UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 30 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOHNELL LEE CLEVELAND, AKA Bankroll Johnny, Defendant - Appellant.	No. 24-3251 D.C. No. 3:18-cr-00155-MO-1 District of Oregon, Portland ORDER
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOHNELL LEE CLEVELAND, AKA Bankroll Johnny, Defendant - Appellant.	No. 24-3253 D.C. No. 3:21-cr-00404-MO-1 District of Oregon, Portland
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOHNELL LEE CLEVELAND, AKA Bankroll Johnny, Defendant - Appellant.	No. 24-3256 D.C. No. 3:22-cr-00095-MO-1 District of Oregon, Portland

Before: McKEOWN, TALLMAN, and MENDOZA, JR., Circuit Judges.

The motion (Docket Entry No. 39) for summary affirmance is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard). Appellant's Second Amendment challenge to his conviction for being in a felon in possession of a firearm under 18 U.S.C. 922(g)(1) is foreclosed. *See United States v. Duarte*, 137 F.4th 743, 761 (9th Cir. 2025) (en banc), *cert. denied*, __ S. Ct. __, 2026 WL 135692 (U.S. Jan. 20, 2026).

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA

Plaintiff,

v.

JOHNELL LEE CLEVELAND

Defendant.

JUDGMENT IN A CRIMINAL CASE

Case No.: 3:22-CR-00095-MO-1

USM Number: USM #80821-065

Ryan Costello, Clais Daniels-Edwards,
Defendant's Attorney

Peter Sax, Nicole Bockelman,
Assistant U.S. Attorney

THE DEFENDANT:

☒pleaded guilty to count(s) 1, 2 and 3 of the Superseding Information.

The defendant is adjudicated guilty of the following offense(s):

Title, Section & Nature of Offense	Date Offense Concluded	Count Number
18:922(g)(1) Felon in Possession of Firearm	On or about November 3, 2021	1s
18:2421(a) Transportation for Illegal Sexual Activity	Beginning on or about August 5, 2020, and continuing through November 3, 2021	2s
18:1956(a)(1)(B)(i) Money Laundering	Beginning on or about August 5, 2020 and continuing through November 3, 2021	3s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐The defendant has been found not guilty on count(s) and is discharged as to such count(s).

☒Underlying Indictment is dismissed on the motion of the United States.

☒The defendant shall pay a special assessment in the amount of $300 for Counts 1, 2 and 3 payable to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)

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

May 07, 2024
Date of Imposition of Sentence

Signature of Judicial Officer

Michael W. Mosman, Senior U.S. District Judge
Name and Title of Judicial Officer

May 7th, 2024
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **60 months on each Counts 1 and 3**. As to **Count 2,** the defendant is committed to the Bureau of Prisons for confinement for a period of **108 months.** The sentences in Counts 1, 2, and 3 are all ordered to be served **concurrently** with each other and **concurrently** with the sentences imposed in U.S. District Court case #21CR404 and #18CR155.

☒The court makes the following recommendations to the Bureau of Prisons:

1. Defendant should be designated close to Oregon to be near family.

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

☐ The defendant shall surrender to the custody of the United States Marshal for this district:

☐ at _____ on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

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 UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years** on Counts 1 and 3, and **7 years** on Count 2.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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.
   ☐The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must 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, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must 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. You must not act or make any 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 you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, vehicle, papers, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

2. You must not communicate, or otherwise interact, with the victim identified in the presentence report as Adult Victim 1, or their immediate family members, either directly or through someone else, without first obtaining the permission of the probation officer.

3. You must notify the probation officer prior to operating any rental vehicle.

4. You must submit to substance abuse testing to determine if you have used a prohibited substance. Such testing may include up to twelve (12) urinalysis tests per month. You must not attempt to obstruct or tamper with the testing methods.

5. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption, except with the prior approval of the probation officer.

6. You must not go to, or remain at any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer. Except as authorized by court order, you must not possess, use or sell marijuana or any marijuana derivative (including THC) in any form (including edibles) or for any purpose (including medical purposes). Without the prior permission of the probation officer, you must not enter any location where marijuana or marijuana derivatives are dispensed, sold, packaged, or manufactured.

7. You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer will obtain the authorization of the Court before requiring residential or inpatient treatment pursuant to this condition. The probation officer, in consultation with the treatment provider, will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

8. You must take all mental health medications that are prescribed by your treating physician.

9. You must participate in a sex offense-specific assessment.

10. You must participate in a sex offense-specific treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.).

11. You must not associate with prostitutes and must not frequent areas or places where prostitution is a known activity.

12. You must not frequent a hotel, motel, or other commercial establishment that offers temporary lodging without the prior written permission of the probation officer.

13. You must not work in any type of employment without the prior approval of the probation officer.

14. You must meet any legal obligation to support or make payment toward the support of any person, including any dependent child, the co-parent or caretaker of a dependent child, or a spouse or former spouse.

15. If the judgment imposes a financial penalty, including any fine or restitution, you must pay the financial penalty in accordance with the Schedule of Payments sheet of the judgment. You must also notify the court of any changes in economic circumstances that might affect your ability to pay this financial penalty.

16. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.

17. You must not incur new credit charges, or open additional lines of credit without the approval of the probation officer.

18. You must not make application for any loan, or enter into any residential or business lease agreement, without the prior approval of the probation officer.

19. You must maintain a single checking account and/or savings account in your own name. You must deposit into this account all income, monetary gains or other pecuniary proceeds, and make use of this account for payment of all personal expenses. You must disclose all other accounts to the probation officer.

20. You must maintain proper debit, credit, and receipt ledgers for all business transactions. You must make provide these records to the probation officer as directed.

CRIMINAL MONETARY PENALTIES

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

	Assessment (as noted on Sheet 1)	Restitution	Fine	AVAA Assessment[1]	JVTA Assessment[2]	TOTAL
TOTALS	$300	TBD	$0	$0	$0	$ 300.00

☒The determination of restitution is deferred until TBD. An *Amended Judgment in a Criminal Case* will be entered after such determination.

☐The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss[3]	Amount of Restitution Ordered	Priority Order or Percentage of Payment
	$	$	
TOTALS	$ 0.00	$ 0.00	

☐If applicable, restitution amount ordered pursuant to plea agreement: $_____.

☐The defendant must pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐The court determined that the defendant does not have the ability to pay interest and it is ordered that

☐The interest is waived for the ☐ fine and/or ☐ restitution.

☐The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

Any payment shall be divided proportionately among the payees named unless otherwise specified.

[1] Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

[2] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

[3] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment[4] of the total criminal monetary penalties shall be as follows:

A. ☐Lump sum payment of $_____ due immediately, balance due
☐not later than _____, or
☐in accordance with ☐ C, ☐ D, or ☐ E below; or

B. ☒Payment to begin immediately (may be combined with ☒ C, ☐ D, or ☐ E below); or

C. ☒If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than $50, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately upon release from imprisonment.

D. ☐ Any balance at the imposition of this sentence shall be paid in monthly installments of not less than $_____, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately.

E. ☐Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) $25 per quarter if the defendant is not working in a prison industries program. . If the defendant received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, the defendant shall be required to apply the value of such resources to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

Nothing ordered herein shall affect the government's ability to collect up to the total amount of criminal monetary penalties imposed, pursuant to any existing collection authority.

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

Clerk of Court
U.S. District Court - Oregon
1000 S.W. 3rd Ave., Ste. 740
Portland, OR 97204

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ **Joint and Several**

Case Number **Defendant and Co-Defendant Names** (including Defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐The defendant shall pay the cost of prosecution.

☐The defendant shall pay the following court costs: $.

☒ The defendant shall forfeit to the U.S. Government all property, currency, and assets as stated in the Preliminary Order of Forfeiture and Final Order of Forfeiture.

[4] Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Nos. 24-3251, 24-3253, 24-3256,

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNELL LEE CLEVELAND,

Defendant-Appellant.

GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

With his appeal, defendant raises a single claim that his conviction for being a felon who possessed a firearm in violation of 18 U.S.C. § 922(g) violates the Second Amendment because he is a non-violent felon. Defendant acknowledges in his brief (D. Br. at 33) that this Court has ruled against his arguments in *United States v. Duarte,* 137 F. 4th 743, 748 (9th Cir. 2025)(en banc); *see also United States v. Martinez,* 169 F.4th 1147, 1157 (9th Cir. 2026) (noting that *Duarte* rejected felony-by-felony litigation for 922(g) Second Amendment challenges)

Summary affirmance is appropriate when an appeal is "obviously controlled by precedent." *United States v. Hooton,* 693 F.2d 857, 858 (9th Cir. 1982; *see also* Fed. R.

App. P. 27; 9th Cir. Rule 27-1. This appeal is controlled by *Duarte,* and therefore it should be summarily affirmed.

Defendant is in custody serving a combined 108-month sentence for multiple convictions, including felon-in-possession of a firearm, and his projected release date is September 22, 2028.

In filing this motion to efficiently address this appeal, the United States neither waives nor gives up its right to challenge any further appeal or post-conviction challenge based on defendant's plea agreement waivers and his failure to preserve this issue in the district court.

DATED this 18th day of June 2026.

Respectfully submitted,

SCOTT E. BRADFORD
United States Attorney
District of Oregon

/s/Kelly A. Zusman
KELLY A. ZUSMAN
Acting Appellate Chief

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 27(d)(2)(A), motions are limited to 5,200 words. I hereby certify that the enclosed Motion for Summary Affirmance contains 208 words including footnotes, in compliance with FRAP 27's limit.

DATED this 18th day of June 2026.

Respectfully submitted,

SCOTT E. BRADFORD
United States Attorney
District of Oregon

/s/ Kelly A. Zusman
KELLY A. ZUSMAN
Acting Appellate Chief

Nos. 24-3251, 24-3253, 24-3256

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNELL LEE CLEVELAND,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Oregon
No. 3:18-cr-00155-MO
Hon. Michael W. Mosman

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Page

Table of Authorities iv

Introduction 7

Issue Presented 7

Jurisdictional Statement 8

Statutory Authorities 8

Statement of the Case 8

Standard of Review 10

Summary of the Argument 11

Argument 12

I. *Bruen* requires the government identify a comparable historical analogue to the modern regulation—18 U.S.C. § 922(g)—and Cleveland's nonviolent felony convictions lack a comparable historical analogue meaning his conviction under 18 U.S.C. § 922(g) for Count 1 is unconstitutional as applied to him. 12

A. Cleveland's conduct is covered by the plain text of the Second Amendment, making it presumptively protected by the Second Amendment of the United States Constitution. 13

B. Contrary to this Court's holding in *Duarte*, 18 U.S.C. § 922(g) is not consistent with this Nation's historical tradition of firearm regulation. 15

1. This Court's analysis of the history of felony punishments in the United States fails to identify relevantly similar historical regulations that justify a categorical elimination of a person's Second Amendment

rights and corresponding punishment for the exercise of those rights. 17

a. The death penalty is not a legal equivalent to permanently disenfranchising Cleveland's Second Amendment rights. 18

b. Estate forfeiture is not an analogue or equivalent legal restriction because it was the legal seizure of property and not the permanent extinguishing of a constitutional right. 21

2. The United States's historical records do not definitively establish that targeted groups of Americans were permanently disarmed and the disarmament were based on racist or prejudiced laws that are clearly unconstitutional today. 23

C. Cleveland's predicate convictions are nonviolent and lack comparable historical analogues to disarm him permanently. 27

II. De novo standard of review applies because this Court can exercise discretion to apply it, Cleveland has good cause for not moving for dismissal below, and, alternatively, prevails under the plain error standard of review 29

A. This Court has the discretion to apply de novo review rather than plain error because this appeal involves a pure question of law and failing to raise the issue before the district court does not prejudice the government's ability to contest the appeal. 31

B. Cleveland has good cause for not challenging Count 1 before the district court. 32

C. Alternatively, Cleveland prevails under plain error. 34

Conclusion 35

Addendum of Constitutional Provisions and Rules .... Addendum -1

TABLE OF AUTHORITIES

Page(s)

CASES

Atkinson v. Garland,
70 F.4th 1018 (7th Cir. 2023) 23

District of Columbia v. Heller,
554 U.S. 570 (2008) 12

Garland v. Range,
144 S.Ct. 2706 (2024) 18, 19, 21, 23

Moncrieffe v. Holder,
569 U.S. 1678 (2013) 32

New York State Rifle & Pistol Ass'n, Inc. v. Bruen,
597 U.S. 1 (2022) 11, 12, 13, 14, 15

Range v. Attorney General United States,
124 F.4th 218 (3rd Cir. 2024) 11, 18, 20, 29, 30

Range v. Att'y Gen. United States of Am.,
69 F.4th 96 (3d Cir. 2023) 18, 19, 21

United States v. Aguilera-Rios,
769 F.3d 626 (9th Cir. 2014) 32, 33, 34

United States v. Cockerham,
162 F.4th 500 (5th Cir. 2025) 11, 17, 29, 30, 33

United States v. Diaz,
116 F.4th 458 (5th Cir. September 18, 2024) 30

United States v. Duarte,
101 F.4th 657 (9th Cir. 2024) 10, 28, 33

United States v. Duarte,
137 F.4th 743 (9th Cir. 2025) ... 12, 13, 14, 15, 15, 18, 20, 21, 23, 24, 25, 28, 29

United States v. Dubois,
139 F.4th 887 (11th Cir. June 2, 2025) 30

United States v. Gonzalez–Aparicio,
663 F.3d 419 (9th Cir. 2011) 31

United States v. Guerrero,
921 F.3d 895 (9th Cir. 2019) 10, 32

United States v. Hunt,
123 F.4th 697 (4th Cir. December 18, 2024) 30

United States v. Jackson,
110 F.4th 1120 (8th Cir. 2024) 16, 23, 30

United States v. Myers,
804 F.3d 1246 (9th Cir. 2015) 34

United States v. Olano,
507 U.S. 725 (1993) 34

United States v. Perez-Garcia,
96 F.4th 1166 (9th Cir. 2024) 13, 15, 30

United States v. Rahimi,
602 U.S. 680 (2024) 16, 30

United States v. Regalado,
709 F.Supp.3d 619 (N.D. Ind. December 20, 2023) 19, 22

United States v. Vongxay,
594 F.3d 1111 (9th Cir. 2010) 33

United States v. Williams,
113 F.4th 637 (6th Cir. August 23, 2024) 30

United States v. Williams,
807 F.Supp.3d 853 (S.D. Ill. October 21, 2025).....18

United States v. Yijun Zhou,
838 F.3d 1007 (9th Cir. 2016) 10, 31, 34

Vincent v. Bondi,
127 F.4th 1263 (10th Cir. February 11, 2025) 30

Zherka v. Bondi,
140 F.4th 68 (2d Cir. June 9, 2025) 30

STATUTES

18 U.S.C. § 922(g)
..... 7, 8, 10, 11, 12, 15, 17, 18, 22, 24, 25, 26, 28, 29, 30, 31, 33, 34

18 U.S.C. § 3231 8

28 U.S.C. § 1291 8

RULES

Fed. R. App. P. 4(b) 8

Fed. R. Crim. P. 7 9

Fed. R. Crim. P. 12 ..... 10, 32

Fed. R. Crim. P. 52 ..... 10, 11, 34

OTHER

Beth A. Colgan, *Reviving the Excessive Fines Clause*,
102 Cal. L. Rev. 277 (2014) 21

Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYLR 249, 270 (2020) 26, 27

Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use and Regulation in America*, 25 WYLR 111, 130-36 (2025) 28

1 *A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1894*, 541 (Frank F. Brightly ed., 12th ed. 1894) 26

INTRODUCTION

This criminal appeal raises a single issue: was 18 U.S.C. § 922(g) unconstitutional as applied to Johnell Cleveland, who lacks any prior violent felony convictions. Because Cleveland's prior felony convictions are nonviolent and lack comparable historical analogues to felony crimes during the founding generation, his conviction under Count 1 in 3:22-cr-00095-MO-1 is unconstitutional pursuant to the Second Amendment of the United States Constitution. The United States lacks a historical tradition of barring such nonviolent offenders from possessing firearms because the modern regulations are not equivalent to gun regulations during the founding generation.

This Court should vacate the conviction and sentence for Count 1 in 3:22-cr-00095-MO-1 charging 18 U.S.C. § 922(g) and remand for the district court to dismiss Count 1 consistent with this Court's opinion.

ISSUE PRESENTED

I. Whether the district court erred in convicting and sentencing Cleveland for being a prohibited person (felony conviction) in possession of a firearm in Count 1 in 3:22-cr-00095-MO-1 because the Second Amendment's plain language covered Cleveland's conduct and the United States does not have a historical tradition of broadly regulating firearms like 18 U.S.C. § 922(g) currently does.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 28 U.S.C. § 1291. Cleveland timely filed notice of appeal on May 21, 2024, from the district court judgment entered on May 7, 2024. ER-4, 95-97; Fed. R. App. P. 4(b).

Cleveland is in Bureau of Prisons custody at Lompoc I FCI, with a projected release date of September 22, 2028.

STATUTORY AUTHORITIES

All relevant constitutional and statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

This is a direct appeal from Cleveland's conviction and sentence following his guilty plea for felon in possession of a firearm in 3:22-cr-00095-MO-1, along with convictions and sentences for other offenses which are not being challenged in this appeal. On March 10, 2022, a grand jury indicted Cleveland for knowingly possessing a Berretta 9mm caliber pistol while knowing he had previously been convicted of a felony offense, in violation of 18 U.S.C. § 922(g). ER-90-91. Count 1 in 3:22-cr-00095-MO-1 detailed the felon in possession charge. ER-90-91. The government alleged three prior felony convictions, dated July 11, 2019:

1) conspiracy to possess with intent to distribute and distribution of a controlled substance

2) possession of an unregistered firearm; and

3) laundering of monetary instruments.

ER-90. These felony convictions occurred in the United States District Court for the District of Oregon, case number 18-cr-00155-JO. ER-90. These convictions are nonviolent offenses. The grand jury also returned an indictment on two other crimes in Counts 2 and 3 in the Indictment. ER-91-93.

On February 2, 2024, the government filed a Superseding Information in 3:22-cr-00095-MO-1 changing the nature and details for Count 2 from the Indictment. ER-86. Count 1 did not change. ER-85. On February 5, 2024, Cleveland agreed to waive his rights under Federal Rule of Criminal Procedure 7 to be indicted by a grand jury and proceed by the Superseding Information. ER-84. On February 5, 2024, Cleveland signed a plea agreement, pleading guilty to Count 1 of the Superseding Information and. ER-70-83. The factual basis for Count stated that Cleveland knowingly possessed a Beretta 9-millimeter (9mm) pistol on November 3, 2021, in the District of Oregon. ER-75. The Beretta 9mm was manufactured outside of Oregon, travelling in interstate commerce to Oregon. ER-76. Cleveland possessed the Beretta 9mm knowing that he had previously been convicted of the following felony convictions: 1) conspiracy to possess with intent

to distribute and distribution of a controlled substance, 2) possession of an unregistered firearm; and 3) laundering of monetary instruments. ER-75.

On May 7, 2024, the district court sentenced Cleveland to 60 months imprisonment for Count 1, along with separate sentences for his other offenses. ER-4-5; ER-12-13; and ER-20-21. Counsel never moved to dismiss Count 1 in 3:22-cr-00095-MO-1 for failure to state a cognizable offense. ER-98-109.

On May 9, 2024, the Ninth Circuit Court of Appeals ruled 18 U.S.C. § 922(g) was unconstitutional as applied to nonviolent offenders in *United States v. Duarte*, 101 F.4th 657, 691 (9th Cir. 2024) (vacated *en banc*). Cleveland filed his notice of appeal on May 21, 2024. ER-95.

STANDARD OF REVIEW

This Court can use its discretion to apply de novo review and to reject Federal Rule of Criminal Procedure 52(b)'s plain error standard because this appeal involves a purely legal question and the government suffers no prejudice from this issue being raised initially on appeal. *See United States v. Yijun Zhou*, 838 F.3d 1007, 1011 (9th Cir. 2016). Alternatively, Cleveland established good cause under Federal Rule of Criminal Procedure 12(c)(3), so the Court can apply de novo instead of plain error. S*ee United States v. Guerrero*, 921 F.3d 895, 897

(9th Cir. 2019). Finally, if the Court rejects these two rationales to apply de novo review, plain error standard of review applies. Fed. R. Crim. P. 52(b)

SUMMARY OF THE ARGUMENT

Cleveland has only nonviolent prior felony convictions that lack comparable historical analogues to Founding-era crimes. Under the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and the Fifth Circuit Court of Appeals' decision in *United States v. Cockerham*, 162 F.4th 500 (5th Cir. 2025) and the Third Circuit Court of Appeals decision in *Range v. Attorney General United States*, 124 F.4th 218, 231(3rd Cir. 2024), the blanket federal felon dispossession law at 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him.

First, the plain text of the Second Amendment covers Cleveland and his conduct. *Bruen* explained that the Second Amendment protects Cleveland' conduct of possessing a firearm for self-defense outside his home. And as an American, he is part of "the people" whom the Second Amendment protects.

Second, permanently barring nonviolent felons from possessing firearms is not consistent with the United States's historical tradition of firearm regulation. There is no historical evidence of Founding-era laws permanently disenfranchising nonviolent felons of the right to bear arms. While conditional or temporary

restrictions could be applied to individuals' estates, no permanent disarmament and extinguishing of Second Amendment rights existed. Because status-based offenses statutes that blanketly prohibit large groups of people from possessing guns are not consistent with the United States's historical tradition of gun regulation, they run afoul of the Second Amendment. There are no relevantly similar historical analogues for Cleveland's prior felony convictions, meaning there was no evidence that Cleveland would have been permanently disarmed during the founder's generation.

ARGUMENT

I. *Bruen* requires the government identify a comparable historical analogue to the modern regulation—18 U.S.C. § 922(g)—and Cleveland's nonviolent felony convictions lack a comparable historical analogue meaning his conviction under 18 U.S.C. § 922(g) for Count 1 is unconstitutional as applied to him.

The Supreme Court in *Bruen*, 597 U.S. 1, worked a sea change in the analytical framework that the federal courts had developed analyzing gun regulations since *District of Columbia v. Heller*, 554 U.S. 570 (2008), issued. *United States v. Duarte*, 137 F.4th 743, 747 (9th Cir. 2025). The Supreme Court clarified the standard for the Second Amendment constitutional protection:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

Duarte, 137 F.4th at 747 (quoting *Bruen*, 597 U.S. at 24).

The first prong of the *Bruen* test is whether the individual's conduct is covered by the plain text of the Second Amendment. *Id.* at 752 (citing *United States v. Perez-Garcia*, 96 F.4th 1166, 1178 (9th Cir. 2024)). If yes, then the conduct is presumptively protected, and the second prong requires the government to justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. *Id.* at 752 (citing *Bruen*, 597 U.S. at 24).

When comparing modern regulations to historical regulations, courts can and will often involve reasoning by analogy. *Bruen*, 597 U.S. at 28. When determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are "relevantly similar." *Id.* at 28-29. The government bears the burden of establishing the constitutionality of its action restricting gun possession. *Id.* at 24-25, 33-34, 60, and 70.

A. Cleveland's conduct is covered by the plain text of the Second Amendment, making it presumptively protected by the Second Amendment of the United States Constitution.

"The text of the Second Amendment refers to the right of 'the people' to keep and bear arms." *Id.* (quoting *Perez-Garcia*, 96 F.4th at 1178 (citing U.S. Const. amend. II)). "'[T]he people' seems to have been a term of art employed in

select parts of the Constitution[,] ... refer[ring] to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Duarte*, 137 F.4th at 752 (quoting *Heller*, 554 U.S. at 580). The Supreme Court in *Heller* instructs that courts start "with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.* (quoting *Heller*, 554 U.S. at 581).

In *Duarte*, this Court found Duarte undoubtedly to be a member of the national community, making him part of "the people," with the "Constitution presumptively protect[ing]" his right to possess a firearm. *Id.* This Court rejected the government's arguments that Duarte was not a member of the national community because of his prior felony convictions. *Id* at 754-55.

Here, Cleveland is a United States citizen who possessed a pistol in his car that he drove in public spaces. PSR-41. This is protected conduct according to the Supreme Court in both *Bruen* and *Heller*. "As [the Supreme Court] explained in *Heller*, the 'textual elements' of the Second Amendment's operative clause—'the right of the people to keep and bear Arms, shall not be infringed'—'guarantee the individual right to possess and carry weapons in case of confrontation.'" *Bruen*, 597 U.S. at 32 (quoting *Heller*, 554 U.S. at 592). That "plain text" encompasses

protection in the home but also public carry, since "[m]any Americans hazard greater danger outside the home than in it." *Bruen*, 597 U.S. at 33. Cleveland's conduct is clearly covered by *Bruen*, making his conduct presumptively protected by the Second Amendment.

B. Contrary to this Court's holding in *Duarte*, 18 U.S.C. § 922(g) is not consistent with this Nation's historical tradition of firearm regulation.

Under *Bruen*, courts must engage in analogical reasoning to determine "whether the modern regulation is 'relevantly similar' to historical laws and traditions, . . . so as to 'evince[ ] a comparable tradition of regulation.'" *Duarte*, 137 F.4th at 755 (citing *Perez-Garcia*, 96 F.4th at 1181 (citations omitted)). Two metrics guide the analysis: (1) "whether modern and historical regulations impose a comparable burden on the right of armed self-defense" (the "how"); and (2) "whether that burden is comparably justified" (the "why"). *Id.* (citing *Bruen*, 597 U.S. at 29 (citation omitted)). "[A]nalogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin." *Id.* (citing *Bruen*, 597 U.S. at 30). Thus, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* (citing *Bruen*, 597 U.S. at 30). Ultimately, "the appropriate analysis involves considering whether the challenged

regulation is consistent with the principles that underpin our regulatory tradition." *Duarte*, 137 F.4th at 755 (citing *United States v. Rahimi*, 602 U.S. 680, 692 (2024)).

Not all historical evidence is entitled to equal weight because the inquiry focuses on interpreting the Second Amendment as the founding generation would have understood it. *Id.* Courts primarily look to historical regulations extant when the Second and Fourteenth Amendments were adopted in 1791 and 1868, respectively. *Id.* Courts must attempt to place the court in the shoes of the founding generation, and to evaluate from this point of view whether the present regulation would be consistent with its understanding of the Second Amendment. *Id.*

This Court found two historical regulatory principles that supplied a basis to categorically disarm nonviolent offenders convicted of felony offenses, extinguishing their rights under the Second Amendment. *Id.* The two historical regulatory principles were: (1) legislatures may disarm those who have committed the most serious crimes; and (2) legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness. *Id.*; *see also United States v. Jackson*, 110 F.4th 1120, 1126 (8th Cir. 2024) ("One view is that legislatures have longstanding authority and discretion to disarm citizens who are not law-abiding and are unwilling to obey the law.").

This Court incorrectly found the United States's history of gun regulation had sufficiently equivalent regulations to 18 U.S.C. § 922(g)'s complete and permanent disarmament of people with felony conviction. Historical regulations of estates or firearms were conditional or temporary restrictions and class-based categorizations of people based on race or religious practice are patently unconstitutional today. Rather, this Court must assess whether Cleveland's individual criminal history establishes his prosecution under 18 U.S.C. § 922(g) was constitutional. *Cockerham*, 162 F.4th at 510 ("And we are unable to find a historical basis for disarming Cockerham for the rest of his life, just because he was once convicted of failure to pay child support."). Because Cleveland has nonviolent criminal offenses that lack comparable historical analogues to felony crimes during the founding generation, his conviction for possessing a firearm with a felony conviction in violation of 18 U.S.C. § 922(g) is unconstitutional as applied to him.

1. This Court's analysis of the history of felony punishments in the United States fails to identify relevantly similar historical regulations that justify a categorical elimination of a person's Second Amendment rights and corresponding punishment for the exercise of those rights.

In *Duarte*, this Court found that the pre- and post-ratification history of the United States supports the view that legislatures could disarm people who

committed the most serious crimes. *Duarte*, 137 F.4th at 757. This Court relied on two historical regulations to reach this conclusion, namely: 1) the "death [penalty] was 'the standard penalty for all serious crimes' at the time of the founding," and 2) colonial governments also used estate forfeiture to seize property and chattel as punishment for serious felonies. *Id.* at 756. However, the death penalty and estate forfeiture are not relevantly similar historical analogues to 18 U.S.C. § 922(g). *United States v. Williams*, 807 F.Supp.3d 853, 860-61 (S.D. Ill. October 21, 2025) ("The consequences imposed by these laws, though severe, 'do[ ] not suggest that the particular (and distinct) punishment at issue – lifetime disarmament – is rooted in our Nation's history and tradition.") (citing *Range*, 124 F.4th at 231; *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96, 105 (3d Cir. 2023) (en banc) (vacated by *Garland v. Range*, 144 S.Ct. 2706, 2707 (2024)).

a. The death penalty is not a legal equivalent to permanently disenfranchising Cleveland's Second Amendment rights.

The death penalty argument fails the analogue or family member comparison. The Oxford English dictionary defines analogue, in the most relevant context, as, "A thing which (or occasionally person who) is analogous to another; a parallel, an equivalent." *Analogue*, Oxford English Dictionary (3rd Ed. 2010), https://www.oed.com/dictionary/analogue_n?tab=meaning_and_use#4176309 (last

visited May 28, 2026). Extinguishing a person's Second Amendment rights and prosecuting them for exercising those rights is not equivalent to the death penalty. *United States v. Regalado*, 709 F.Supp.3d 619, 626 (N.D. Ind. December 20, 2023) ("For another, why should a loss of life be considered analogous to the penalty of living a life, albeit disarmed? Just on its face, one punishment seems vastly different than fairly analogous.").

The death penalty presents the most complete and visceral punishment for a crime. "While the penalties were severe, they were imposed for criminal conduct; not for status crimes that arose from otherwise lawful conduct by felons who had completed their sentences." *Williams*, 807 F.Supp.3d at 860. While killing a person naturally prevents them from exercising their rights, it is not a legal determination about the legality of the ongoing exercise of their constitutional rights. "But the 'greater does not necessarily include the lesser: founding-era governments' execution of some individuals convicted of certain offenses does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed.'" *Regalado*, 709 F.Supp.3d at 626 (citing *Range*, 69 F.4th at 105 (vacated by *Garland*, 144 S.Ct. at 2707).

If the comparison point for modern regulations is the principles underpinning the death penalty, then all modern regulations and penalties could be

justified as a subset of the death penalty. Nothing is the equivalent of the death penalty. If the death penalty could be applied to all serious crimes during the founders' generation, there would be no need to evaluate whether the modern regulation has an analogue in history because the death penalty includes all other possible regulations as a subset of its performance.

Additionally, placing this Court in the shoes of the founding generation demonstrates that the founding generation's United States of America did not tolerate the permanent annulment of a person's Second Amendment rights. This Court's example of Edward Livingston in *Duarte* illustrates this very point. As this Court noted, Edward Livingston prepared a systematic code of criminal law for Louisiana to replace the death penalty for crimes such as forgery, perjury, and fraud with permanent forfeiture of certain rights, including the "right of bearing arms." *Duarte*, 137 F.4th at 757 (citing *Range*, 124 F.4th at 271–72 (Krause, J., concurring) and (citation omitted)).

While this substitute legal code was proposed and reviewed well by members of the founding generation, the Court did not sufficiently address the fact that no legislature adopted this code. *Id.* Several members of the founding generation lauding the merits of this code does not equate to state legislatures adopting and implementing this code, including its permanent forfeiture of civil

rights and the right to bear arms. Standing in the founding generations' shoes reveals a society that lacked and rejected the concept of permanently banning a person's right to bear arms.

b. Estate forfeiture is not an analogue or equivalent legal restriction because it was the legal seizure of property and not the permanent extinguishing of a constitutional right.

This Court also pointed to the estate forfeiture penalties existing during the founding generation as justification for the complete dissolution of a person's Second Amendment rights. *Duarte*, 137 F.4th at 756-57 (citing Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 332 nn.275 & 276 (2014)). However, estate forfeiture is not the equivalent to permanent abolition of a person's Second Amendment rights to bear arms. While estate forfeiture could include forfeiting a person's guns, nothing about estate forfeiture prevents the person from buying, bartering for, trading for, or borrowing another gun. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 332 nn.275 & 276 (2014); *see also Range*, 69 F.4th at 105 ("A felon could 'repurchase arms' after successfully completing his sentence and reintegrating into society.") (vacated by *Garland*, 144 S.Ct. at 2707).

Professor Colgan highlighted several laws regarding estate forfeiture and none of the cited laws established a permanent ban on the right to bear arms or any

other right. *Id.* Professor Colgan also cited the case of Joseph Streeter who suffered the forfeiture of his entire estate after a conviction for counterfeiting paper money. *Id.* at 333. Mr. Streeter subsequently joined the United States Army, and he "not only maintained a considerable Family, but procured a real Estate." Colgan, 102 Cal. L. Rev. at 333. Mr. Streeter's case demonstrates estate forfeiture was not a permanent ban on owning or possessing guns.

Additionally, estate forfeiture was specifically outlawed and banned at the federal level in 1791. *Regalado*, 709 F.Supp.3d at 626. While some states allowed for estate forfeiture, estate forfeiture's permanent ban by the federal government establishes it was not as widely accepted a practice as recognized by this Court.

Because estate forfeiture was not a permanent ban on rights, let alone a permanent ban on owning an estate, it is not relevantly similar to 18 U.S.C. § 922(g)'s permanent disenfranchisement of a person's right to bear arms. Estate forfeiture could be the equivalent to modern criminal or civil forfeiture laws, possibly modern restitution laws. However, it fails to qualify as a reasonable analogue under *Bruen* for the permanent disarmament of a person's Second Amendment rights.

2. The United States's historical records do not definitively establish that targeted groups of Americans were permanently disarmed and the disarmament were based on racist or prejudiced laws that are clearly unconstitutional today.

This Court found "[t]he historical record reveals a host of regulations that disarmed those whom the legislature deemed dangerous on a categorical basis." *Duarte*, 137 F.4th at 759 (citing *Jackson*, 110 F.4th at 1126; *Atkinson v. Garland*, 70 F.4th 1018, 1035 (7th Cir. 2023)). This Court referenced a variety of religious and racial groups as being the target of laws permanently disarming them:

- Non-Anglican Protestants who refused to participate in the Church of England, making them dangerous to the peace for the kingdom.
- Catholics who refused to take an oath renouncing their faith, except as necessary for self-defense.
- Black Americans, freed or enslaved.
- Prohibited transferring or giving guns to Native Americans.
- Colonists who refused to swear an oath of loyalty to the United States of American during the Revolutionary War, maintaining their prior oath of loyalty to the Crown of England.

Id. Outside of the prohibition on colonists who refused to swear an oath of loyalty, these restrictions are patently unconstitutional being based on racist and prejudiced motivations. *Williams*, 807 F.Supp.3d at 860 ("These laws, justified solely on discriminatory bases, would thankfully be prohibited today."). This Court

acknowledged that very concern, stating, "[t]hese laws reflect overgeneralized and abhorrent prejudices that would not survive legal challenges today. And many of these laws would likely be unconstitutional today under other parts of the Constitution." *Duarte*, 137 F.4th at 760. This Court continued, stating, "[b]ut these laws are reflective of American history and tradition." *Id.*

While true, these laws are based in racist and prejudiced beliefs and are not the equivalent to 18 U.S.C. § 922(g)'s permanent extinguishing of Second Amendment rights. As the district court in *Williams* said, "laws reflecting the English tradition of categorically disarming religious, ethnic, and racial minorities are not relevantly similar and historically analogous to § 922(g)(1)." *Williams*, 807 F.Supp.3d at 860. "As such, [the district court found] that they cannot impose a 'comparably justified' burden on the right of armed self-defense." *Id.*

Beyond the racist and prejudiced motivations, the restrictions on religious groups were conditional and not permanent. The individuals targeted could change or renounce their religions to regain their right to bear arms. 18 U.S.C. § 922(g)'s ban on exercising Second Amendment rights is permanent.

The same conditional disarmament applies to the colonial loyalists who refused to swear oaths of loyalty to the emerging United States. This disarmament could be reversed and was a war-time measure. Patrick J. Mahoney, *Connecticut's*

Loyal Subjects: Toryism and the American Revolution, Connecticut History.org (May 16, 2021), https://connecticuthistory.org/connecticuts-loyal-subjects-toryism-and-the-american-revolution/ ("To avail of such a reprieve, however, the individual had to present himself or herself in Connecticut before a justice of the peace and swear an oath of allegiance. By the close of the war, a large proportion of the state's Tories took the oath (recanting their earlier political allegiances to the crown) and settled back in to their respective communities."). A war-time measure of conditional disarmament is not the equivalent to a permanent ban on possessing a gun for being convicted of a felony offense under 18 U.S.C. § 922(g).

This Court also cited other gun regulations that emerged through nineteenth century, namely: (1) the sale of firearms to, or the possession of firearms by, individuals below specified ages; (2) the sale of firearms to those of unsound mind; (3) the possession of firearms by those who were intoxicated; and (4) the possession of weapons by certain vagrants—known as "tramps." *Duarte*, 137 F.4th at 759-60. However, this Court's recitation of these restrictions suggests the regulations were conditional in nature, existing until the person came of age, treated their mental health disorder, achieved recovery from alcohol, or found work or housing, ending their status as tramps. Conditional or temporary disarmament

are not the equivalent of 18 U.S.C. § 922(g) which functions as a permanent prohibition on a person exercising their Second Amendment rights.

Even the tramp restriction does not appear to have been a complete ban or restriction on the right to bear arms. "Tramps" were typically defined as males begging for charity outside of their home county. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYLR 249, 270 (2020) (citing 1 A Digest of the Statute Law of the State of Pennsylvania from the Year 1700 to 1894, 541 (Frank F. Brightly ed., 12th ed. 1894) ("Any person going about from place to place begging, asking or subsisting upon charity, and for the purpose of acquiring money or living, and who shall have no fixed place of residence, or lawful occupation in the county or city in which he shall be arrested, shall be taken and deemed to be a tramp.")). "Since, by definition, bans on tramps did not apply inside their home (or even their county), they were less restrictive than the current federal ban on felons, which applies everywhere." *Id.*

Professor's Greenlee's examination of several of the laws prohibiting tramps from possessing guns illustrates this conditional disarmament. For example, New Hampshire's 1878 statute that imprisoned any tramp who "shall enter any dwelling-house ... without the consent of the owner ... or shall be found carrying

any fire-arm or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another." *Id.* This restriction reflected the goal to prevent violence by preventing tramps from using guns to threaten others' person or property. *Id.* The Pennsylvania 1879 law was narrower, prohibiting tramps from carrying a weapon "with intent unlawfully to do injury or intimidate any other person." *Id.*

Based on the historical review of the tramp statutes, the bans on prohibiting possession of guns only applied during the status of tramp vagrancy and did not appear to apply categorically. The laws did not seem to ban tramps from possessing guns in their own homes. The conditional nature of the laws prohibiting tramps from possessing guns illustrates how these laws are not the equivalent to 18 U.S.C. § 922(g)'s complete and permanent ban on a person exercising their right to bear arms under the Second Amendment.

C. Cleveland's predicate convictions are nonviolent and lack comparable historical analogues to disarm him permanently.

Cleveland's predicate felony convictions are nonviolent and lack a comparable historical analogue. Cleveland's felony convictions are: 1) conspiracy to possess with intent to distribute and distribution of a controlled substance, 2) possession of an unregistered firearm; and 3) laundering of monetary instruments. ER-90. In *Duarte*, this Court recognized that drug trafficking offenses could not

form the basis for a § 922(g)(1) conviction because there are no comparable historical analogues. 137 F.4th at 758-59 (citing *Duarte*, 101 F.4th at 691 n.16 (noting that criminalizing drug possession did not gain momentum until the early 20th century, and modern "illicit drugs" were legal "for a long stretch of this country's history")); Dissenting Op. at 792 ("[T]here are no comparable analogues that allowed for disarmament based upon drug offenses.")).

The felony conviction for possessing an unregistered firearm also lacks a comparable historical analogue because registration of specific types of firearms seemingly started with the National Firearms Act of 1934. *See* Joseph G.S. Greenlee, *The Tradition of Short-Barreled Rifle Use and Regulation in America*, 25 WYLR 111, 130-36 (2025). Finally, there was no comparable historical analogue to Cleveland's laundering of money instruments conviction. *See Duarte*, 137 F.4th at 756-57, 770-71, 789-90. Money laundering was not formally criminalized by the federal government until 1970. Financial Crimes Enforcement Network, *History of Anti-Money Laundering Laws*, https://www.fincen.gov/resources/history-anti-money-laundering-laws (last accessed May 29, 2026).

Lacking comparable historical analogues to his prior felony convictions means prosecuting Cleveland for possessing a gun violates his Second Amendment

rights. *Cockerham*, 162 F.4th at 510 ("Historical analysis determines whether a particular individual can be disarmed for life under § 922(g)(1). And we are unable to find a historical basis for disarming Cockerham for the rest of his life, just because he was once convicted of failure to pay child support."). Because Cleveland's convictions are nonviolent and lack comparable historical analogues, his conviction under Count 1 must be vacated and remanded for dismissal with the district court. *See Range*, 124 F.4th at 231-32 (holding the government has not shown that the principles underlying the United States's historical tradition of firearms regulation support depriving Range of his Second Amendment right to possess a firearm after being convicted for making a false statement on a food stamps application).

II. De novo standard of review applies because this Court can exercise discretion to apply it, Cleveland has good cause for not moving for dismissal below, and, alternatively, prevails under the plain error standard of review.

De novo review applies because this Court has the discretion to apply it to this pure matter of law that does not prejudice the government and because Cleveland has good cause for not moving for dismissal before the district court. While *Bruen* was decided nearly two years prior to district court issuing the judgment for Cleveland (*see* ER-4), *Bruen* uncorked a sea change in the framework for litigation challenging gun regulations. *Duarte*, 137 F.4th at 747. This led to a

scuttling of prior standards and explosion of litigation and varying decisions about applying *Bruen* and what gun regulations were constitutional. *See e.g. Rahimi*, 602 U.S. 680 (June 21, 2024); *Perez-Garcia*, 96 F.4th 1166 (9th Cir. March 18, 2024); *United States v. Williams*, 113 F.4th 637 (6th Cir. August 23, 2024); *Jackson*, 110 F.4th 1120 (8th Cir. August 8, 2024); *United States v. Diaz*, 116 F.4th 458 (5th Cir. September 18, 2024); *United States v. Hunt*, 123 F.4th 697 (4th Cir. December 18, 2024); *Range*, 124 F.4th 218 (December 23, 2024); *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. February 11, 2025); *United States v. Dubois*, 139 F.4th 887 (11th Cir. June 2, 2025); *Zherka v. Bondi*, 140 F.4th 68 (2d Cir. June 9, 2025); *Cockerham*, 162 F.4th 500 (December 17, 2025) (full dates added to citations).

To date, these choppy waters of litigation have not settled. Specifically, the Fifth Circuit Court of Appeals held 18 U.S.C. § 922(g) unconstitutional as applied to the defendant in *Cockerham*, 162 F.4th at 510. That decision is being appealed to the Supreme Court who granted certiorari to hear the potentially groundbreaking decision. *See United States v. Edward Cockerham*, 25-1029 (docketed February 27, 2026).

A. This Court has the discretion to apply de novo review rather than plain error because this appeal involves a pure question of law and failing to raise the issue before the district court does not prejudice the government's ability to contest the appeal.

Because this appeal involves a pure question of law and there is no prejudice to the government, this Court has discretion to apply the de novo standard and not plain error standard of review. The Ninth Circuit has held that "[the Ninth Circuit Court of Appeals is] not limited to [the plain-error] standard of review where the appeal presents a pure question of law and there is no prejudice to the opposing party." *United States v. Yijun Zhou*, 838 F.3d 1007, 1011 (9th Cir. 2016) (citing *United States v. Gonzalez–Aparicio*, 663 F.3d 419, 426 (9th Cir. 2011)). "In those circumstances, '[the Ninth Circuit Court of Appeals] possess[es] the discretion to refrain from applying the default plain error standard of review.'" *Id.* at 1011-12.

Here, the question is entirely one of law, specifically, whether the Second Amendment applies to Cleveland's conduct in his count of conviction and whether there is a historical analogue comparable to 18 U.S.C. § 922(g). The government suffers no prejudice because Cleveland failed to raise this issue at the district court level. Additionally, litigation surrounding 18 U.S.C. § 922(g) has been extensively briefed before and after the initial *Duarte* opinion on May 9, 2024. The government is already readily familiar with this issue. Consequently, this Court should exercise its discretion to apply de novo review to this matter.

B. Cleveland has good cause for not challenging Count 1 before the district court.

Under Rule 12, a defense that the government's charging document has failed to state a legally cognizable offense is supposed to be raised pretrial per the district court's deadline. *See* Fed. R. Crim. P. 12(b)(3)(B)(v), (c)(1), & (c)(3). But a court, including this Court, may consider an untimely articulation of such a defense if the defendant shows "good cause." Fed. R. Crim. P. 12(c)(3); *see also Guerrero*, 921 F.3d at 897.

That this Court's controlling precedent at the time of the motion's deadline foreclosed a defense constitutes good cause for not raising the defense. In *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014), the defendant in an 8 U.S.C. § 1326 prosecution argued for the first time on appeal that his prior California firearms conviction was not a categorical match for a federal firearms conviction, making his prior removal invalid and not a legal predicate for prosecution, *id.* at 629. That argument was made possible by the Supreme Court's decision in *Moncrieffe v. Holder*, 569 U.S. 1678 (2013), which issued during the pendency of the *Aguilera-Rios* appeal. *See Aguilera-Rios*, 769 F.3d at 629.

The fact that Moncrieffe opened up an argument that was previously foreclosed by precedent constituted good cause under Rule 12 for raising the argument for the first time on appeal: "Prior to *Moncrieffe*, Aguilera would have

had no reason to challenge whether he was properly removed for a 'firearms offense,'" because "this Court's caselaw prior to *Moncrieffe* foreclosed the argument he now makes." *Id.* at 630-31. This Court may entertain an issue raised for the first time on appeal when there is "'a change in the intervening law that brought the issue into focus.'" *Id.* at 631 (quoting *In re Skywalkers, Inc.*, 49 F.3d 546, 548 n. 4 (9th Cir.1995)). That is all the more true when the issue is "purely legal" and the government has the full opportunity to respond in written briefing and at oral argument. *Id.*

So too here. Prior to *Bruen*, this Court held that § 922(g)(1) was constitutional even as applied to nonviolent offenders. *See United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010). Accordingly, *Vongxay* "foreclosed" Cleveland from making the argument now made on appeal. *See Aguilera-Rios*, 769 F.3d at 631. Until the Ninth Circuit Court of Appeal's initial opinion in *Duarte*, 101 F.4th 657, Cleveland's arguments were foreclosed by prior precedent in this Circuit. The initial *Duarte* opinion presented a change in the intervening law that brought the issue of 18 U.S.C. 922(g)'s constitutionality into focus, enabling Cleveland to raise this challenge.

And while the Ninth Circuit Court of Appeals en banc opinion rules against Cleveland's arguments, the Fifth Circuit's ruling in *Cockerham* and the Supreme

Court's decision to grant certiorari either constitutes an intervening change of law opening up the issue or a statement that the case law on this issue is not settled. This intervening change and uncertainty warrants applying de novo review in this case. Moreover, as in *Aguilera-Rios*, the issue is purely legal and the government will have a full opportunity to brief and respond in written argument and at any potential oral argument.

C. Alternatively, Cleveland prevails under plain error.

Alternatively, Cleveland also prevails under the plain error standard per Fed. R. Crim. P. 52(b). "Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights. *Yijun Zhou*, 838 F.3d at 1012; *United States v. Olano*, 507 U.S. 725, 732 (1993). If all three conditions are met, we may then exercise our discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Yijun Zhou*, 838 F.3d at 1012 (citing *United States v. Myers*, 804 F.3d 1246, 1257 (9th Cir. 2015)).

Because Cleveland's conduct is presumptively protected by the Second Amendment and because there is no representative historical analogue for 18 U.S.C. § 922(g), Cleveland's conviction for Count 1 is an error, it is plainly established, and it certainly affects his substantial rights as a conviction and prison sentence. Being wrongly convicted under 18 U.S.C. § 922(g) seriously affects the

fairness, integrity, or public reputation of judicial proceedings. Cleveland meets the standard for plain error and his conviction for Count 1 should be vacated and remanded for dismissal by the district court.

CONCLUSION

For the foregoing reasons, the judgment of the district court for Count 1 in 3:22-cr-00095-MO-1 should be vacated, and Count 1 remanded for the district court to dismiss Count 1 consistent with this Court's opinion.

Date: May 29, 2026.

s/ Ryan Costello
Ryan Costello

Attorney for Appellant Johnell Lee Cleveland

ADDENDUM OF CONSTITUTIONAL PROVISIONS AND RULES

Defendant sets out the following addendum of relevant constitutional provisions and rules. Fed. R. App. Pro. 28(f).

United States Constitution

The Second Amendment to the United States Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Federal Statutes

18 U.S.C. § 922(g). The statute provides in the most pertinent part:

(g) It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Federal Rules of Criminal Procedure

Rule 52. Harmless and Plain Error.

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Rule 12. Pleadings and Pretrial Motions. Rule 12 provides in the most pertinent parts:

(b) Pretrial Motions.

(1) In General. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(B) a defect in the indictment or information; including;

(v) failure to state an offense;

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of the trial.

3) Consequences of Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 24-3251, 24-3253, 24-3256

The undersigned attorney or self-represented party states the following:

- (●) I am unaware of any related cases currently pending in this court.
- ( ) I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ( ) I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Counsel is only aware of the Fifth Circuit Court of Appeals case that has been docketed with the Supreme Court on the issue of the constitutionality of 18 U.S.C. § 922(g) in United States v. Edward Cockerham, 25-1029 (docketed February 27, 2026).

Signature s/Ryan Costello **Date** 5/29/2026

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 24-3251, 24-3253, 24-3256

I am the attorney or self-represented party.

This brief contains 6,200 **words,** including _____ words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
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- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - [ ] it is a joint brief submitted by separately represented parties.
  - [ ] a party or parties are filing a single brief in response to multiple briefs.
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- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Ryan Costello **Date** 5/29/2026
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