precisely measured the barrel at 10.62 inches.⁵

⁴ The officers were there based on information that Trevino had recently shot and killed a woman. The jury in the present case was not told why the police were at Kopp's residence.

⁵ The second agent testified that to count toward a barrel's length, a suppressor must be "permanently welded and pinned to the front of the barrel." R. vol. I at 603.

II. Procedural History

A. Indictments

On January 13, 2023, a grand jury in the District of New Mexico indicted Trevino on one count of knowingly possessing, on or about September 2, 2022, an unregistered “rifle with a barrel length less than 16 inches and an overall length less than 26 inches.” R. vol. I at 24; *see generally* 26 U.S.C. §§ 5845, 5861(d). On April 17, 2024, the grand jury returned a second superseding indictment, charging the same count as above and adding two counts for Trevino’s willfully receiving ammunition while under felony indictment in Texas. *See generally* 18 U.S.C. §§ 922(n), 924(a)(1)(D).

B. Trial

At trial, the jury heard two full days of testimony. Because the sole issue now on appeal is whether the district court erred in its rulings during Trevino’s closing argument, we recount only the evidence and arguments that pertain to that issue.⁶

1. Evidence

To prove the violation of 26 U.S.C. § 5861(d), the government needed to prove that on or about September 2, 2022, Trevino knew that he possessed a “firearm” as defined by § 5845. *See Staples v. United States*, 511 U.S. 600,

⁶ Initially, Trevino challenged the facial constitutionality of 18 U.S.C. § 922(n). But in his reply brief, he concedes that this argument fails under *United States v. Ogilvie*, 153 F.4th 1098, 1111 (10th Cir. 2025), *cert. denied*, -- S. Ct. ----, 2026 WL 490576, at *1 (Feb. 23, 2026).

602, 619 (1994). That count required proof that Trevino knew that his rifle’s barrel length was less than sixteen inches.⁷ *See* 26 U.S.C. § 5845(a).

Separately, to prove the violations of 18 U.S.C. § 922(n), the government needed to prove that while under felony indictment, Trevino “willfully” received ammunition on or about July 22, 2022, and on or about August 12, 2022. *See* 18 U.S.C. § 924(a)(1)(D). Each ammunition count required proof that when Trevino purchased the ammunition, he knew it was unlawful to do so. *See Bryan v. United States*, 524 U.S. 184, 196 (1998).⁸

For the short-barreled-rifle count, the government introduced compelling evidence that Trevino knew that his rifle’s barrel was less than sixteen inches long. As mentioned, an agent at the ATF lab detached the flash suppressor and precisely measured the barrel at 10.62 inches. Trevino was familiar with the rifle, having built it himself and modified it to shoot different ammunition,

⁷ Again, the indictments charge Trevino’s possessing a “rifle with a barrel length less than 16 inches and an overall length less than 26 inches.” R. vol. I at 24–25. Though Trevino doesn’t appeal this language, we note that it doesn’t match any of § 5845(a)’s definitions of “firearm.” The language could implicate either of two such definitions. *Contrast* 26 U.S.C. § 5845(a)(3) (“a rifle having a barrel . . . less than 16 inches in length” (emphasis added)), *with id.* § 5845(a)(4) (“a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel . . . less than 16 inches in length” (emphasis added)). The ambiguity persists in the jury instructions. *See* R. vol. I at 343 (requiring that Trevino owned “a rifle with a barrel length less than 16 inches” yet also requiring that he owned “a weapon made from a rifle with a barrel of less than 16 inches in length or an overall length of less than 26 inches”).

⁸ The government did not need to prove that Trevino knew the specific law or laws that made his purchases unlawful. *See Bryan*, 524 U.S. at 196–97.

which required a different barrel. Trevino's ex-girlfriend testified that Trevino had worried about moving the firearms from Texas to New Mexico and disassembled them before doing so. Trevino also periodically disassembled the rifle to clean it. And Kopp testified that Trevino told him that he had shortened the rifle's barrel. R. vol. I at 429.

Likewise, for the ammunition counts, the evidence was strong that Trevino knew that it was illegal for him to receive ammunition. The original terms of his probation in Texas had barred him from possessing "any type of firearm, prohibited weapon, or body armor." Supp. R. vol. I at 17. Just weeks before his two ammunition purchases, he signed multiple forms agreeing to New Mexico's ban on his possessing "firearms, ammunition, or other deadly weapons." *Id.* at 46, 49. And at trial, he conceded that by the time he agreed to New Mexico's conditions, he understood that it was unlawful for him to possess ammunition.

For his part, Trevino argued that he hadn't known that the barrel length was less than sixteen inches. In support, he testified that when he modified the rifle, he swapped out "a complete upper receiver," not just the barrel.⁹ R. vol. I at 693. He also argued that he hadn't known that it was unlawful for him to possess ammunition. He testified that if he had known, he wouldn't have used

⁹ On direct examination by the government, the second ATF agent agreed that the easiest way to swap out a barrel is "just [to] get another upper receiver," like Trevino said he had done. R. vol. I at 601. Otherwise, the agent said, one would need "the skills to change the barrel out by itself." *Id.*

his own name, debit card, and loyalty-account number at the sporting-goods store. And he noted that Texas’s probation conditions did not explicitly prohibit him from possessing *ammunition*.

More controversially, Trevino sought to introduce evidence about his reobtaining the two firearms from the El Paso police—namely, (1) that the police returned the firearms to him, (2) that a property-release form listed the rifle as a “LONG RIFLE,” and (3) what Trevino later told his New Mexico probation officer about the interaction.

The government objected. It argued that the forms and the probation officer’s testimony would contain inadmissible hearsay, that the forms hadn’t been authenticated, and that all the El Paso–police evidence was irrelevant. In the government’s view, Trevino was arguing that because the police returned his firearms, the jury couldn’t fairly convict him for possessing the rifle or purchasing ammunition afterward. And so, the government argued, Trevino was either making an unnotified public-authority-style defense or advocating jury nullification, neither of which was permissible.¹⁰

¹⁰ A public-authority-style defense excuses illegal conduct based on a public official’s permission or assurance of legality. *See, e.g., United States v. Jumah*, 493 F.3d 868, 874–75, 874 n.4 (7th Cir. 2007). But a defendant can’t mount such a defense without timely notice to the government, which Trevino hadn’t given. *See Fed. R. Crim. P. 12.3(a)(1)*. Nor can a defendant encourage jury nullification. *See United States v. Gonzalez*, 596 F.3d 1228, 1237 (10th Cir. 2010).

Trevino denied this. He argued that the evidence was relevant to his “state of mind” about the rifle’s barrel length. *See, e.g., id.* at 553. Because the police “did not identify [the rifle] as” short-barreled but instead called it a “long rifle,” he claimed that the jury might find it less likely that he knew that the barrel’s length was less than sixteen inches.¹¹ *See id.* at 553, 575–77; Supp. R. vol. II at 1. He also briefly contended that the evidence would negate the willfulness element of the ammunition charges.

The district court mostly sustained the government’s objections. The court excluded Trevino’s statements to his probation officer as irrelevant and as inadmissible hearsay. And when Trevino wanted to use the release forms to cross-examine one of the ATF agents, the court excluded the forms as “irrelevant and potentially confusing for the jury.” R. vol. I at 657.

But later, when Trevino took the stand, the district court allowed him to testify about his reobtaining the firearms from the El Paso police. The court also admitted the release forms.¹² Trevino read the rifle’s form aloud to the

¹¹ In this exchange with the court, Trevino’s counsel misstated that the release form referenced a “long-barreled rifle.” R. vol. I at 576–77. He would later do so again during closing argument to the jury.

¹² We struggle to see the release forms’ relevance. If Trevino already knew the rifle’s barrel length when he reobtained his firearms from the El Paso police—as the government’s evidence attempted to show—he could not “unknow” it just because an officer returned the firearm and described it as a “LONG RIFLE.” And if he didn’t already know the rifle’s barrel length, the only relevance we can see would be if the forms made him less likely to measure the barrel later. But he never made such an argument.

jury: “LONG RIFLE, AMERICAN TACTICAL.” *See id.* at 691; Supp. R. vol. II at 1. He testified that he hadn’t known the rifle’s barrel length or changed the barrel after reobtaining the rifle from the El Paso police. And without much explanation, he added that because he had thought that the police “would be able to see” his probation order, he believed that their returning his guns meant that his probation must have “been updated” to allow him to possess firearms and ammunition. *See* R. vol. I at 724–25.

2. Closing Arguments

Trevino’s counsel began by reminding the jury that the government had the burden of proving that on or about the dates charged, Trevino knew that his rifle’s barrel length was less than sixteen inches and knew that it was unlawful for him to receive ammunition. And in arguing that the government hadn’t met its burden, counsel mostly stuck to safe territory. For the short-barreled-rifle count, he noted the law-enforcement officers’ differing barrel measurements (though all were considerably less than sixteen inches) and Trevino’s having modified the entire upper assembly rather than just the barrel. He also stressed that Trevino hadn’t hidden the rifle from Kopp but had instead shown it off and gone shooting with him. For the ammunition counts, counsel emphasized that Trevino had purchased ammunition “using his name, his loyalty account, his debit card,” all “because he thought he could.” *Id.* at 805.

But then counsel turned to the evidence about the El Paso police. To start, he misstated the evidence by saying that the El Paso police had listed the

rifle as “long-*barreled*” on the release form.¹³ *Id.* at 807–08 (emphasis added). He repeatedly reminded the jury that the police “gave [Trevino] the firearms back.” *Id.* at 809; *accord id.* at 813. And he culminated by imploring, “if we can’t trust that, what can we trust in the United States? . . . [W]hen the police say, ‘You can make an appointment and come get your guns,’ he comes and gets his guns.” *Id.* at 813.

The government objected, arguing that Trevino had just asserted a public-authority defense, or one “by some other name.” *Id.* At the ensuing bench conference, the court agreed, describing Trevino’s argument as being, “now the police gave [the rifle] to him; it must have been okay. That’s Public Authority.” *Id.* The court added that “we had this discussion time and again” and “that’s been your argument the last three minutes.” *Id.*

Trevino’s counsel agreed to “move on.” *Id.* But he disclaimed making a public-authority defense, reasoning that he “vehemently den[ied]” that Trevino was admitting the crime. *Id.* at 813–14. Still, he emphasized that “if [he was] toeing the line,” he would “move on from this, judge.” *Id.* The court responded “[y]ou will move on from this” and told counsel that his argument was “not acceptable.” *Id.*

¹³ Again, the release form referred to the rifle as “LONG RIFLE, AMERICAN TACTICAL.” Supp. R. vol. II at 1. The form says nothing about the rifle’s barrel or the barrel’s length.

The government then moved to strike. The court agreed, instructing the jury that it was “not an accurate statement of law” that just “because the police in El Paso gave [Trevino] the guns, it was okay for him to have the guns relative to this entire proceeding.” *Id.* The court then told the jury to “have that in mind as you consider what’s been said up to this point.” *Id.* at 815.

C. Conviction & Sentence

That day, the jury returned a guilty verdict on all three counts. The court imposed a mid-range sentence of eighty months’ imprisonment.

D. Appeal

Trevino timely appealed. He challenges the district court’s sustaining the government’s objection at closing argument and striking what the jury had just heard. In his view, the court mistook legitimate mens rea arguments for a public-authority defense. He says that this error led the court to misapply Rule 12.3 and to violate his Sixth Amendment right to present a defense. So he asks us to reverse the court’s legal conclusion, vacate his conviction, and remand for a new trial.

JURISDICTION

Trevino appeals the district court’s final judgment of conviction. We have jurisdiction under 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review de novo a criminal defendant’s argument that a district court violated his constitutional rights to present a defense. *See United States v.*

Buntyn, 104 F.4th 805, 813 (10th Cir. 2024); *United States v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005). But when constitutional rights aren’t implicated, we review a court’s limits on closing arguments like we review its other decisions about conducting trial: for abuse of discretion. *See United States v. Apperson*, 441 F.3d 1162, 1206 (10th Cir. 2006); *Ramsey v. Culpepper*, 738 F.2d 1092, 1100 (10th Cir. 1984). A court abuses its discretion when its decision “rests on an error of law or a clearly erroneous finding of fact” or “manifests a clear error in judgment.” *United States v. Kirby*, 161 F.4th 1208, 1213 (10th Cir. 2025) (citation modified).¹⁴

DISCUSSION

During Trevino’s case in chief, the district court allowed him to testify that his reobtaining the firearms from the El Paso police lessened the likelihood that he knew the rifle’s barrel length or knew that he received ammunition unlawfully. The court also allowed him to introduce the release form describing the rifle as a “LONG RIFLE, AMERICAN TACTICAL.”

But in his closing remarks, Trevino’s counsel went beyond arguing those points. The court correctly perceived that his argument—“if we can’t trust that, what can we trust in the United States?”—proclaimed, even if unintentionally,

¹⁴ We also review most constitutional errors and all nonconstitutional errors for harmlessness. *See Neder v. United States*, 527 U.S. 1, 7 (1999); *United States v. Rivera*, 900 F.2d 1462, 1469–70 (10th Cir. 1990). But as we will explain, the district court didn’t err in cutting off and striking parts of Trevino’s summation, so we needn’t consider the rulings’ harmlessness.

that the jury could acquit Trevino based on his reobtaining his firearms from the El Paso police, even if he knew all along that his rifle’s barrel was shorter than sixteen inches and that his probation terms made it unlawful for him to receive ammunition. That was an impermissible argument. The court correctly ruled it out of bounds and instructed the jury not to consider it. We affirm.

* * *

Trevino insists that he wasn’t making a public-authority defense but was instead trying to argue his “state of mind”—his lack of knowledge about the rifle’s barrel length and the unlawfulness of his receiving ammunition. Thus, he says, the district court erred by cutting off and striking parts of his closing argument.¹⁵

We agree that Trevino wasn’t making a public-authority defense. True, that’s what the government and the district court called his argument at trial. But to assert a public-authority defense, he would have had to argue that he acted in a way he “kn[ew] to be . . . illegal but that ha[d] been authorized by the government.” *Norweathers v. United States*, 133 F.4th 770, 776 (7th Cir.

¹⁵ The government argues that because Trevino’s counsel agreed to “move on” from the district court’s cutting off his argument, Trevino abandoned, and thus waived, his objection to that ruling. We disagree. Waiver by abandonment occurs “when a party deliberately considers an issue and makes an intentional decision to forgo it.” *United States v. Martinez*, 92 F.4th 1213, 1260 (10th Cir. 2024) (citation omitted). Yet by agreeing to “move on,” Trevino did no more than “acknowledge[] that the district court had resolved the issue.” *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169, 1174 (10th Cir. 2021). He “neither agreed with the district court’s resolution . . . nor suggested that [he] would not appeal” it. *Id.*

2025) (citation omitted); *see also Apperson*, 441 F.3d at 1204. And he never argued that.¹⁶

But even though the district court was wrong that Trevino was making a public-authority defense, it was right about what matters: By the time the government objected to counsel’s “what can we trust?” argument, counsel was no longer arguing that Trevino hadn’t known his rifle’s barrel length or known that his probation condition against possessing ammunition remained in force. Instead, even if unintentionally, counsel was arguing that the jury could acquit Trevino even if he *had* known those things. That’s the argument that prompted the government’s objection and the court’s ruling. And we affirm a district court’s rulings “on any ground that finds support in the record,” regardless of whether the court “reached its conclusions from a different or even erroneous course of reasoning.” *United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003) (citation omitted).

Recall counsel’s closing remarks. True, he *began* by saying that Trevino hadn’t known that the rifle’s barrel was less than sixteen inches long or that the New Mexico probation condition against possessing ammunition remained in

¹⁶ On appeal, the government characterizes the stricken portion of Trevino’s closing argument as asserting the defense of entrapment by estoppel, not public authority. But the entrapment-by-estoppel defense requires a defendant to argue that he committed a crime only because a government official “affirmatively misle[d]” him about “the state of the law.” *See Apperson*, 441 F.3d at 1204 (citation omitted). And Trevino never argued that, either.

force. For support, he relied on the El Paso police’s release form describing the rifle as a “LONG RIFLE” and the testimony and receipts showing that Trevino had purchased ammunition under his own name. But then, without tying his remarks to Trevino’s knowledge, counsel repeatedly stressed that *the police* had given Trevino the firearms. And right before the government objected, he asked, “if we can’t trust that, what can we trust in the United States?” R. vol. I at 813.

That wasn’t “a proper mens rea argument.” Trevino’s Open. Br. at 49. The district court had by then excluded the El Paso–police evidence for all purposes but two: Trevino could testify how the release forms affected his knowledge of the barrel’s length, and he could testify how the police’s returning his firearms affected his knowledge that it was unlawful to receive ammunition. In other words, by the time closing arguments began, counsel knew that “a proper mens rea argument” was one that established Trevino’s lack of knowledge or willfulness.

Yet during closings, counsel tried something different. By emphasizing the need for “trust” in the police’s returning the rifle, counsel subtly argued that the jury could acquit Trevino even if the government proved that he knew that his rifle’s barrel length was shorter than sixteen inches or that it remained illegal for him to receive ammunition. *See* R. vol. I at 813. Rather than poke holes in the government’s proof, counsel proposed a false basis for acquittal.

A district court has “considerable discretion . . . in exercising supervision over arguments of counsel.” *Ramsey*, 738 F.2d at 1100 (citation omitted). Among other things, the court may “ensure that argument does not stray unduly from the mark[] or otherwise impede the fair and orderly conduct of the trial.” *Herring v. New York*, 422 U.S. 853, 862 (1975). That includes the power to limit arguments that are irrelevant, confusing, or misleading. *See United States v. Wilcox*, 487 F.3d 1163, 1173 (8th Cir. 2007); *United States v. McKinley*, 70 F.3d 1307, 1314 (D.C. Cir. 1995). It also includes the power to limit arguments that misstate the law. *See United States v. Hollis*, 971 F.2d 1441, 1455 (10th Cir. 1992); *Deck v. Jenkins*, 814 F.3d 954, 981 (9th Cir. 2016).

Given that, the district court properly cut off counsel’s “what can we trust” argument and struck it from the jury’s consideration. When counsel misstated the jury’s duty under the law, he made an improper argument. *See Hollis*, 971 F.2d at 1455. And it isn’t an abuse of discretion for a court to impose reasonable limits on closing argument, including cutting off and striking improper remarks. *See id.*; *McKinley*, 70 F.3d at 1314.

Nor do reasonable limits on closing argument violate a defendant’s constitutional right to present a defense.¹⁷ *See Buntyn*, 104 F.4th at 813–14;

¹⁷ The government argues that Trevino waived his constitutional argument by not specifically objecting “that the [district] court was improperly limiting his ability to put on a defense.” Gov’t’s Resp. Br. at 54. Again, we disagree. To preserve an argument, an objection “must be sufficiently specific to bring into focus the precise nature of the alleged error.” *See Antero Res.* (footnote continued)

Herring, 422 U.S. at 862. The right to present a defense allows a defendant to “make a *proper* argument on the evidence and the *applicable* law in his favor,” not to argue matters “not within the issues in the case.” *See Herring*, 422 U.S. at 860 (emphasis added) (citation omitted). Because counsel’s argument exceeded those bounds, Trevino had no constitutional right to the jury’s considering it. *See United States v. Doe*, 705 F.3d 1134, 1149 (9th Cir. 2013).

Finally, we disagree with Trevino that the district court prevented him from making other proper arguments during closing. The court ordered Trevino not to argue that “the police gave [the rifle] to him; it must have been okay.” *See R. vol. I* at 813. But the court never kept him from using the release forms to try to counter the government’s proof that he knew the barrel’s length. Nor did the court keep him from using his own testimony about reobtaining the firearms to try to counter the proof that he willfully received ammunition. On the contrary, earlier in the trial, the court had admitted that evidence and allowed Trevino to argue just those points. Counsel simply chose not to circle back and argue them again after the court’s rulings during closing argument.

Corp. v. S. Jersey Res. Grp., LLC, 933 F.3d 1209, 1225 (10th Cir. 2019) (citation omitted). And on appeal, Trevino’s two arguments rest on one purported error: the district court’s misinterpreting part of his closing as an unnotified public-authority defense. That’s the same error counsel identified at trial.

Nor did the district court tell the jury that “everything that it had heard about the El Paso Police Department was not relevant to its verdict.”¹⁸ Trevino’s Open. Br. at 58 (citation modified). Rather, the court instructed the jury to “accept” that it was “not an accurate statement of the law” to say that “because the police in El Paso gave [Trevino] the guns, it was okay for him to have the guns.” R. vol. I at 814. The court also instructed the jury to “have that in mind as you consider what’s been said up to this point.” *See id.* at 815. So the jury remained free to consider Trevino’s earlier mens rea testimony about his reobtaining the firearms and the accompanying release forms.

CONCLUSION

We affirm Trevino’s conviction.

Entered for the Court

Gregory A. Phillips
Circuit Judge

23a

¹⁸ Though the *government* said that to the jury, Trevino never objected.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

May 21, 2026

Ms. Shira Kieval
Office of the Federal Public Defender
District of Colorado
633 Seventeenth Street, Suite 1000
Denver, CO 80202

RE: 24-2170, United States v. Trevino
Dist/Ag docket: 2:23-CR-00066-RB-1

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of Court

cc: James Robert Wolfgang Braun

CMW/jm

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CR 2:23-cr-00066 RB

DELBERT TYLER TREVINO,

Defendant.

MEMORANDUM OPINION AND ORDER

In 1961, Congress banned persons “under indictment for a crime punishable by imprisonment for a term exceeding one year” from receiving firearms or ammunition that have traveled in interstate commerce. 18 U.S.C. § 922(n). On June 21, 2023, the United States filed a superseding indictment charging Defendant Delbert Tyler Trevino, who was under indictment for purposes of the statute, with two counts of receiving firearms and ammunition pursuant to § 922(n). Trevino moves to the dismiss the superseding indictment on the basis that § 922(n) is unconstitutional under the framework instituted by the United States Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 F. Ct. 2111 (2022). (Doc. 51.)

Having examined § 922(n) under the *Bruen* standard, the Court finds that while Trevino may be part of the class of citizens whom the Second Amendment covers, the Government meets its burden to show that § 922(n) is consistent with our country’s historical tradition of firearms regulation and, therefore, does not violate the Second Amendment. The Court **DENIES** Trevino’s motion to dismiss.

I. Procedural History¹

On November 12, 2020, Trevino was indicted in a Texas state court on three counts: theft of property; fraud; and possession of a controlled substance. (*See* Doc. 55-1.) On January 19, 2022, Trevino pleaded guilty, and the court entered an Order of Deferred Adjudication on the three felony charges. (*See* Doc. 55-2.) “In Texas, deferred adjudication permits a defendant to accept responsibility for a crime without an actual conviction.” (Doc. 55 at 2.) “If a defendant successfully completes the terms and conditions of ‘community supervision’ (*i.e.*, probation), then the defendant’s case [is] dismissed” without the blight of a felony conviction on their record. (*See id.*)

According to the Order of Deferred Adjudication, Trevino was not allowed to “possess or transport any type of firearm, prohibited weapon, or body armor.” (*See* Doc. 55-2 at 8.) Thus, the El Paso Police Department (EPPD) seized Trevino’s firearms. (*See* Doc. 55 at 2.) On June 6, 2022, while he was still on deferred adjudication, Trevino went to “the EPPD and demanded the return of his firearms on the basis that he was not a convicted felon.” (*Id.* at 2–3.) The EPPD returned the firearms to Trevino. (*See id.* at 3.)

The Government asserts that on July 22, 2022, Trevino “purchased, and thus received,” ammunition from a store in Las Cruces, New Mexico. (*Id.*) “On September 2, 2022, in connection with a homicide investigation,” authorities executed search warrants on Trevino’s residence and vehicle. (*See id.*) Officers recovered the firearms Trevino received from the EPPD and the ammunition he purchased in Las Cruces. (*Id.*) Consequently, the United States charged Trevino with, *inter alia*,² illegal receipt of firearms and of ammunition by a person under indictment in violation of 18 U.S.C. §§ 922(n) and 924(a)(1)(D). (Doc. 39.) Trevino now moves to dismiss the

¹ The Court recounts the factual history as presented in the Government’s response brief. (Doc. 55 at 2–3.) Trevino did not file a reply brief.

² Trevino has also been charged with possessing a firearm not registered with the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. (Doc. 39.)

charges on the basis that § 922(n) violates the Second Amendment. (Doc. 51.)

II. Legal Standards

Federal Rule of Criminal Procedure 12(b)(1) allows parties to “raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” The Court may entertain a motion to dismiss under Rule 12(b)(1) “that require[s] it to answer only pure questions of law.” *See United States v. Pope*, 613 F.3d 1255, 1260 (10th Cir. 2010) (citations omitted). Trevino’s constitutional challenge is appropriately raised in a motion to dismiss because the Court may decide the question without considering any issues of fact. *See id.*

Trevino summarily asserts that § 922(n) is invalid both facially and as applied to him. (*See* Doc. 51 at 10, 19.) A facial challenge requires “the challenger [to] establish that no set of circumstances exists under which the [law] would be valid.” *See United States v. Salerno*, 481 U.S. 739, 745 (1987). “In contrast, an as-applied challenge may concede that the statute is generally constitutional in most of its applications, but asserts that the statute is unconstitutional under the particular case’s circumstances.” *United States v. Streett*, 434 F. Supp. 3d 1125, 1149 n.15 (D.N.M. 2020), *aff’d*, 83 F.4th 842 (10th Cir. 2023) (citation omitted).

III. Analysis

A. The relevant legal landscape.

At issue here is the constitutionality of 18 U.S.C. § 922(n), which makes it “unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to . . . receive any firearm or ammunition which has been shipped or transported in

interstate or foreign commerce.”³ Trevino argues that, given the new standard announced in *Bruen*, § 922(n) violates the Second Amendment. (Doc. 51.)

The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court affirmed “that ‘the people,’ not just members of the ‘militia,’ have the right to use a firearm to defend themselves.” *See Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) (discussing the “key point” of *Heller*). Specifically, the *Heller* court opined that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635. In *McDonald v. Chicago*, 561 U.S. 742, 750 (2010), the Supreme Court held that the same Second Amendment right applies to the States. Following *Heller* and *McDonald*, courts employed “a ‘two-step’ framework for analyzing Second Amendment challenges that combine[d] history with means-end scrutiny.” *See Bruen*, 142 S. Ct. at 2125; *see also, e.g., United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010), *abrogated by Bruen*, 142 S. Ct. 2111 (employing the “two-pronged approach to Second Amendment challenges”) (citations omitted). That approach required courts to first “ask[] whether the challenged law impose[d] a burden on conduct falling within the scope of the Second Amendment’s guarantee.” *See Reese*, 627 F.3d at 800 (quotation omitted). “If the government [could] prove that the regulated conduct [fell] beyond the Amendment’s original scope, then” the regulation was constitutional. *See Bruen*, 142 S. Ct. at 2126 (citation omitted). If the conduct fell within the scope of the Second Amendment, courts applied means-end scrutiny to determine whether the regulation was constitutional. *See id.*

³ Trevino does not dispute that § 922(n) applies to him. (*See* Doc. 51.) Indeed, Tenth Circuit authority provides that “an offender subject to conditional discharge is still under indictment until the condition is met—completion of the term of probation.” *United States v. Saiz*, 797 F.3d 853, 854 (10th Cir. 2015).

In *Bruen*, the Court held as violative of the Second Amendment a New York law that conditioned issuance of a concealed-carry permit on an individual’s showing of a “special need for self-defense” *See id.* at 2122. The Supreme Court decided the two-step framework and means-end scrutiny test that arose post-*Heller* was “one step too many.” *See id.* at 2127. The Court held that the first step, “which demands a test rooted in the Second Amendment’s text, as informed by history[,]” is still acceptable. *See id.* At the newly adopted second step, however, “the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.*

Although *Bruen* expanded our understanding of citizens’ Second Amendment rights to include the right to possess firearms outside one’s home, the majority seemingly took care not to disturb other “restrictions that may be imposed on the possession or carrying of guns.” *See id.* at 2157 (Alito, J., concurring). For example, the Tenth Circuit recently observed that *Bruen* “didn’t appear to question the constitutionality of longstanding prohibitions on possession of firearms by convicted felons.” *Vincent v. Garland*, 80 F.4th 1197, 1201 (10th Cir. 2023). The *Vincent* court pointed out that “*Bruen* apparently approved the constitutionality of regulations requiring criminal background checks before applicants could get gun permits[,]” as the *Bruen* Court observed that firearms “‘applicants [must often] undergo a background check’ to ensure that the applicant is a ‘law-abiding, responsible citizen[.]’” *Id.* at 1201–02 (quoting *Bruen*, 142 S. Ct. at 2138 n.9).

It is against this backdrop that the Court examines Trevino’s challenge to § 922(n). Trevino asserts that his conduct—receipt of firearms—is covered by the plain text of the Second Amendment. (Doc. 51 at 10.) He further argues that the United States cannot establish that § 922(n) is consistent with our “Nation’s historical tradition of firearm regulation.” (*Id.* at 17 (quoting *Bruen*, 142 S. Ct. at 2126).)

As outlined below, the Court answers the first question in the affirmative: the plain text of the Second Amendment covers Trevino’s conduct. Turning to the second question, the Court holds the Government meets its burden to demonstrate that the statute is consistent with historical analogues. Consequently, the Court declines to find that § 922(n) violates the Second Amendment. In reaching this conclusion, the Court joins the substantial majority of courts that have, since *Bruen*, found § 922(n) withstands constitutional scrutiny. *See, e.g., United States v. Posada*, --- F. Supp. 3d ---, 2023 WL 3027877 (W.D. Tex. Apr. 20, 2023); *United States v. Jackson*, --- F. Supp. 3d ---, 2023 WL 2499856 (D. Mary. Mar. 13, 2023); *United States v. Bartucci*, --- F. Supp. 3d --, 2023 WL 2189530 (E.D. Cal. Feb. 23, 2023); *United States v. Simien*, --- F. Supp. 3d ---, 2023 WL 1980487 (W.D. Tex. Feb. 10, 2023); *United States v. Rowson*, 652 F. Supp. 3d 436 (S.D.N.Y. 2023); *United States v. Kays*, 624 F. Supp. 3d 1262 (W.D. Okla. 2022); *United States v. Now*, No. 22-CR-150, 2023 WL 2717517 (E.D. Wis. Mar. 15, 2023), *R&R adopted*, 2023 WL 2710340; *United States v. Stennerson*, No. 22-cr-0139, 2023 WL 2214351 (D. Mont. Feb. 24, 2023); *United States v. Gore*, No. 2:23-cr-04, 2023 WL 2141032 (S.D. Ohio Feb. 21, 2023); *United States v. Kelly*, No. 3:22-cr-0037, 2022 WL 17336578 (M.D. Tenn. Nov. 16, 2022); *cf. United States v. Holden*, 70 F.4th 1015 (7th Cir. 2023); *but see, e.g., United States v. Hicks*, 649 F. Supp. 3d 357 (W.D. Tex. 2023); *United States v. Stambaugh*, 641 F. Supp. 3d 1185 (W.D. Okla. 2022); *United States v. Quiroz*, 629 F. Supp. 3d 511 (W.D. Tex. 2022).

B. The Second Amendment’s plain text covers Trevino’s conduct.

Trevino contends that the receipt of firearms is covered by the Second Amendment. (*See id.* at 10–16.) He states that “[t]he Second Amendment’s operative clause contains three textual elements: it protects the right of (1) ‘the people’ to (2) ‘keep and bear’ (3) ‘Arms.’” (*Id.* at 10–11.) He believes that he “satisfies all three elements.” (*Id.* at 11.) Trevino contends that if the fact of

his indictment strips him of his right to bear arms under the Second Amendment, then it would similarly “deprive him of his First Amendment rights to speak about matters of public concern and worship according to his faith, and his Fourth Amendment right to be free from warrantless searches of his home.” (*Id.* at 12.)

The Government disagrees and argues the Second Amendment “does not cover receiving guns while under felony indictment.” (Doc. 55 at 6 (bolding omitted).) The Government emphasizes the *Bruen* decision’s reference to “law-abiding” citizens and argues that the Second Amendment does not apply to individuals who are not law-abiding. (*See id.* at 9–13.) Moreover, the Government asserts, the fact of an indictment may indeed serve as grounds to restrict an individual’s constitutional rights. (*See id.* at 23.) “For instance, the First Amendment protects the freedom of speech, yet released defendants may be requires to ‘avoid all contact’ with victims and potential witnesses.” (*Id.* (citing 18 U.S.C. § 3142(c)(1)(B)(v)).) “The First Amendment also guarantees the freedom of association, yet defendants may be required to ‘abide by specified restrictions on personal associations.’” (*Id.* (quoting 18 U.S.C. § 3142(c)(1)(B)(iv)).) The court in *Now*, examining the same argument, agreed that “[a]n information or indictment . . . significantly alters the status quo and may result in a myriad of restrictions on a person’s constitutional rights.” 2023 WL 2717517, at *5 (citation omitted). An indicted individual “may be incarcerated based solely on the conclusion that he is a danger to the community” or “because he lacks resources sufficient to allay the court’s fears that he may flee.” *Id.* (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987)). An indicted individual may have his assets seized pending forfeiture, he “may be required to provide DNA samples,” and he may face travel restrictions. *See id.* (citations omitted). (*See also* Doc. 55 at 23 (citing 18 U.S.C. § 3142(c)(1)(B)(iv)).)

Both Trevino and the Government offer well-reasoned arguments. Ultimately, however, courts across the country have weighed in on this issue and almost without exception have come down on Trevino’s side. *See Jackson*, 2023 WL 2499856, at *8 (“of the few district courts that have specifically addressed the constitutionality of § 922(n) post-*Bruen*, they have all concluded that the plain text of the Second Amendment covers the conduct of individuals under indictment (gathering cases); *Bartucci*, 2023 WL 2189530 at *5 (“none of the post-*Bruen* decisions that have analyzed the constitutionality of Section 922(n) have followed what the Government proposes”) (gathering cases). In *Kays*, for example, the court noted that the Government’s emphasis on a citizen’s status as a person under indictment “ignores the Supreme Court’s emphasis on an individual’s conduct, rather than status, to decide if Second Amendment protection exists.” 624 F. Supp. 3d at 1265.

Thus, the Court will not spill much ink on the issue and will, as other courts have, assume *arguendo* that Trevino “is among ‘the people’ to whom the Second Amendment applies, despite his status as an indictee.” *See Jackson*, 2023 WL 2499856, at *9; *see also Now*, 2023 WL 2717517, at *5 (noting that although it “doubts that Now has sustained his burden to show that he is an ‘ordinary law-abiding’ citizen so as to come within ‘the people’ subject to protection of the Second Amendment[,]” it would presume otherwise for purposes of the motion and move to step two of the *Bruen* framework); *cf.*, *United States v. Rowson*, 652 F. Supp. 3d 436, 459 (S.D.N.Y. 2023) (noting that, “[w]ith limited exceptions, most [pre-*Bruen* decisions have] declined to hold that [different groups of people, e.g., immigrants or felons,] were categorically without Second Amendment rights”) (citing, e.g., *United States v. Huitron-Guizar*, 678 F.3d 1164, 1169 (10th Cir. 2012) (assuming, without deciding, that illegal immigrants are within “the people”)).

C. Section 922(n) is consistent with the United States’ historical tradition of firearm regulation.

Having found that Trevino’s conduct fits within the ambit of the Second Amendment, the Court must determine whether the Government meets its burden at the second step of the *Bruen* framework to show that § 922(n) is “consistent with the Nation’s historical tradition of firearm regulation.” *See Bruen*, 142 S. Ct. at 2126. This step requires jurists to view regulations through a historical lens. *See id.* at 2131. *Bruen* does not mandate that the Government identify an *identical* 18-century regulation. *See id.* at 2133. Rather, the Supreme Court directs courts to “reason[] by analogy” to “determin[e] whether a historical regulation is a proper analogue for a . . . modern firearm regulation” *Id.* at 2132. This analysis should include a consideration of “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.* at 2132–33.

Here, the United States “acknowledges that [§] 922(n) lacks a ‘historical *twin*[.]’” as it has identified no equivalent 18th century law. (Doc. 55 at 15 (quoting *Bruen*, 142 S. Ct. at 2133).) The Government contends it has, however, laid out three restrictions that it argues serve as “historical precursors.” (*Id.*) These restrictions include: (1) laws detaining criminal defendants without bail that also served as restrictions on their right to keep and receive arms; (2) surety laws; and (3) laws that allowed individuals to be divested of their arms on arrest. (*Id.* at 15–21.) The Court will examine these restrictions below to analyze “how and why” § 922(n) and its alleged historical precursors burden Second Amendment Rights. *See Bruen*, 142 S. Ct. at 2132–33.

1. Why § 922(n) and related historical restrictions burden Second Amendment rights.

The Government explains that our country has long “subjected criminal defendants to temporary restrictions on their liberty” to secure their attendance at trial and to “preserve ‘the safety of the people’ from offenders who are still awaiting trial.” (Doc. 55 at 15 (quoting *A Digest*

of the *Doctrine of Bail in Civil and Criminal Cases* vii (1783)) (citing *Ex parte Milburn*, 9 Pet. 704, 710 (1835) (Story, J.)).) United States District Judge Kathleen Cardone, deciding a similar motion to dismiss, examined the Judiciary Act of 1789 and other sources and opined that § 922(n) and historical pretrial detention laws evidence enduring governmental goals related to the detention of individuals who “posed a risk of flight or a danger to the community.” *Posada*, 2023 WL 3027877, at *3 (citations omitted); *see also Now*, 2023 WL 2717517, at *7 (“most scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens’”) (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)). Other courts that have held § 922(n) withstands constitutional scrutiny post-*Bruen* have analogized § 922(n) to a broader set of colonial laws: those that “bespeak a ‘public understanding of the [Second Amendment] right’ in the period leading up to 1791 as permitting the denial of access to firearms to categories of persons based on their perceived dangerousness.” *See, e.g., Rowson*, 652 F. Supp. 3d at 466; *Jackson*, 2023 WL 2499856, at *12–13; *Bartucci*, 2023 WL 2189530, at *7.

2. How § 922(n) and related historical restrictions burden Second Amendment rights.

The Government offers three types of allegedly analogous historical restrictions. (*See* Doc. 55 at 15–21.) The Court will consider them in turn.

Laws Detaining Criminal Defendants Without Bail

The Government first notes that historically, indictees charged with capital crimes were frequently denied bail. It explains that “at the time of the founding[,] . . . virtually all felonies were punishable by death.” (Doc. 55 at 16 (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019); *Tennessee v. Garner*, 471 U.S. 1, 13 (1985)).) In fact, “the First Congress imposed capital punishment” even for non-violent crimes such as “‘forgery of United States securities’ and

‘running away with a ship or vessel, or any goods or merchandise to the value of fifty dollars.’” (*Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 980–81 (1991)).) The States were no different, imposing the death penalty “for ‘nonviolent crimes such as forgery and horse theft.’” (*Id.* (quoting *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019)).)

The First Congress made a capital defendant’s entitlement to bail dependent “on the strength of the prosecution’s evidence against him.” (*Id.* at 16–17 (citing Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91).) “In determining whether the evidence was sufficiently strong to justify denying bail, courts accorded great weight to the grand jury’s indictment.” (*See id.*) The Government cites Chief Justice Marshall’s decision in Aaron Burr’s trial for treason to grant bail *before* indictment, and later to refuse bail *after* the indictment. (*See id.* (citing Thomas F. Davidson, *The Power of Courts to Let to Bail*, 24 Am. L. Reg. 1, 3 (1876)).) “At the bail hearing, Chief Justice Marshall ‘doubted extremely’ whether he had the power to grant bail ‘after an indictment.’” (*Id.* (quoting David Robertson, *Reports of the Trials of Colonel Aaron Burr* 311 (1808)).)

The Government offers a litany of resources from the early to mid-1800s to establish “that, in early America, a defendant indicted for a serious (and hence capital) crime would *ordinarily* be held without bail.” (*See id.* at 17–18.) The Government posits that the practice of holding criminal defendants without bail also logically operated to restrict their ability to receive or possess arms. (*See id.* at 19.) While Trevino did not file a reply brief, the Court’s independent research reveals “[a]t least some scholarship indicates that, contrary to the Government’s stance, pretrial release for defendants accused of felonies, as well as capital offenses, was ‘routine’ and a ‘common pattern.’” *Posada*, 2023 WL 3027877, at *5 (citing Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 981–82 (1965)). Still, the Government’s research provides some insight into the question.

Surety Laws

The Government next draws on historical surety laws as analogues for § 922(n). (*See* Doc. 55 at 19.) To be released on bail, a criminal defendant had to find a surety—a person who ensured the defendant would both attend trial and would “ke[ep] the peace’ until trial.” (*Id.* (quoting 4 Blackstone 250).) Should the defendant fail to do so, the surety “would forfeit a sum of money” (*See id.* (citing 3 Blackstone at 280; 4 Blackstone at 250).)

“To enable sureties to fulfill their functions, the common law granted them legal custody of the bailed defendant.” (*Id.*) Lord Chief Justice Hale stated, “he that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers.” (*Id.* (quoting 2 Matthew Hale, *The History of the Pleas of the Crown* 124 (1736)).) The Supreme Court observed “that a bailed defendant ‘is regarded as delivered to the custody of his sureties,’ whose ‘dominion is a continuance of the original imprisonment.’” (*Id.* (quoting *Taylor v. Taintor*, 83 U.S. 366, 371 (1873)).) Sureties had “unrestricted authority” over bailed defendants, and could seize and deliver a defendant to the court at any time. (*See id.* (quoting Charles Petersdorff, *A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings* 514 (1824)) (discussing *Taylor*, 83 U.S. at 371).) Sureties were allowed to restrict a defendant’s movement, even imprisoning him at will. (*See id.* (discussing *Taylor*, 83 U.S. at 371; 2 William Hawkins, *A Treatise of the Pleas of the Crown* ch. 15, § 84 at 178 (6th ed. 1787)).)

Even more fitting are surety laws that put specific restrictions on the right to bear arms. The *Kays* court, for example, analogized § 922(n) to an 1836 Massachusetts law that “required any person who was reasonably likely to breach the peace . . . to post a bond before publicly carrying a firearm.” 624 F. Supp. 3d at 1268 (quoting *Bruen*, 142 S. Ct. at 2148). “From 1838 to 1871, ‘nine other jurisdictions adopted variants of the Massachusetts law.’” *Id.* (quoting *Bruen*, 142 S. Ct. at

2148). The *Kays* court opined that “§ 922(n) is arguably less restrictive than the surety laws[, which] . . . required those ‘reasonably accused’ to ‘show a special need in order to avoid posting a bond’ before carrying” a firearm. 624 F. Supp. 3d at 1268 (quoting *Bruen*, 142 S. Ct. at 2149). “Section 922(n) does not prevent an individual from publicly carrying; it simply limits an individual’s right to receive a firearm during the pendency of an indictment.” *See id.* In fact, most courts that have upheld § 922(n) post-*Bruen* have found that these surety laws provide a sufficient historical analogue. *See, e.g., id.* at 1267–68 (relying on surety laws as the sole historical analogue to uphold § 922(n)); *Gore*, 2023 WL 2141032, at *4 (same); *Simien*, 2023 WL 198770487, at *7 (same); *Rowson*, 652 F. Supp. 3d at 465–72 (relying on surety laws and laws that disarmed persons deemed dangerous to uphold § 922(n)); *Bartucci*, 2023 WL 2189530, at *7–10 (same); *Jackson*, 2023 WL 2499856, at *12–14 (same); *Now*, 2023 WL 2717517, at *7–8 (same).

The Court agrees that surety laws—both those that required sureties to exercise authority over criminal defendants to ensure that they appeared for court and kept the peace until trial and those that restricted individuals’ right to carry firearms—are sufficiently analogous to § 922(n) “to pass constitutional muster.” *See Bruen*, 142 S. Ct. at 2133. Both § 922(n) and the relevant surety laws “presume[] that all individuals have a right to keep and carry firearms but impose[] a burden on that right for a limited time upon a finding by a judicial officer or other legal process that an individual has participated in dangerous, disruptive, or otherwise felonious conduct.” *See Gore*, 2023 WL 2141032, at *4.

Laws that Divested Individuals of Their Arms on Arrest

The Government finally notes “[t]he common law has long allowed the arresting officer to seize, among other things, a suspect’s ‘weapons,’ lest the suspect use them to ‘effect an escape from custody.’” (Doc. 55 at 20 (quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925)).) This

“power was ‘always recognized under English and American law’ and was ‘uniformly maintained in many cases.’” (*Id.* (quoting *Weeks v. United States*, 232 U.S. 383, 392 (1914)).) While it is true that arresting officers have long held the authority to disarm arrestees, this is somewhat inapposite to § 922(n), which prohibits the *receipt* of firearms by indictes and says nothing of firearms they might already possess.

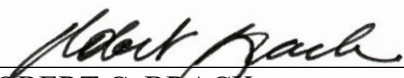
IV. Conclusion

“To be an appropriate analogue to § 922(n), a historical regulation must ‘impose a comparable burden on the right of armed self-defense’ and that burden must be ‘comparably justified.’” *Gore*, 2023 WL 2141032, at *4 (quoting *Bruen*, 142 S. Ct. at 2132). Here, the Government demonstrates that our country has historically imposed restrictions on felony indictes’ rights, including restrictions on the right to possess arms via surety laws. We impose these burdens both to ensure defendants’ presence at trial and to preserve the safety of our communities. Accordingly, the Court holds § 922(n) does not, on its face, violate the Second Amendment.

Trevino does not develop any argument to establish that § 922(n) is unconstitutional as applied to him and has, therefore, waived the argument.⁴ (*See* Doc. 51.)

THEREFORE,

IT IS ORDERED that Trevino’s Motion to Dismiss (Doc. 51) is **DENIED**.



ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

⁴ To the extent Trevino intends to argue that § 922(n) is unconstitutional as applied to him because he was on deferred adjudication, the Court would disagree. *See Simien*, 2023 WL 198770487, at *7 (finding that a felony indictes who was on deferred adjudication “fail[ed] to raise an actionable as-applied challenge to § 922(n)”).