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APPENDIX A

FILED

JUL 23 2026

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DAVID PAUL MARTINEZ, Defendant - Appellant.	No. 23-432 D.C. No. 3:17-cr-00257-VC-1 Northern District of California, San Francisco ORDER
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALEX LEON PADGETT, Defendant - Appellant.	No. 23-2417 D.C. No. 1:23-cr-00006-TMB-MMS-1 District of Alaska, Juneau
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOEL MICHAEL RYNO, Defendant - Appellant.	No. 23-3426 D.C. No. 3:22-cr-00045-JMK-MMS-1 District of Alaska, Anchorage

Before: W. FLETCHER and DE ALBA, Circuit Judges, and PITMAN, District Judge.*

The panel has unanimously voted to deny Appellants' petition for panel rehearing. Judge de Alba has voted to deny the petition for rehearing en banc, and Judge W. Fletcher and Judge Pitman have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and rehearing en banc (Dkt. 90) is DENIED.

* The Honorable Robert Pitman, United States District Judge for the Western District of Texas, sitting by designation.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. DAVID PAUL MARTINEZ, *Defendant - Appellant*.	No. 23-432 D.C. No. 3:17-cr-00257-VC-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Vince Chhabria, District Judge, Presiding

UNITED STATES OF AMERICA, *Plaintiff - Appellee*, v. ALEX LEON PADGETT, *Defendant - Appellant*.	No. 23-2417 D.C. No. 1:23-cr-00006-TMB-MMS-1

Appeal from the United States District Court
for the District of Alaska

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Timothy M. Burgess, District Judge, Presiding

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOEL MICHAEL RYNO,

Defendant - Appellant.

No. 23-3426

D.C. No. 3:22-cr-00045-JMK-MMS-1

Appeal from the United States District Court
for the District of Alaska
Joshua M. Kindred, District Judge, Presiding

Argued and Submitted September 19, 2025
Seattle, Washington

Filed March 18, 2026

Before: William A. Fletcher and Ana de Alba, Circuit Judges, and Robert Pitman, District Judge.*

Opinion by Judge W. Fletcher

* The Honorable Robert Pitman, United States District Judge for the Western District of Texas, sitting by designation.

SUMMARY**

Criminal Law / Second Amendment

The panel affirmed three appellants' convictions under 18 U.S.C. § 922(g)(9), which prohibits a person who has been convicted of a misdemeanor crime of domestic violence from possessing a firearm or ammunition.

Appellants argued that § 922(g)(9) violates the Second Amendment facially and as applied.

Rejecting the facial challenge, the panel applied the two-step framework established by *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). The panel held that the Second Amendment's plain text presumptively protects domestic violence misdemeanants, but that the Government has overcome that presumption by demonstrating that § 922(g)(9) is consistent with our historical tradition of firearm regulation. The panel concluded that § 922(g)(9) may be constitutionally applied to individuals who have been previously convicted of misdemeanors based on them having used criminal force against their domestic partners.

Rejecting the as-applied challenge, the panel held that § 922(g)(9) categorically disarms individuals convicted of a misdemeanor crime of domestic violence, reflecting Congress's determination that members of a class of convicted criminals are dangerous. The panel therefore held that it need not engage in a misdemeanor-by-misdemeanor

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

inquiry under § 922(g)(9). Section 922(g)(9) is constitutional as applied to Appellants, each of whom was convicted of a misdemeanor crime of domestic violence.

COUNSEL

Merry J. Chan (argued), Assistant United States Attorney, Chief, Appellate Section, Criminal Division; Ismail J. Ramsey, United States Attorney; Office of the United States Attorney, United States Department of Justice, San Francisco, California; Seth Brickey, Stephen Corso and Christopher D. Schroeder, Assistant United States Attorneys; S. Lane Tucker, United States Attorney; Office of the United States Attorney, United States Department of Justice, Anchorage, Alaska; for Plaintiffs-Appellees.

Carmen A. Smarandoiu (argued), Chief, Appellate Unit; Lara S. Vinnard and Varell L. Fuller, Assistant Federal Public Defenders; Jodi Linker, Federal Public Defender; Federal Public Defenders Office, San Jose, California; Daniel F. Poulson (argued) and Gretchen L. Staft, Assistant Federal Public Defenders; Office of the Federal Public Defender, Anchorage, Alaska; for Defendants-Appellants.

OPINION

W. FLETCHER, Circuit Judge:

Under 18 U.S.C. § 922(g)(9), a person "who has been convicted in any court of a misdemeanor crime of domestic violence" may not possess a firearm or ammunition. Congress enacted § 922(g)(9) in 1996 to fill a lacuna in federal gun control laws. Although federal law had long prohibited felons from possessing firearms, those prohibitions did not apply to domestic abusers convicted only of misdemeanors, despite the dangerousness evidenced by their abuse.

Joel Michael Ryno, Alex Leon Padgett, and David Paul Martinez (collectively, "Appellants") were convicted of misdemeanor crimes of domestic violence under state law and were later convicted of possessing firearms in violation of § 922(g)(9). Relying on *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), they argue that § 922(g)(9) violates the Second Amendment.

We hold that 18 U.S.C. § 922(g)(9) is constitutional.

I. Background

Ryno told his girlfriend he was going to kill her, held her against the garage door with a gun and a screwdriver while she held their infant child, hit her on the head, pointed a knife at her, and twice stabbed her bedroom door. He was convicted of assault in the fourth degree for "recklessly caus[ing] physical injury" to his girlfriend, in violation of Alaska Statute § 11.41.230(a)(1), a misdemeanor. Two years later, Ryno flipped over a table that hit his girlfriend's thigh, causing pain, abrasion, and bruising. Ryno told her

not to call the police or he would kill himself. He was again convicted of assault in the fourth degree.

After his first domestic violence conviction, a police officer stopped Ryno's vehicle and seized a rifle and ammunition in his possession. After his second conviction, officers seized another firearm. Two months later, after officers found Ryno sleeping behind the wheel of a car parked along a public highway, they seized two additional handguns. Ryno was convicted of one count of possessing firearms in violation of 18 U.S.C. § 922(g)(9).

Padgett pushed his wife into a dresser and hit her in front of her two young children, ages six and nine. One of the children told officers that he hid during the assault because he feared Padgett. Padgett had been consuming alcohol "heavily" for the previous three or four days. He was convicted of assault in the fourth degree, in violation of Alaska Statute § 11.41.230(a)(1). This was Padgett's fourth domestic violence conviction. Previously, Padgett had grabbed his girlfriend by her throat and pulled her over the back of a couch; had pushed a woman to the ground and strangled her until she could not breathe; and had strangled his girlfriend while she sat on a couch with her infant child.

In 2021, after Padgett shot and killed a bear near his home in Alaska, law enforcement seized a rifle and a handgun from his home. He was convicted of one count of possessing firearms in violation of 18 U.S.C. § 922(g)(9).

Martinez pushed his girlfriend into a door during an argument while he held their infant child. Concerned for her safety, his girlfriend called the police. Officers found Martinez running from the couple's home. He told the officers, "I'll sit if you want, but if you put your hands on me then it's on." Martinez was convicted of violating

California's misdemeanor domestic battery statute, Cal. Pen. Code § 243(e)(1).

In 2017, a police officer stopped Martinez for traffic violations. During a consensual search of Martinez's vehicle, the officer found a loaded semiautomatic handgun hidden in the center console. Officers then searched Martinez's home and found several additional firearms, including an AR-15 rifle, as well as ammunition and high-capacity magazines. Martinez was convicted of two counts of possessing firearms in violation of 18 U.S.C. § 922(g)(9).

Appellants argue that 18 U.S.C. § 922(g)(9) violates the Second Amendment. They bring both facial and as-applied challenges.

II. Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. We review the constitutionality of a statute de novo. *United States v. Alaniz*, 69 F.4th 1124, 1127 (9th Cir. 2023).

III. Discussion

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The amendment "confer[s] an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment, *McDonald v. City of Chicago*, 561 U.S. 742, 750, 778 (2010). The Supreme Court has written that certain longstanding prohibitions, including but not limited to "prohibitions on the possession of firearms by felons and the mentally ill," are

"presumptively lawful." *Heller*, 554 U.S. at 626, 627 n.26; *Rahimi*, 602 U.S. at 698–99.

Section 922(g)(9) prohibits any person previously convicted of a misdemeanor crime of domestic violence from possessing firearms or ammunition. 18 U.S.C. § 922(g)(9). The prior conviction must be a misdemeanor under federal, state, or tribal law that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former" member of a domestic relationship. 18 U.S.C. § 921(a)(33)(A). Use of force includes "the knowing or intentional application of force," *United States v. Castleman*, 572 U.S. 157, 170 (2014), as well as "reckless assaults," *Voisine v. United States*, 579 U.S. 686, 692 (2016). Section 922(g)(9) adopts the common-law definition of "force." *Castleman*, 572 U.S. at 162–63, 168.

A prior conviction counts as a misdemeanor crime of domestic violence under § 922(g)(9) only if the defendant was represented by counsel and tried by a jury, unless the defendant validly waived those requirements. 18 U.S.C. § 921(a)(33)(B)(i). In many circumstances, a prior misdemeanor conviction of domestic violence results in a lifetime ban on possession of firearms and ammunition under § 922(g)(9). However, if an individual has a single prior domestic violence misdemeanor conviction from a dating relationship and does not share a child with the victim, the prohibition lasts five years from the later of the judgment of conviction or completion of the sentence, provided the individual is not convicted of another disqualifying offense. 18 U.S.C. § 921(a)(33)(C). The prohibition also generally ends if the "conviction has been expunged or set aside, or is an offense for which the person

has been pardoned or has had civil rights restored." *Id.* § 921(a)(33)(B)(ii).

Before the Supreme Court decided *Bruen*, we held that § 922(g)(9) was consistent with the Second Amendment. *United States v. Chovan*, 735 F.3d 1127, 1130 (9th Cir. 2013), *abrogated on other grounds by Bruen*, 597 U.S. at 17. Now, post-*Bruen*, we join every circuit that has applied *Bruen* and upheld § 922(g)(9) against Second Amendment challenges. *See United States v. Simmons*, 150 F.4th 126 (2d Cir. 2025); *United States v. Jackson*, 138 F.4th 1244 (10th Cir. 2025); *United States v. Nutter*, 137 F.4th 224 (4th Cir. 2025), *cert. denied*, 146 S. Ct. 270 (2025); *United States v. Bernard*, 136 F.4th 762 (8th Cir. 2025), *cert. denied*, 146 S. Ct. 254 (2025); *United States v. Gailes*, 118 F.4th 822 (6th Cir. 2024). Consistent with the holdings of our sister circuits, we hold that § 922(g)(9) is facially constitutional and constitutional as applied to Appellants.

A. Facial Challenge

To succeed in a facial challenge, Appellants must show § 922(g)(9) is unconstitutional in all its applications. *See Rahimi*, 602 U.S. at 693 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). In other words, in order to prevail, "the Government need only demonstrate that [the law] is constitutional in some of its applications." *Id.*

Bruen established a two-step historical framework to determine whether a firearm regulation violates the Second Amendment. *Bruen*, 597 U.S. at 17, 24. At step one, we must determine whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 24. If it does, then the amendment "presumptively protects that conduct." *Id.* The government can overcome the presumption at step

two by demonstrating that the regulation is consistent with "the Nation's historical tradition of firearm regulation." *Id.*

1. Plain Text of the Constitution

The Second Amendment protects "the right of 'the people' to keep and bear arms." *United States v. Duarte*, 137 F.4th 743, 752 (9th Cir. 2025) (en banc) (quoting U.S. Const. amend. II). "The people" includes those "who are part of [the] national community." *Heller*, 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)); *Duarte*, 137 F.4th at 752–53 (citing *Heller*, 554 U.S. at 580). All three appellants are members of the "national community."

Appellants' status as domestic violence misdemeanants does not remove them from the ambit of the Second Amendment's text. In *Duarte*, we held en banc that felons are "people" who come within the scope of the Second Amendment. *Duarte*, 137 F.4th at 753–55. In *Perez-Garcia*, we repeated our pre-*Bruen* conclusion that "at least one group of misdemeanants—specifically, domestic violence misdemeanants—is 'entitled to some measure of Second Amendment protection.'" *United States v. Perez-Garcia*, 96 F.4th 1166, 1180 (9th Cir. 2024) (quoting *Chovan*, 735 F.3d at 1137), *cert. denied*, 145 S. Ct. 2707 (2025).

2. Historical Tradition of Firearm Regulation

Although the Second Amendment's plain text presumptively protects Appellants, the Government may overcome the presumption by demonstrating that § 922(g)(9) is consistent with our "historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

Bruen allows "reasoning by analogy" to determine whether a modern firearm regulation is "relevantly similar" to historical traditions of firearm regulation. *Id.* at 28–29. Central to this inquiry is "how" and "why" the regulation burdens the Second Amendment right. *Rahimi*, 602 U.S. at 692. The "how" considers "whether modern and historical regulations impose a comparable burden on the right of armed self-defense," and the "why" considers "whether that burden is comparably justified." *Duarte*, 137 F.4th at 755 (quoting *Bruen*, 597 U.S. at 29). "[W]hen a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" *Rahimi*, 602 U.S. 692 (quoting *Bruen*, 597 U.S. at 30). A modern regulation "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Id.* We primarily look to historical regulations extant in 1791 and 1868 when the Second and Fourteenth Amendments were adopted, though "we may consider pre-and post-ratification history to the extent that it does not contravene founding-era evidence." *Duarte*, 137 F.4th at 755 (citing *Bruen*, 597 U.S. at 35–36, 39).

In *Rahimi*, the Supreme Court recently analyzed historical firearm regulations and rejected a facial challenge to a provision closely related to § 922(g)(9). The Court upheld the constitutionality of § 922(g)(8), which prohibits a person subject to a domestic violence restraining order from possessing a firearm if the order includes a finding that the person "'represents a credible threat to the physical safety of [an] intimate partner' or a child." *Rahimi*, 602 U.S. at 684–85, 690 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). The Court held that § 922(g)(8) fits within the historical tradition of disarming those who "pose[] a clear threat of physical

violence to another." *Id.* at 698. It characterized this tradition as derived from two sets of historical regulations, surety and "going armed" laws. *Id.*

Surety laws "authorized magistrates to require individuals suspected of future misbehavior to post a bond." *Rahimi*, 602 U.S. at 695. As a "form of preventive justice," surety laws "could be invoked to prevent all forms of violence, including spousal abuse" and "targeted the misuse of firearms." *Id.* at 695–96 (internal quotations omitted) (citing 4 William Blackstone, Commentaries *251–53). "Going armed" laws prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land." *Id.* at 697 (quoting 4 William Blackstone, Commentaries *149). The laws "punish[ed] those who had menaced others with firearms" with "forfeiture of the arms . . . and imprisonment." *Id.* (citation omitted).

Section 922(g)(9) is analogous to the surety and going armed laws identified in *Rahimi*. Like those laws, § 922(g)(9) targets people deemed dangerous to the physical safety of others. As noted above, § 922(g)(9) disarms those convicted of a misdemeanor crime of domestic violence that involved "the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A). It offers procedural protections, providing that, absent waiver, a defendant must have been represented by counsel and tried by a jury for his state conviction to be disqualifying. 18 U.S.C. § 921(a)(33)(B)(i). Section 922(g)(9) "matches the surety and going armed laws, which involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Cf. Rahimi*, 602 U.S. at 699. Further, going armed laws punished those whose past conduct—menacing others with firearms—demonstrated a "threat of physical

violence." *See Rahimi*, 602 U.S. at 698. In much the same way, § 922(g)(9) disarms domestic violence misdemeanants whose past conduct resulting in a conviction demonstrates the same threat. Finally, § 922(g)(9) prevents further violence by domestic violence misdemeanants, much like the surety laws prevented violence, including spousal abuse. *See id.* at 695–97.

Appellants recognize the similarities between § 922(g)(9) and the surety and going armed laws that led the Court to uphold the constitutionality of § 922(g)(8) in *Rahimi*. However, they propose two distinctions between § 922(g)(8) and § 922(g)(9) that, in their view, place § 922(g)(9) outside *Rahimi*'s identified tradition of disarming individuals who pose a clear threat of physical violence. First, they point out that § 922(g)(8) is a temporary ban on firearm possession, while in many circumstances § 922(g)(9) is a permanent ban. Second, they emphasize that § 922(g)(8) requires an individualized judicial determination of future dangerousness. They argue that because § 922(g)(9) disarms individuals convicted of misdemeanors requiring only reckless conduct or common law force, the failure of § 922(g)(9) to require individualized findings of future dangerousness would result in disarming individuals who do not pose a clear threat of physical violence.

These distinctions are unconvincing. The burden on the presumptive Second Amendment right imposed by § 922(g)(9) is roughly comparable to that of § 922(g)(8), and to the degree § 922(g)(9)'s burden is greater, that burden is justified by the past behavior of the defendant. As Appellants concede, in at least some cases § 922(g)(9), like § 922(g)(8), operates as only a temporary ban on firearm possession. 18 U.S.C. §§ 921(a)(33)(B)(ii), (C); *see also Jackson*, 138 F.4th at 1254; *Nutter*, 137 F.4th at 231–32;

Bernard, 136 F.4th at 766; *Gailes*, 118 F.4th at 829. Further, § 922(g)(8) applies to those found to threaten domestic violence and subjected to civil restraining orders but convicted of nothing, whereas § 922(g)(9) applies to those criminally convicted of prior domestic violence. *Nutter*, 137 F.4th at 232; *Gailes*, 118 F.4th at 829 ("[I]f someone who is merely accused of committing domestic violence can be disarmed without offending the Second Amendment, then *a fortiori* someone with a valid conviction can also be disarmed."). Finally, § 922(g)(9) disarms individuals who present a clear threat of physical violence, *Nutter*, 137 F.4th at 233; *Gailes*, 118 F.4th at 829, given their past conduct and the likelihood that they will repeat their abuse in the future, *Bernard*, 135 F.4th at 765 (citing *Gailes*, 118 F.4th at 829).

Our decision is reinforced by our decision in *Duarte*, where we rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(1), which permanently disarms convicted felons. *Duarte*, 137 F.4th at 748, 761. Duarte argued under *Bruen* that § 922(g)(1) was unconstitutional as applied to nonviolent felons. *Id.* at 749. We identified two historical traditions that each independently justified § 922(g)(1): first, "legislatures may disarm those who have committed the most serious crimes," and second, "legislatures may categorically disarm those they deem dangerous, without an individualized determination of dangerousness." *Id.* at 755; *see also id.* at 761. Discussing the second tradition, we wrote, "[F]our centuries of unbroken Anglo-American history show[] that legislatures consistently disarmed entire categories of people who were presumed to pose a special risk of misusing firearms," even though "[n]ot all persons disarmed under historical precedents . . . were violent or dangerous persons." *Id.* at 761 (first quoting *Range v. Att'y Gen.*, 124 F.4th 218, 273 (3d Cir. 2024) (en banc) (Krause,

J., concurring); then quoting *United States v. Jackson*, 110 F.4th 1120, 1128 (8th Cir. 2024)). "Indeed, every categorical disarmament law was overbroad—sweeping in law-abiding people who were not dangerous, violent, untrustworthy, or unstable—yet they comported with the Second Amendment." *Id.* (internal quotations omitted) (quoting *Range*, 124 F.4th at 267 (Krause, J., concurring)).

The historical evidence supporting permanent, categorical disarmament of convicted felons under § 922(g)(1) applies equally to § 922(g)(9). We reject Appellants' argument that *Duarte*'s second tradition applies only to felonies. *Duarte* made clear that legislatures historically could "disarm on a categorical basis those who present a 'special danger of misuse' of firearms." 137 F.4th at 761 (quoting *Rahimi*, 602 U.S. at 698). Like § 922(g)(1), § 922(g)(9) permanently disarms a group Congress deemed dangerous—the members of which Congress had ample reason to consider dangerous. Convicted domestic abusers are "especially dangerous and require special attention" in part because "[d]omestic violence . . . leads to more domestic violence." 142 Cong. Rec. 22986 (1996) (statement of Sen. Lautenberg). "[A]ll too often, the only difference between a battered woman and a dead woman is the presence of a gun." 142 Cong. Rec. 22986 (1996) (statement of Sen. Wellstone). Section 922(g)(9) disarms domestic violence misdemeanants without an individualized judicial finding of future dangerousness because § 922(g)(9) reflects Congress's conclusion that "[t]here is no margin of error when it comes to domestic abuse and guns." 142 Cong. Rec. 22986 (1996) (statement of Sen. Lautenberg).

Section 922(g)(9) filled a dangerous gap in gun control laws. *Voisine*, 579 U.S. at 689 (quoting *Castleman*, 572 U.S. at 160). Domestic violence rarely results in a felony

conviction. *See id.* Indeed, felony prosecutions are rarely pursued. *United States v. Hayes*, 555 U.S. 415, 426 (2009). It is often difficult to obtain even a misdemeanor conviction. First, the abuse must be reported. Victims often do not report domestic violence because of fear, a desire to restore the relationship, embarrassment, or a belief that reporting is unhelpful. Michelle Fugate et al., *Barriers to Domestic Violence Help Seeking*, 11 Violence Against Women 290, 298–301 (2003); *see also* Susannah N. Tapp & Emilie J. Coen, U.S. DOJ Bureau of Just. Stat., *Criminal Victimization, 2024*, at 7 (2025) (documenting report rates). Second, a prosecutor must be persuaded to bring charges. Carol E. Jordan, *Intimate Partner Violence and the Justice System*, 19 J. Interpersonal Violence 1412, 1420 (2004) ("There is evidence that victims of domestic violence face low rates of prosecution . . . ."). Third, the prosecution must obtain a conviction, which is often difficult given the evidentiary issues in domestic violence cases. Lauren Bennett et al., *Systemic Obstacles to the Criminal Prosecution of a Battering Partner*, 14 J. Interpersonal Violence 761, 762 (1999) ("Victims' reluctance to cooperate with the prosecution . . . . can make successful prosecution difficult or impossible, especially in cases where there is little physical evidence of the assault." (citation omitted)); Lois A. Ventura & Gabrielle Davis, *Domestic Violence: Court Case Conviction and Recidivism*, 11 Violence Against Women 255, 265 (2005) ("[T]he most common reason a judge dismissed a domestic violence case was that at some point in the process, the victim failed to appear." (internal quotations omitted)).

A history of domestic violence is highly predictive of future violence. *Gailes*, 118 F.4th at 829 (collecting studies); *see United States v. Skoien*, 614 F.3d 638, 644 (7th

Cir. 2010). Domestic violence has a uniquely high recidivism rate. *See* Thomas P. George, *Domestic Violence Sentencing Conditions and Recidivism* 1, 17 (2016) (finding that 55% of individuals jailed for a domestic violence offense in Washington committed another domestic violence offense within five years); Carla Smith Stover, *Domestic Violence Research*, 20 J. Interpersonal Violence 448, 450 (2005) ("Studies have suggested that recidivism rates in domestic violence cases are high with studies estimating 40% to 80% or more of repeat violence . . . ."); Ventura & Davis, *supra*, at 268 (finding that 32.6% of individuals charged with domestic abuse were arrested for another domestic violence offense within one year). Recurring domestic violence is likely to become deadly when a firearm is present. *See* Aaron J. Kivisto & Megan Porter, *Firearm Use Increases Risk of Multiple Victims in Domestic Homicides*, 48 J. Am. Acad. Psychiatry & L. 26 (2020) (concluding that domestic violence victims are five times more likely to be murdered if there is a firearm in the home and that over half of domestic homicides are committed with firearms); Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043, 3044 (1992) (finding that domestic violence involving firearms is 12 times more likely to be deadly than domestic violence without firearms).

Appellants' facial challenge to § 922(g)(9) therefore fails. We conclude that § 922(g)(9) may be constitutionally applied to individuals who have been previously convicted of misdemeanors based on them having used criminal force against their domestic partners.

B. As-Applied Challenges

Appellants also argue that § 922(g)(9) is unconstitutional as applied to them. A statute is unconstitutional "as applied," when "by its own terms, [it] infringe[s] constitutional freedoms in the circumstances of the particular case." *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 565 (1972); *see also Perez-Garcia*, 96 F.4th at 1177.

Not every firearm regulation is susceptible to an as-applied challenge. In *Duarte*, we held that § 922(g)(1) categorically applied to all felons, regardless of whether a particular underlying felony was violent. *Duarte*, 137 F.4th at 755, 761. We rejected "felony-by-felony litigation" for challenges to § 922(g)(1) because history established that "the government is empowered to regulate guns through categorical restrictions." *Id.* at 761 (internal quotations omitted) (quoting *Atkinson v. Garland*, 70 F.4th 1018, 1038 (7th Cir. 2023) (Wood, J., dissenting)).

We similarly hold here that § 922(g)(9) categorically disarms individuals convicted of a misdemeanor crime of domestic violence. Like § 922(g)(1), § 922(g)(9) reflects Congress's determination that members of a class of convicted criminals are dangerous. Therefore, we hold that we need not engage in a misdemeanor-by-misdemeanor inquiry under § 922(g)(9). We are not alone in so holding. As we do here, the Second Circuit rejected a defendant's as-applied challenge to § 922(g)(9) based on Congress's power to disarm groups of people without distinguishing between the nature of the offense underlying particular convictions. *See Simmons*, 150 F.4th at 133–34 ("[W]e conclude that the statute is constitutional both facially and as applied to Simmons, who has undisputedly been convicted of a

misdemeanor crime of domestic violence."). Section 922(g)(9) is constitutional as applied to Appellants, each of whom was convicted of a misdemeanor crime of domestic violence.

IV. Conclusion

Congress enacted § 922(g)(9) to close a dangerous loophole in our gun control laws. In doing so, it legislated against a background of historical traditions of firearm regulation. Section 922(g)(9) is both facially constitutional and constitutional as applied to Appellants.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. JOEL MICHAEL RYNO, Defendant.	Case No. 3:22-cr-00045-JMK **ORDER ADOPTING REPORT AND RECOMMENDATION**

Before the Court at Docket 30 is Defendant Joel Michael Ryno's Motion to Dismiss. The United States of America (the "Government") responded in opposition at Docket 31. The motion was referred to Chief Magistrate Judge Matthew M. Scoble. At Docket 49, Judge Scoble issued his Final Report and Recommendation, in which he recommended that the motion be denied. In light of the Fifth Circuit's decision in *Rahimi v. United States*,[1] at Docket 50, Judge Scoble withdrew his Final Report and Recommendation and ordered supplemental briefing. The Government and Mr. Ryno provided their supplemental briefing at Dockets 51 and 53, respectively. At Docket 54, Judge Scoble issued his Final Report and Recommendation, in which he again

[1] 61 F.4th 443 (5th Cir. 2023).

recommended that the motion be denied. Mr. Ryno objected to the Final Report and Recommendation at Docket 55.

The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1). That statute provides that a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge."[2] A court is to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."[3] But as to those topics on which no objections are filed, "[n]either the Constitution nor [28 U.S.C. § 636(b)(1)] requires a district judge to review, de novo, findings and recommendations that the parties themselves accept as correct."[4]

Before turning to Defendant's objection, the Court recognizes the unique historical analysis now required by the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[5] Without a determinative test, federal district courts must evaluate and compare developments in American legal history to the modern regulation. The Court thanks the parties for their thoughtful and well-researched briefing on the issues posed here, as well as Judge Scoble for his well-considered recommendations. Additionally, the Court gives special thanks to its local Circuit Librarian for her assistance in locating many of the historical primary sources cited in this order and required for this

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[2] 28 U.S.C. § 636(b)(1)(C).

[3] *Id.*

[4] *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.").

[5] 142 S. Ct. 2111 (2022).

review. Amidst a quickly evolving and changing area of law, these cumulative efforts have greatly assisted the Court.

I. Defendant's Objection

Title 18 United States Code section 922(g)(9) strips an individual "convicted in any court of a misdemeanor crime of domestic violence" of their Second Amendment right to bear arms. In passing this statute in 1996, Congress intended to ensure that individuals convicted of domestic violence crimes would be unable to possess firearms.[6] The legislative history reflects an intent to reduce intimate partner homicides and firearm related violence;[7] and therefore, classifies domestic violence misdemeanants as a class of individuals, unable to responsibly maintain their Second Amendment rights.[8] Section 922(g)(9) is a gender neutral regulation, but the legislative history reflects lawmakers' intent to address disproportionate effect of domestic violence on women.[9] The Court takes judicial notice of this disproportionate effect as well as the reported overall decline in intimate partner violence crimes from 1993 to 2010.[10]

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[6] 142 Cong. Rec. S2646-02 (1996) (statement of Sen. Feinstein) (explaining that the Amendment was meant to "close the dangerous loophole" that allowed domestic violence misdemeanants to escape firearm disqualification under § 922(g)(1).

[7] 142 Cong. Rec. S11872-01 (1996) (statement of Sen. Lautenberg) (explaining that the Amendment was designed to "save the life of the ordinary American woman" by ensuring that an abusive misdemeanant partner would not have access to firearms).

[8] 18 U.S.C. § 922(g)(9).

[9] *Supra* notes 7 & 8.

[10] *See generally* SHANNON CATALANO, PH.D., U.S. DEP'T. OF JUST., BUREAU OF STAT., INTIMATE PARTNER VIOLENCE, 1993–2010 (rev. Sept. 29, 2015). The Court will use the term domestic violence throughout this order for consistency with Section 922(g)(9) but recognizes the current, more accurate term is intimate partner violence.

The Second Amendment to United States Constitution provides that "[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." *Bruen* analysis "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[11] From that framework, historical analogies must be presented, tested, and evaluated as "relevantly similar."[12] When analyzing the relevant similarity of regulations, courts at minimum must assess "how and why the [the modern and historical] regulations burden a law-abiding citizen's right to armed self-defense."[13] The Government need only show a "well-established and representative historical *analogue*, not a historical *twin*."[14]

Bruen guides that "unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."[15] Although the meaning of the Second Amendment is fixed "according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[16] "[T]he right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms."[17]

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[11] *Bruen*, 142 S. Ct. at 2131.
[12] *Id.* at 2131–33.
[13] *Id.* at 2133.
[14] *Id*. (emphasis in the original).
[15] *Id.* at 2132.
[16] *Id.*
[17] *Id.* at 2138.

Defendant objects to the constitutionality of § 922(g)(9) in an as-applied challenge, arguing that the Government failed to offer examples of historical firearm regulations that are "distinctly similar" to 18 U.S.C. § 922(g)(9).[18] However, *Bruen* does not require the Government to identify a "distinctly similar" historical firearm regulation.[19] Rather, a "distinctly similar" historical regulation is "relevant evidence" for a court to consider in its overarching analysis.[20] Defendant's objection overstates the Government's burden.

In analyzing whether the regulation is "consistent with the Nation's historical tradition of firearm regulation," the Court must consider the relevant legal frameworks in place at the time the Amendment was ratified.[21] Here, the lack of a distinctly similar firearm regulation stems from two American historical roots: (1) the societal norms accepting domestic violence; and (2) the limited legal frameworks for addressing domestic violence.

To begin, the Court must first address the past societal convention and common law doctrine of coverture. Under coverture, once a woman married, her legal rights and obligations were subsumed by her husband.[22] As a *feme covert,* she no longer existed as her own entity, but as a dependent to the adult male head of household.[23] From

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[18] *See* Docket 55 at 2–3.
[19] *Bruen*, 142 S. Ct. at 2131–33.
[20] *Id*. at 2131.
[21] *Id.*
[22] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *432, *441–44.
[23] Manby v. Scott (1659) 83 Eng. Rep. 268, 1 Mod. 124, 130 (reasoning "[t]he husband is the head of the wife as fully as the King is the head of the commonwealth; and the wife by law is put *sub potestate viri* and under his protection, although he hath not *potestatem vitae et necis* over her, the King hath over his subjects.").

the English common law well into the modern era, coverture remained a stricture on most American women's rights and lives.[24]

Domestic violence has been a long-recognized occurrence, but women had few legal protections against it until the modern era.[25] The English common law addressed domestic violence as a breach of the King's peace, a crime against the community and crown.[26] However, there were limited remedies for a such claims; courts could only attempt to negate future harm through surety and public scrutiny.[27] Adopting and adapting the English common law, the American Colonies also largely addressed violence and marital discord through common law breach of peace claims, with surety as a remedy.[28]

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[24] *Id.*; 1 WILLIAM BLACKSTONE, COMMENTARIES *432, *445 (summarizing the legal effects of coverture and claiming "that even the disabilities which the wife lies under are for the most part intended for her protection and benefit"); *United States v. Yazell*, 382 U.S. 341, 351–58 (1966) (calling "[t]he institution of coverture peculiar and obsolete," then acknowledging that eleven states continued to have codified coverture laws in place and upholding the contract limitations of the Texas law of coverture).

[25] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *432, *444–45 (discussing the "old" common law permitting a husband to give "moderate correction" to his wife similar to that of a servant or child, but prohibiting "violence." The Court notes that the standard for violence in England in 1765 is likely vastly different than modern American society.).

[26] 1 WILLIAM BLACKSTONE, COMMENTARIES *432, *445 (commenting that "in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband; or in return a husband against his wife."); Justices of the Peace Act 1361, 34 Edw. 3, c.1 (Eng.) (creating justices of the peace with the power to "to the Intent that the People be not by such Rioters or Rebels troubled nor endamaged, nor the Peace be blemished[.]".

[27] *E.g.*, Manby v. Scott (1659) 83 Eng. Rep. 268, 1 Mod. 124, 131 (recognizing the breach of peace claim for a wife "in fear or in doubt of her husband that he will beat or kill her, she shall have *supplicavit* out of the Chancery against her husband, and cause him to find sureties that the will not beat or kill her, and for to order and rule her, &c."); The King v. Lord Lee (1675) 83 Eng. Rep. 128 (binding Lord Lee with sureties for good behavior in response to the wife's claims of being "in danger of her life by him," but declaring "they could do no more than bind him, and that they could not remove her from him.").

[28] *See* WILLIAM EDWARD NELSON, THE COMMON LAW IN COLONIAL AMERICA, VOL. II, THE MIDDLE COLONIES AND THE CAROLINAS, 1660–1730 34–35 (2013).

Colonies, in now the modern states of Massachusetts, Rhode Island, and New Hampshire, enacted laws against wife beating,[29] but the codified laws resulted in few prosecutions.[30]

The American Revolution offered a brief hope to restructure a woman's place in a new American society. As Abigail Adams implored to John Adams:

> in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could.[31]

However, her entreaty to "put it out of the power of the vicious and the Lawless to use us with cruelty and impunity" did not come to pass.[32] American women remained excluded from political participation, their legal rights subsumed by their husbands.[33]

After the Revolution, the States continued to adjudicate the threat of domestic violence as a common law breach of the peace claim using surety as the remedy.[34]

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[29] Ruth H. Bloch, *The American Revolution, Wife Beating, and the Emergent Value of Privacy*, 5 EARLY AM. STUDIES: AN INTERDISC. J., 223, 232; Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, 11 CRIME & JUST. 19, 22–26 (1989).

[30] JOHN GILBERT MCCURDY, *Gender and Violence in Early America, Volume III 1500–1800 CE*, THE CAMBRIDGE WORLD HISTORY OF VIOLENCE 260 (Robert Antony, et al. eds., 2020). Mr. McCurdy also reports that colonial and early American Pennsylvania courts heard spousal assault and battery claims in much greater volume but does not elaborate as to the source of these claims.

[31] Letter from Abigail Adams to John Adams (March 31, 1776) (in ADAMS FAMILY PAPERS, MASSACHUSETTS HISTORICAL SOCIETY).

[32] *Id.*

[33] The Court notes that many living in America lacked citizenship or the constitutional rights constructed by the Founders due to racial or economic exclusions.

[34] *E.g.*, William Waller Hening, The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, in the Commonwealth of Virginia, together with a variety of useful precedents adapted to the laws now in force 573 (2nd ed. 1810) (articulating that a wife or child's "apprehension of present or future danger" due to threats of by a husband or father may merit a surety of the peace, but not for past battery); *Morris v. Palmer*, 107 N.H. 123, 123–129

However many courts viewed violence occurring within a family unit as a private matter unsuitable for public scrutiny.[35] The 1824 Mississippi Supreme Court resoundingly held that "whether a husband can commit an assault and battery upon the body of his wife" should not be adjudicated by courts, dismissing the violence as mere "Family Broils and dissentions."[36] With similar reasoning, North Carolina Supreme Court refused to adjudicate domestic violence as assault and battery, so that it would "not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[37] Some courts expressly endorsed a husband's legal right to use physical violence.[38] Other courts excluded wives and children as entire classes of victims for assault and battery.[39] Even when a wife, separated from her husband, was able to

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(N.H. 1859) (holding that a wife suing for breach of peace may recover costs and attorney's fees from husband); *see also Codd v. Codd*, 32 Johns. Ch. 141, 141–43 (N.Y. Chan. 1816) (declining to impose a surety to keep the peace on a previously violent husband and father but granting custody and care of the children exclusively to the wife and mother).

[35] E.g., *State v. Rhodes*, 61 N.C. 453, 456–57 (N.C. 1868) (reasoning "that family government is recognized by law as being complete in itself as State government in itself . . . we will not interfere with or attempt to control it . . . . For, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.").

[36] *Bradley v. State*, 1 Miss. 156, 157–58 (Miss. 1824) (holding "Family Broils and dissentions cannot be investigated before the tribunals of the country, without casting shade over the character of those who are unfortunately engaged in the controversy. To screen from public reproach those who may be thus unhappily situated, let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehavior, without being subjected to vexatious persecutions, resulting in the mutual discredit and shame of all parties concerned.").

[37] *State v. Rhodes*, 61 N.C. 453, 456–60 (N.C. 1868).

[38] *State v. Black*, 1 Win. 266, 267, 60 N.C. 262 (N.C. 1864) (holding "[a] husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and behave herself[.]"; see also Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661 (2004).

[39] E.g., *State v. Hussey*, 44 N.C. 123, 126 (N.C. 1852) (reasoning "that a slap on the check,

procure an indictment for assault and battery, as in *State v. Black*, the case was roundly rejected on the grounds that:

> unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum or go behind the curtain. It prefers the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife.[40]

Thankfully, society changed.[41] States began to criminalize "wife beating."[42] Women gained the right to vote.[43] The doctrine of coverture faded away.[44] States

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let it be as light as it may, indeed any touching of the person of another in a rude or angry manner—is in law an assault and battery. In the nature of things it cannot apply to persons in the marriage state, it would break down the great principle of mutual confidence and dependence; throw open the bedroom to the gaze of the public, where peace and concord ought to reign.").

[40] *State v. Black*, 1 Win. 266, 267, 60 N.C. 262 (N.C. 1864) (reversing a jury verdict convicting a husband of assault and battery where during the course of a verbal argument he grabbed the wife by the hair, pulled her to floor, and held her on the ground injuring her head and throat).

[41] See Reva B. Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing societal movement away from legally acceptable "wife chastisement," the development of gender-neutral domestic violence laws, and the drafting of the Violence Against Women Act).

[42] *E.g.*, An Act to Protect Married Women, ch. 109, 1850 Tenn. Pub. Acts 301; An Act to Inflict Corporal Punishment Upon Persons Found Guilty of Wife-beating, ch. 120, 1882 Md. Laws 172; An Providing for the Corporal Punishment of Wife-Beaters, ch. 204 Del. Laws 493; An Act to amend Section 1772, ch. 203, sec. 1 § 1772, 1905 Or. Laws 335–36 (amending the assault and battery statute to provide that "any person who shall commit an assault and battery upon or beat his wife, shall in the discretion of the court before which is had, be sentenced to be whipped not exceeding twenty lashes, or by imprisonment or fine as above provided."; *see also Elizabeth Pleck*, *Criminal Approaches to Family Violence, 1640–1980*, 11 CRIME & JUST. 19, 35–44 (1989) (discussing the Temperance Movement and a national wide "volcano of moral outrage at domestic abuse" from 1875–90 resulting in punitive legislative proposals and criminal laws.).

[43] U.S. CONST. amend. XIX.

[44] *Yazell*, 382 U.S. at 361 (Black, J., dissenting addressing that the American adoption and codification of coverture "rests on the old common-law fiction that the husband and wife are one. This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband. This fiction rested on what I had supposed is today a completely discredited notion that a married woman, being a female, is without capacity to make her own contracts and do her own business. I say 'discredited' reflecting on the vast number of women in the United States

criminalized acts of domestic violence in gender neutral terms and outside the bounds of marriage.[45] No longer in the shadows of the home, domestic violence gained national attention and federal legislative support.[46]

Bruen instructs that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[47] American legal history and tradition indicates that lawmakers, both at the time of ratification and well into the 20th century, simply did not recognize domestic violence as a societal problem meriting criminal liability. Section 922(g)(9) cannot be considered to be a "regulation address[ing] a general societal problem that has persisted since the 18th century" because, unfortunately, only in recent decades has domestic violence become codified as a crime against a person and recognized as societal problem rather than a private matter.

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engaging in the professions of law, medicine, teaching, and so forth, as well as those engaged in plain old business ventures as Mrs. Yazell was.").

[45] *See e.g.*, ALASKA STAT. § 18.66.990 (defining acts of domestic violence as part of criminal offenses, enacted in 2003 and amended in various legislative sessions); MONT. CODE ANN. § 45-5-206 (2021) (criminalizing partner or family member assault, originally enacted in 1985 and amended in various legislative sessions); ARIZ. REV. STAT. ANN. § 13-3601, *et seq*. (addressing various acts of domestic violence as "family offenses," originally enacted in 1980 and amended in various legislative sessions); *see also* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L.R. 1849, 1857 (1996) (noting that all states outlawed wife beating by 1920, but only since the 1980s has the criminal justice system began addressing domestic violence as a serious violent crime).

[46] *E.g.*, The Violence Against Women Act, Pub. L. 103-322, 108 Stat. 1796.

[47] *Bruen*, 142 S. Ct. at 2131.

II. Judge Scoble's Analysis

Section 922(g)(9) must be evaluated with a "more nuanced approach," due to the unprecedented societal concern of domestic violence and dramatic technological changes in firearms since the Founding.[48] *Bruen* calls on courts to address the "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[49] Individuals convicted of crimes are, by definition, not law-abiding.[50] As applied here, the State of Alaska adjudicated Mr. Ryno twice for violating Alaska's assault and domestic violence assault statutes.[51] In accordance with federalism and comity, the federal district court must recognize these state court convictions.[52]

In evaluating historical analogues as to whether other non-law-abiding citizens, such as domestic violence misdemeanants like Mr. Ryno, have been divested of their right to bear arms, Judge Scoble relies on proposed language from state ratification

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[48] *Id.* at 2132; *supra* notes 6 & 7; *see generally D.C. v. Heller*, 554 U.S. 570, 711–12 (2008) (Breyer, J., dissenting and discussing the reported prevalence of handguns and domestic violence).

[49] *Bruen*, 142 S. Ct. at 2133.

[50] *Cf. United States v. Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023) (discussing plausible overuse of minor, non-violent criminal convictions as a justification to infringe on the Second Amendment rights of individuals. The Court does not extend this statement beyond the context of this specific analysis.).

[51] *State of Alaska v. Joel Michael Ryno*, Case No. 3PA-17-01151CR (judged guilty of misdemeanor assault per ALASKA STAT. § 11.41.230(a)(1) after entering guilty plea on April 19, 2019). *State of Alaska v. Joel Michael*, Case No. 19-02536CR (judged guilty of misdemeanor assault per ALASKA STAT. § 11.41.230(a)(1) after entering guilty plea on June 15, 2021). The Court also notes Case No. 3PA-15-01330CR (judged guilty of misdemeanor assault per ALASKA STAT. § 11.41.230(a)(3) after entering guilty plea on December 7, 2015, which state court records indicates was also related to domestic violence.

[52] *See Rahimi* at 458–59 (distinguishing Section 922(g)(8) as predicated on a civil adjudication, rather than a criminal conviction); *see also Rahimi* at 455 n.7 (noting "[t]he distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation's history. In crafting the Bill of Rights, the Founders were plainly attuned to the preservation of these protections.").

conventions which would have allowed the disarming of criminals or those who posed a risk of danger to others.[53] While this proposed language was not enacted, Judge Scoble nevertheless found it informative.[54] The Court agrees.[55] Judge Scoble further relies on "the historical treatment of dangerous persons and felons" as a broad representative analogue of legislative power to disarm individuals. The Court also agrees. The Court finds these analogues to be the most consistent with the controlling Second Amendment jurisprudence.[56]

Additionally, the Court finds the historical use of surety for preventative firearm misuse informative.[57] From England to the Colonies and carried on in the States, courts used surety to prevent violence and ensure a stable civil society.[58] At the time of Founding and into the Nineteenth century, justices of the peace and common law courts used breach of the peace claims and surety to address individuals at cognizable risk of

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[53] Docket 54 at 24–27.

[54] *Id.* at 25.

[55] *Bruen*, 142 S. Ct. at 2133 (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3rd Cir. 2021) (When seeking to ensure that we do not "endors[e] outliers that our ancestors would never have accepted," looking to unenacted proposals is not forbidden.).

[56] *Bruen*, 142 S. Ct. at 2133; *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786 (2010) (stating that the holding in Heller, "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.' We repeat those assurances here." (quoting *Heller*, 554 U.S. at 626–27)).

[57] E.g., *Com. v. Miller*, 452 Pa. 35 (Pa. 1973) (affirming the hearing process, surety bond, and order to keep the peace for one year imposed on a husband who brandished a handgun and made repeated threats to commit suicide and murder his wife).

[58] Brief of Professors Robert Leider and Nelson Lund, and the Buckeye Firearms Assoc. at Amici Curiae in Support of Petitioners, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (No. 20-843)at 23.

misusing their firearms.[59] As the Nineteenth century progressed, states and territories codified surety laws.[60] As the Ninth Circuit previously noted, "[t]he English practice of surety of the peace, which carried over to the states, was a substantive restraint on anyone who was the subject of a complaint" and "a means of keeping the peace in areas lacking a centralized police force."[61] The Court agrees that surety laws, though a financial restriction, is historical evidence of codified, substantive infringements on Second Amendment rights.[62]

III. Conclusion

Section 922(g)(9) is a heavy burden and an exceptional circumstance under the Second Amendment. The Nation's legal history in addressing domestic violence demonstrates clear evidence to overrule Defendant's objection. The Court finds sufficient

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[59] *See E.g.*, SAMUEL FREEMAN, ESQ., THE MASSACHUSETTS JUSTICE: BEING A COLLECTION OF THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, RELATIVE TO THE POWER AND DUTY OF JUSTICES OF THE PEACE 147 (1795); JEREMIAH PERLEY, THE MAINE JUSTICE: CONTAINING THE LAWS RELATIVE TO THE POWERS AND DUTIES OF JUSTICES OF THE PEACE, WITH NECESSARY FORMS 272 (1823).

[60] Mass. Rev. Stat., ch. 13, § 16 (1836); 1838 Terr. of Wis. Stat. § 16, p. 381; Me. Rev. Stat., ch. 169, § 16 (1840); Mich. Rev. Stat., ch. 162, § 16 (1846); 1847 Va. Acts ch. 14, § 16; Terr. of Minn. Rev. Stat., ch. 112, § 18 (1851); 1854 Ore. Stat. ch. 16, § 17, p. 220; D. C. Rev. Code ch. 141, § 16 (1857); 1860 Pa. Laws p. 432, § 6; W. Va. Code, ch. 153, § 8 (1868).

[61] *Young v. Hawaii*, 992 F.3d 765, 820 (9th Cir. 2021) (en banc), *cert. granted, judgment vacated*, 213 L. Ed. 2d 1108, 142 S. Ct. 2895 (2022), and *abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S. Ct. 2111 (2022). The Court finds these dicta especially persuasive in this as-applied challenge. In 2019, Attorney General William P. Barr declared a law enforcement emergency in rural Alaska under the Emergency Federal Law Enforcement Assistance Program. U.S. DEP'T. JUST., ATTORNEY GENERAL WILLIAM P. BARR ANNOUNCES EMERGENCY FUNDING TO ADDRESS PUBLIC SAFETY CRISIS IN RURAL ALASKA (June 28, 2019), archived at https://perma.cc/JC27-HW6F.

[62] The Court recognizes that the role and weight of surety laws is debated amongst scholars and members of the United States Supreme Court. *Compare Bruen*, 142 S. Ct. at 2148–51 *with Id.* at 2187–88 (Breyer, J., dissenting); also *compare* Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328–1928*, 55 U.C. DAVIS L. REV. 2545 (2022) *with supra note* 57 at 19–33.

historical guidance and analogues for the constitutionality of 18 U.S.C. § 922(g)(9). Accordingly, the Court adopts the Final Report and Recommendation, and IT IS ORDERED that the Motion to Dismiss is DENIED.

IT IS SO ORDERED this 30th day of May, 2023, at Anchorage, Alaska.

/s/ Joshua M. Kindred
JOSHUA M. KINDRED
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

United States of America v. Alex Leon Padgett
Case No. 3:21-cr-00107-TMB-KFR

By: THE HONORABLE TIMOTHY M. BURGESS

PROCEEDINGS: ORDER FROM CHAMBERS

The matter comes before the Court on the Magistrate Judge's Final Report and Recommendation ("R&R")[1] recommending the Court deny Defendant Alex Leon Padgett's Motion to Dismiss Count 1 of the Indictment (the "Motion").[2] Padgett objects to the R&R "in its entirety" and lodges three specific objections.[3] Pursuant to statute, the Court has conducted a *de novo* review of the record and applicable law.[4] Based on that review, the Court **ACCEPTS and ADOPTS** the R&R at Docket 44 for the reasons discussed below. Accordingly, the Motion at Docket 24 is **DENIED**.

A. Background

On November 7, 2021, Padgett was indicted by grand jury on a charge of Possession of Firearms by a Prohibited Person, in violation of 18 U.S.C. § 922(g)(9) (Count 1).[5] The Indictment alleges that on or about July 17, 2021, Padgett was in possession of two firearms: a Ruger M77 Hawkeye .30-06 rifle and a Glock 17 9mm handgun.[6] The Indictment further alleges that at the time of the offense, Padgett had been convicted of a misdemeanor crime of domestic violence against his spouse.[7] Padgett was therefore barred from possessing firearms pursuant to § 922(g)(9), which prohibits individuals who "ha[ve] been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm.

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[1] Dkt. 44 (Final R&R).
[2] Dkt. 24 (Motion).
[3] Dkt. 41 at 2 (Defense Objections); *see also* Dkt. 45 (Defense Notice); Dkt. 48 (Government Supplemental Briefing); Dkt. 49 (Defense Supplemental Briefing).
[4] 28 U.S.C. § 636(b)(1)(C) ("Within fourteen days after being served with a copy [of the magistrate judge's proposed findings and recommendations], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge.").
[5] Dkt. 2 (Indictment); *see also* 18 U.S.C. §§ 922(g)(9), 924(a)(2).
[6] Dkt. 24 at 1–2. According to Padgett, he used the rifle to shoot and kill a bear that had previously killed one of his chickens and entered the children's play area in his backyard. *Id.* at 8. Padgett alleges that the rifle belonged to his girlfriend and that he "had access to [the] handgun in this home that he used for protection." *Id.* at 8.
[7] Dkt. 2 at 1–2.

After Padgett's indictment, the Supreme Court issued a decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*.[8] *Bruen* sets forth a two-part test that courts must apply when assessing whether a firearm regulation comports with the Second Amendment to the United States Constitution.[9] This framework "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding."[10] Courts must first determine whether "the Second Amendment's plain text covers an individual's conduct."[11] If it does not, then the regulation is valid and the analysis ends there. But if the Second Amendment's text covers the conduct at issue, then the conduct is "presumptively protect[ed]," and courts must then determine whether the government has met its burden to "justify its regulation by demonstrating that it is consistent with this Nation's historical tradition of firearm regulation."[12] "Only if a firearm regulation is consistent with this Nation's historical traditional may a court conclude that the individual's conduct falls outside the Second Amendment's [protection]."[13]

Following *Bruen*, Padgett moved to dismiss Count 1 of the Indictment, arguing that § 922(g)(9)'s prohibition on possession of firearms by individuals with a misdemeanor domestic violence conviction violates the Second Amendment as interpreted in *Bruen*.[14] In the Motion, Padgett contends that he "may claim a protected Second Amendment right" to possess firearms despite having a misdemeanor domestic violence conviction, and that his "use of a firearm in defense of life and property" is "plainly covered by the scope of the Second Amendment."[15] Second, Padgett argues that there is "no American historical tradition" prohibiting possession of firearms by individuals with a misdemeanor domestic violence conviction.[16] As a result, Padgett insists, § 922(g)(9) is unconstitutional as applied to his conduct.[17]

The Government opposes, contesting each of Padgett's arguments.[18] First, the Government contends that as a person convicted of a domestic violence misdemeanor crime, Padgett is neither "law-abiding" nor "responsible," and is therefore not guaranteed the Second Amendment right to possess firearms.[19] Second, the Government argues that even if Padgett does enjoy Second Amendment rights, § 922(g)(9)'s prohibition on firearm possession by individuals convicted of

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[8] Dkt. 24 at 7; 142 S. Ct. 2111 (2022).
[9] The Court adopts and will not repeat the Magistrate Judge's thoughtful summary of Second Amendment jurisprudence prior to *Bruen*. *See* Dkt. 44 at 4–6.
[10] *Bruen*, 142 S. Ct. at 2131.
[11] *Id.* at 2126.
[12] *Id.* at 2130.
[13] *Id.* at 2126.
[14] Dkt. 24; *see also* Fed. R. Crim. P. 12(b) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits."); *United States v. Mayer*, 503 F.3d 740, 747 (9th Cir. 2007) (noting that dismissal of a criminal charge is appropriate when the charge is based on "a statute that is unconstitutional on its face or as applied") (citation omitted)).
[15] Dkt. 24 at 21–23.
[16] *Id.* at 23–36.
[17] *Id.* at 36–37.
[18] Dkt. 28 (Opposition).
[19] *Id.* at 5–6.

domestic violence misdemeanors is "consistent with this Nation's historical tradition of firearm regulation."[20] In support, the Government cites several potential historical analogues to § 922(g)(9), including founding-era proposals "recogniz[ing] the permissibility" of disarming convicted criminals and enacted laws "disarming people . . . deemed to be dangerous or untrustworthy."[21] Therefore, according to the Government, § 922(g)(9) is constitutional.[22]

B. R&R and Objections

In the R&R, the Magistrate Judge determines that § 922(g)(9) is constitutional and recommends that the Court deny the Motion.[23] Citing *Bruen*'s repeated references to "law-abiding citizens," the Magistrate Judge finds that, at the first stage of *Bruen*'s inquiry, the plain text of the Second Amendment "likely does not cover [Padgett's] conduct" because the Second Amendment appears to "exclude . . . those convicted of misdemeanor[] crimes of domestic violence" from its scope.[24] However, the Magistrate Judge ultimately declines to recommend a ruling on this issue because: (1) prior to *Bruen*, the Ninth Circuit "reject[ed] arguments that 'domestic violence misdemeanants . . . have historically been restricted from bearing arms";[25] and (2) the Government has met its burden under the second part of the *Bruen* test to show that § 922(g)(9) is "part of the historical tradition of firearms regulation," which renders a ruling on the Second Amendment's scope "unnecessary."[26]

Turning to *Bruen*'s second question, the Magistrate Judge concludes that § 922(g)(9) "fits within this Nation's 'historical tradition of excluding felons and those who abuse their rights to commit violence from the rights and power of 'the people[.]'"[27] The Magistrate Judge describes § 922(g)(9) as a "[r]egulation[] affecting the rights of those who have engaged in criminal conduct or who possessed characteristics that make them a danger in the eyes of the elected legislature," and finds that such regulations "have a longstanding history."[28] In conducting this analysis, the Magistrate Judge refers to historical laws: (1) prohibiting public carry of weapons by those who "bear[] arms in a way that spreads 'fear' or 'terror' among the people";[29] (2) banning "gun

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[20] *Id.* at 7–15.
[21] *Id.* at 10–15. These founding-era proposals consist of (1) the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, and (2) an amendment that Samuel Adams offered at the Massachusetts convention to ratify the Constitution. *Id.* at 11–12.
[22] *Id.* at 15.
[23] Dkt. 44 at 1.
[24] *Id.* at 11–12.
[25] *See United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013). The Magistrate Judge elaborates that "[w]hile the holding in *Chovan* is no longer of precedential value in light of its conflict with *Bruen*, . . . the Court still acknowledges the reasoning for that holding." Dkt. 44 at 12 n.64.
[26] Dkt. 44 at 12–13.
[27] *Id.* at 16 (alteration in R&R) (quoting *United States v. Collette*, No. MO:22-CR-00141-DC, --- F. Supp. 3d ---, 2022 WL 4476790, at *7 (W.D. Tex. Sept. 25, 2022)).
[28] *Id.* at 13 (internal quotation marks omitted).
[29] *Id.* at 15 (internal quotation marks omitted) (quoting *Bruen*, 142 S. Ct. at 2144–45).

ownership by free blacks, slaves, Native Americans, . . . those of mixed race," and those who "refused to swear loyalty oaths";[30] (3) and granting "[l]ocalized authority . . . to disarm or confine the mentally ill."[31] Determining that these historical laws, though largely "abhorrent," are sufficiently analogous to establish a tradition of firearm regulation, the Magistrate Judge recommends holding that § 922(g)(9) is not unconstitutional as applied to Padgett.[32]

Padgett objects to the R&R "in its entirety," though he also objects on three specific bases: that the Magistrate Judge (1) "ignore[d] text, history, and precedent" in concluding that domestic violence misdemeanants are outside the Framers' conception of "the people" entitled to keep and bear arms;[33] (2) applied the incorrect standard for evaluating the constitutionality of § 922(g)(9) under *Bruen*; and (3) erred by determining that the "racist and flagrantly discriminatory historical examples cited by the Government" are sufficiently analogous to § 922(g)(9) to uphold the regulation.[34]

C. Discussion

Having reviewed the parties' initial and supplemental briefing, the R&R, Padgett's objections, and considerable Second Amendment case law before and since *Bruen*, the Court agrees with the Magistrate Judge that § 922(g)(9) is not unconstitutional as applied to Padgett and that the Motion should therefore be denied. The Court addresses each of Padgett's objections below.

1. The Court need not decide whether the Second Amendment presumptively protects Padgett's alleged possession of firearms as a domestic violence misdemeanant.

In this case, *Bruen* requires the Court to first ask whether the Second Amendment's plain text covers Padgett's alleged possession of firearms despite his status as a domestic violence misdemeanant.[35] If it does, then the Court must evaluate whether § 922(g)(9) is consistent with this Nation's historical tradition of firearm regulation.[36]

The Magistrate Judge concludes at the first part of the *Bruen* inquiry that the Second Amendment's plain text "likely does not cover [Padgett's] conduct."[37] Drawing on the Supreme Court's repeated references in *Bruen* to "law-abiding citizens," the Magistrate Judge reasons that "[t]here is a strong argument" that domestic violence misdemeanants—as people who are not "law-abiding"—are

[30] *Id.* (quoting Adam Winkler, Heller's *Catch-22,* 56 UCLA L. REV. 1551, 1562–66–63 (2009)).
[31] *Id.* at 15–16 (internal quotation marks omitted) (citing Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1377 (2009)).
[32] *Id.* at 15–20.
[33] The Court includes within this objection Padgett's separately listed objection that the Magistrate Judge failed to properly apply *Chovan*. *See* Dkt. 41 at 4.
[34] *Id.* at 2–6.
[35] *See Bruen*, 142 S. Ct. at 2134–35.
[36] *See id.* at 2135.
[37] Dkt. 44 at 8.

excluded from the Second Amendment's reach.[38] However, the Magistrate Judge ultimately declines to decide whether the Second Amendment's plain text covers domestic violence misdemeanants such as Padgett for two reasons: (1) the Ninth Circuit in *United States v. Chovan*[39] rejected the argument that "domestic violence misdemeanants . . . have historically been restricted from bearing arms"; and (2) it is "unnecessary" to decide this issue because the Government prevails in the second part of the *Bruen* inquiry.[40]

Padgett objects, arguing that he is among those entitled to Second Amendment protections.[41] Pointing to excerpts from the Supreme Court's decision in *District of Columbia v. Heller*,[42] Padgett contends that "there is no precedent suggesting that individuals with prior criminal convictions inherently lack standing" to assert Second Amendment rights.[43] In addition, Padgett argues that the Magistrate Judge should have interpreted *Chovan* to hold that "domestic violence misdemeanants enjoy Second Amendment protections," resolving the first part of the *Bruen* inquiry.[44]

Padgett's objections reflect a debate that has existed for some time and intensified since *Bruen*. This debate concerns the scope of "the people" to whom the Second Amendment applies.[45] Although "[i]t is difficult to address th[is] issue without veering into semantics,"[46] courts have typically employed one of two competing approaches. The first approach, the "scope-of-the-right" or "civic-virtue" approach, holds that "there are certain groups of people—for example, violent felons—who fall entirely outside the Second Amendment's scope."[47] This approach relies on the Supreme Court's repeated use of the phrase "law-abiding citizens" when describing the Second

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[38] *Id.* at 9–11.
[39] 735 F.3d 1127, 1137 (9th Cir. 2013).
[40] Dkt. 44 at 12–13.
[41] Dkt. 41 at 2.
[42] 554 U.S. 570 (2008).
[43] Dkt. 41 at 3.
[44] *Id.* at 4.
[45] U.S. Const. amend. II ("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." (emphasis added)); *see also United States v. Bartucci*, No. 119CR00244ADABAM, 2023 WL 2189530, at *5–6 (E.D. Cal. Feb. 23, 2023) (observing that disagreement on this question "was in existence before *Bruen* and now post-*Bruen* is more alive than ever").
[46] *United States v. Hammond*, No. 422CR00177SHLHCA, 2023 WL 2319321, at *5 (S.D. Iowa Feb. 15, 2023)
[47] *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 142 S. Ct. 2111 (internal citations omitted); *see also Range v. Att'y Gen.*, 53 F.4th 262, 273 n.13 (3d Cir. 2022), *reh'g en banc granted, opinion vacated sub nom. Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2023).

Amendment's scope, first in *Heller*[48] and later in *Bruen*.[49] Based on this language, some courts have concluded that non-law-abiding citizens are excluded altogether from the Second Amendment's reach.[50]

The second approach, the "individual-right" approach, provides that "*all* people have the right to keep and bear arms but that history and tradition supports [legislatures'] power to strip certain groups of that right."[51] This approach finds support in *Heller*'s statement that "the people" broadly "refers 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."[52] Courts following this approach have reasoned that it is consistent with "the typical way of conceptualizing constitutional rights," such as those protected by the First Amendment.[53] In a dissenting opinion

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[48] *See* 554 U.S. at 625, 635; *see also id.* at 643 (Stevens, J., dissenting) (interpreting *Heller*'s majority opinion as "read[ing] the Second Amendment to . . . limit[] the protected class to 'law-abiding, responsible citizens'" (citing *id.* at 635)).

[49] *See* 142 S. Ct. at 2122, 2125, 2131, 2133, 2134, 2135 n.8, 2138, 2138 n.9, 2150, 2156; *see also id.* at 2157–59, 2161 (Alito, J., concurring); *id.* at 2161 (Kavanaugh, J., concurring); *id.* at 2186–87, 2190, (Breyer, J., dissenting). Among the *Bruen* majority's references to "law-abiding citizens" is the following sentence: "It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." *Id.* at 2134.

[50] *See, e.g., Binderup v. Att'y Gen.*, 836 F.3d 336, 367 (3d Cir. 2016) (Hardiman, J., concurring), *abrogated by Bruen*, 142 S. Ct. 2111 ("[T]he Founders understood that not everyone possessed Second Amendment rights. These appeals require us to decide who count among 'the people' entitled to keep and bear arms. . . . The most germane evidence available directly supports the conclusion that the founding generation did not understand the right to keep and bear arms to extend to certain categories of people deemed too dangerous to possess firearms."); *Range*, 53 F.4th at 284 ("We believe the Supreme Court's repeated characterization of Second Amendment rights as belonging to 'law-abiding' citizens supports our conclusion that individuals convicted of felony-equivalent crimes, like Range, fall outside 'the people' entitled to keep and bear arms."); *United States v. Coleman*, No. 3:22-CR-8-2, 2023 WL 122401, at *2 (N.D. W. Va. Jan. 6, 2023) ("The bottom line is the Defendant's status as a felon removes him from 'the people' enumerated in the Second Amendment.").

[51] *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting) (internal citations omitted) (emphasis added); *see also*, *e.g.*, *United States v. Rahimi*, 61 F.4th 443, 451–53 (5th Cir. Feb. 2, 2023) (concluding that the Supreme Court's repeated use of the words "law-abiding" in *Heller* and *Bruen* do not "add a gloss on the Second Amendment that restricts its applicability to only 'law-abiding, responsible citizens'" (quoting *Heller*, 554 U.S. at 635)); *United States v. Coombes*, No. 22-CR-00189-GKF, --- F. Supp. 3d ---, 2022 WL 4367056, at *4 (N.D. Okla. Sept. 21, 2022) ("Based on existing precedent and well-established canons of construction, the court declines to carve out felons from the scope of the Second Amendment's protection of 'the people.' "); *Bernard*, 2022 WL 17416681, at *7 (same); *United States v. Perez-Gallan*, No. 22-CR-00427, 2022 WL 16858516, at *8–9 (W.D. Tex. Nov. 10, 2022) (same).

[52] 554 U.S. at 580.

[53] *See id.* (noting that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset");

in *Kanter v. Barr*, now-Justice Barrett described the "scope-of-the-right" approach as both "analytically awkward" and "at odds with *Heller*," and reasoned that the second approach is preferable because it reflects the historically-supported "proposition that the state can take away the right to bear arms away from a category of people that it deems dangerous."[54]

The Ninth Circuit has not yet ruled which approach is proper,[55] and the Court need not decide this issue today because it has no bearing on the Magistrate Judge's recommendation to deny the Motion.[56] As Justice Barrett observed in *Kanter*, "[t]hese [two] approaches will typically yield the same result; one uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away."[57] And although the R&R contains a lengthy discussion of the merits of the parties' positions at the first stage of *Bruen*'s inquiry, the Magistrate Judge effectively assumes, without deciding, that the Second Amendment's plain text covers Padgett's conduct, and proceeds to analyze whether the Government met its burden to show that § 922(g)(9) is consistent with this Nation's historical tradition of firearm regulation.[58] The Court therefore need not disturb this portion of the R&R.

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but see, e.g., *Hammond*, 2023 WL 2319321, at *5 (questioning consistency of this approach with typical treatment of constitutional rights, noting: "A prison inmate, for example, has no right to leave the prison to engage in peaceable assembly with others despite the First Amendment's admonition that 'Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . . .' One therefore reasonably might describe the inmate as no longer being part of 'the people' protected by the peaceable assembly clause. Alternatively, one could define "the people" to include the inmate but nonetheless describe him or her as having 'lost' or 'forfeited' the right to peaceable assembly. So it is with 'the people' as used in the Second Amendment." (citation omitted)); *United States v. Hill*, No. CR H-22-249, 2022 WL 17069855, at *4 (S.D. Tex. Nov. 17, 2022) ("Like voting rights, Second Amendment rights are a privilege afforded to the political community and can be forfeited upon demonstration that an individual does not, or no longer, fits the criteria to be a member of that political community.").

[54] 919 F.3d at 458, 464 (Barrett, J., dissenting).

[55] In *United States v. Vongxay*, the Ninth Circuit observed that "most scholars of the Second Amendment agree that the right to bear arms was 'inextricably ... tied to' the concept of a 'virtuous citizen[ry]' that would protect society through 'defensive use of arms against criminals, oppressive officials, and foreign enemies alike,' and that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) . . . .'" 594 F.3d 1111, 1118 (9th Cir. 2010). The court recognized, though, that this "historical question has not been definitively resolved." *Id.*

[56] Nevertheless, the Court observes that the structure of the *Bruen* test appears to lend support to the individual-right approach. Namely, applying the scope-of-the-right approach tends to "shoehorn[] the government's historical-tradition burden" into *Bruen*'s first question, even though this question involves an analysis that is "based simply on the Second Amendment's plain text." *See United States v. Harrison*, No. CR-22-00328-PRW, 2023 WL 1771138, at *4 (W.D. Okla. Feb. 3, 2023).

[57] 919 F.3d at 452 (Barrett, J., dissenting).

[58] This approach is in keeping with how many courts have engaged in *Bruen* analyses. *See, e.g.*, *United States v. Jackson*, No. CR ELH-22-141, 2023 WL 2242873, at *9 (D. Md. Feb. 27, 2023); *Hammond*, 2023 WL 2319321, at *4–6.

Furthermore, the Court disagrees with Padgett that *Chovan* definitively resolves the issue of whether the Second Amendment's plain text covers domestic violence misdemeanants. *Chovan* held that "by prohibiting domestic violence misdemeanants from possessing firearms, § 922(g)(9) burdens rights protected by the Second Amendment."[59] In coming to this conclusion, the Ninth Circuit relied exclusively on historical evidence of similar regulations and did not address the Second Amendment's text.[60] Moreover, the court merely assumed that the defendant was entitled to Second Amendment rights, observing that it was unable "to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors."[61] The *Chovan* court's analysis reflects the distinct analytical framework that was in place at the time and that *Bruen* abrogated, and shows that the court did not "appl[y] the first step" of *Bruen*, as Padgett suggests.[62] The Court therefore rejects Padgett's contention that the Magistrate Judge failed to afford *Chovan* proper weight.

2. The Magistrate Judge applied the correct standard under *Bruen* in analyzing § 922(g)(9)'s constitutionality.

The second part of the *Bruen* inquiry asks whether the Government has justified the regulation at issue by "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[63] In engaging in this analysis, the Magistrate Judge concludes that although there were no equivalents to § 922(g)(9) at the time of the founding, the Court should uphold the regulation because the Government met its burden to identify a "well-established and representative historical analogue."[64]

Padgett argues that the Magistrate Judge "misconstrues" the standard to be applied at the second stage of *Bruen*'s inquiry because "[t]he character" of this inquiry "depends on the nature of the [firearm] regulation at issue."[65] Specifically, Padgett draws a distinction between regulations that address a "general societal problem that has existed since the 18th century," and those that implicate "unprecedented societal concerns or dramatic technological changes" or that would have been "unimaginable at the founding."[66] According to Padgett, when a regulation addresses a "general societal problem that has existed since the 18th century," courts may uphold the regulation only if a "distinctly similar" tradition of firearm regulation exists.[67] But when a regulation implicates "unprecedented societal concerns or dramatic technological changes" or was "unimaginable at the founding," courts may uphold the regulation if "relevantly similar" historical antecedents exist.[68] Padgett contends that the Magistrate Judge failed to distinguish between these

[59] 735 F.3d at 1137.
[60] *See id.*
[61] *Id.* (quoting *United States v. Chester*, 628 F.3d 673, 681–82 (4th Cir. 2010)).
[62] *See* Dkt. 41 at 4.
[63] 142 S. Ct. at 2130.
[64] Dkt. 44 at 15 (quoting *Bruen*, 142 S. Ct. at 2133).
[65] Dkt. 41 at 5.
[66] *Id.* (quoting *Bruen*, 142 S. Ct. at 2129, 2131–32).
[67] *Id.* (quoting *Bruen*, 142 S. Ct. at 2129).
[68] *Id.* (quoting *Bruen*, 142 S. Ct. at 2131–33).

"different standards" and should not have compared § 922(g)(9) with regulations that are not "distinctly similar" to it.[69]

To address this objection, the Court looks to pertinent passages of *Bruen*, including those from which Padgett quotes. The Supreme Court observed that the "focus on history" in the second stage of the *Bruen* inquiry "comports with how [courts] assess many . . . constitutional claims"; that is, by "look[ing] to history for guidance."[70] Acknowledging that "[h]istorical analysis can be difficult" and may require "nuanced judgments,"[71] the Supreme Court offered some direction for courts when evaluating whether a particular modern law is consistent with historical tradition. For example, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is *relevant evidence* that the challenged regulation is inconsistent with the Second Amendment."[72] Similarly, "if earlier generations addressed the societal problem, but did so through materially different means, that *also could be evidence* that a modern regulation is unconstitutional."[73] And "if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide *some probative evidence*" of unconstitutionality.[74]

At the same time, the Supreme Court observed that the "regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868."[75] In "cases implicating unprecedented societal concerns or dramatic technological changes," historical analogies may not be as "simple to draw" and courts may need to take "a more nuanced approach."[76] When considering modern firearm regulations that were "unimaginable at the founding," courts must determine—as is the case with "all analogical reasoning"—whether the two regulations are "relevantly similar."[77]

The Supreme Court clarified that "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check."[78] Along similar lines, the Supreme Court

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[69] *Id.* at 6.
[70] *Bruen*, 142 S. Ct. at 2130 (internal quotation marks omitted).
[71] *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring) (alteration in *Bruen*).
[72] *Id.* at 2131 (emphasis added).
[73] *Id.* (emphasis added).
[74] *Id.* (emphasis added).
[75] *Id.* at 2132.
[76] *Id.*
[77] *Id.* (internal quotation marks omitted) (citing Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).
[78] *Id.* at 2133. The Supreme Court also noted: "On the one hand, courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.' On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin." *Id.* (citation omitted) (alteration in *Bruen*) (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3rd Cir. 2021)).

highlighted the flexibility of the Constitution and the Second Amendment, noting that they were "intended to endure for ages to come, and consequently, to be adopted to the various crises of human affairs."[79] Furthermore, the Supreme Court remarked that although the "meaning" of the Constitution "is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[80] To that end, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[81]

To the extent Padgett interprets these passages to preclude courts from engaging in certain types of analogical reasoning to determine whether a modern regulation is constitutional, the Court disagrees. Although *Bruen* offers non-exhaustive guidance for what the Court might consider to be "relevant" or "probative" evidence when a regulation addresses a persistent "societal problem," it does not suggest that any of this evidence—such as "the lack of a distinctly similar historical regulation"[82]—is dispositive of the regulation's constitutionality. Comparisons to historical antecedents that share only broad commonalities may be most compelling in cases involving regulations that were "unimaginable at the founding" or that involve "unprecedented societal concerns."[83] But *Bruen* indicates that courts may properly weigh evidence of such historical antecedents against the other available evidence in any given case. "Otherwise, some [firearm] restrictions that the Founders would have 'believed to be permissible' would fail simply because they 'happened [not] to exist in the founding era.'"[84] Such an outcome would be inconsistent with *Bruen*'s exhortation that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated."[85]

To be sure, some historical analyses may be more "straightforward" and others "more nuanced."[86] Yet no matter where a case falls on this spectrum, the Government has the burden to identify historical evidence demonstrating a "comparable tradition of regulation."[87] The Supreme Court's own analysis of the law at issue in *Bruen*, which required an applicant for an unrestricted license to carry a handgun in public to show a "special need for self-defense,"[88] bears this out. Even though

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[79] *Id.* at 2132 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)).
[80] *Id.*
[81] *Id.* at 2133.
[82] *Id.* at 2131.
[83] *See id.* at 2131–32.
[84] *Jackson*, 2023 WL 2242873, at *12 (quoting *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022)).
[85] *See Bruen*, 142 S. Ct. at 2132 ("[T]he Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.").
[86] *See id.* at 2131–32; *see also Kelly*, 2022 WL 17336578, at *2 (explaining that courts engaging in *Bruen*'s historical analysis must not only "consider what earlier legislatures did, but imagine what they could have imagined," because "a list of the laws that happened to exist in the founding era is, as a matter of basic logic, not the same thing as an exhaustive account of what laws would have been theoretically believed to be permissible by an individual sharing the original public understanding of the Constitution").
[87] *Bruen*, 142 S. Ct. at 2131–32.
[88] *Id.* at 2122.

this New York law addressed a persistent problem—handgun violence, primarily in urban areas[89]—the Supreme Court "still scoured centuries of English and American history for relevant analogues when it applied the test to New York's law."[90] The Supreme Court considered various potential analogues from the historical record, including colonial statutes that "codified the existing common-law offense of bearing arms to terrorize the people," founding-era statutes that "prohibit[ed] bearing arms in a way that spreads 'fear' or 'terror' among the people," and Western territorial restrictions on public carry.[91] Weighing various factors, including "how and why" these laws burdened public carry," the laws' historical prevalence, and the laws' temporal proximity to the founding, the Supreme Court ultimately held that these analogues did not demonstrate "an American tradition justifying [New York's] proper-cause requirement."[92] The Supreme Court's analysis lends further support to the conclusion that courts may properly consider evidence of any historical analogues brought to their attention, and that their task under the second part of *Bruen*'s inquiry is to "assess which similarities are important and which are not" in determining whether a comparable tradition of regulation exists.[93]

For these reasons, the Court rejects Padgett's objection that *Bruen* sets forth different standards depending on whether the regulation at issue: (1) addresses a "general societal problem that has persisted since the 18th century"; (2) implicates "unprecedented societal concerns or dramatic technological changes"; or (3) was "unimaginable at the founding."[94] The Magistrate Judge did not err by considering the Government's propounded historical analogues to § 922(g)(9) and by stating that, pursuant to *Bruen*, a "well-established and representative historical analogue" may suffice to find a comparable tradition of regulation.[95] The Court therefore declines to modify the R&R on this basis.

3. The Magistrate Judge correctly concluded that § 922(g)(9) is consistent with this Nation's historical tradition of firearm regulation.

The Magistrate Judge finds that the Government carried its burden of showing that § 922(g)(9) is a "regulation [that] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[96] Describing § 922(g)(9) as a regulation that "criminalizes the possession of

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[89] *See id.* at 2131–32 (noting that challenged law concerned "the same alleged societal problem addressed in *Heller*," and "the Founders themselves could have adopted [similar laws] to confront that problem").
[90] *Jackson*, 2023 WL 2242874, at *12 (citing *Bruen*, 142 S. Ct. at 2135–56).
[91] *Bruen*, 142 S. Ct. at 2143–44, 2153–55.
[92] *See id.* at 2139–56; *see also id.* at 2155 (concluding that territorial restrictions "deserve little weight" in part "because they were—consistent with the transitory nature of territorial government—short lived").
[93] *See id.* at 2132 (quoting Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 254 (2017)); *see also Firearms Pol'y Coal., Inc. v. McCraw*, No. 4:21-cv-1245-P, --- F. Supp. 3d ---, 2022 WL 3656996, at *8 (N.D. Tex. Aug. 25, 2022) ("Courts use analogical reasoning to determine whether a modern regulation is constitutional.").
[94] *See Bruen*, 142 S. Ct. at 2131–32.
[95] *See id.* at 2133.
[96] Dkt. 44 at 13 (quoting *Bruen*, 142 S. Ct. at 2127).

guns by individuals Congress has determined are dangerous," the Magistrate Judge states that "the historical record demonstrates that the regulation of individuals deemed dangerous by the legislature—like those who commit domestic violences crimes—was prevalent."[97] The Magistrate Judge relies on founding-era laws that: (1) prohibited those who "bear[] arms in a way that spreads 'fear' or 'terror' among the people" from carrying arms; (2) banned gun ownership by "free blacks, slaves, Native Americans, . . . those of mixed race," and those who "refused to swear loyalty oaths"; and (3) permitted disarming the mentally ill.[98] Based on this evidence, the Magistrate Judge concludes that § 922(g)(9) is constitutional because it is consistent with a "historical tradition of excluding felons and those who abuse their rights to commit violence from the rights and power of 'the people[.]'"[99]

Padgett objects, arguing that the Magistrate Judge's reliance on these historical analogues is flawed because they "do not bear any meaningful resemblance to modern-day laws that disarm citizens based on criminal history," such as § 922(g)(9).[100] Padgett further argues that the lack of any "laws that categorically prohibited felons, much less persons with misdemeanor convictions, from possessing firearms" before 1938 is "compelling evidence that § 922(g)(9) is unconstitutional."[101]

In addressing Padgett's objection, the Court finds Justice Barrett's dissent in *Kanter* particularly instructive. In this dissent, Justice Barrett explained that she would have held 18 U.S.C. § 922(g)(1), which bans all felons from possessing firearms, unconstitutional as applied to the appellant, who had been convicted of only a nonviolent felony.[102] Justice Barrett reasoned that although history "support[s] the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous," that authority "extends only to people who are dangerous."[103] Justice Barrett concluded that legislatures may disarm classes of people, including, specifically, "those convicted of crimes of domestic violence."[104] "Short of concluding that []Justice Barrett had a change of heart in the three years between *Kanter* and *Bruen*, it is difficult to believe she signed onto a majority opinion in the latter that undermined her conclusion in the former" that laws such as § 922(g)(9) are constitutional.[105]

Moreover, Justice Barrett expressed a view that legislatures may impose class-wide restrictions "based on *present-day judgments* about categories of people whose possession of guns would

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[97] *Id.* at 15.
[98] *Id.* at 15–16 (first quoting *Bruen*, 142 S. Ct. at 2144–45, then quoting Adam Winkler, Heller's *Catch-22,* 56 UCLA L. REV. 1551, 1562–66–63 (2009)).
[99] *Id.* at 16 (quoting *Collette*, 2022 WL 4476790, at *7).
[100] Dkt. 41 at 6.
[101] *Id.* at 5.
[102] *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).
[103] *Id.* at 453, 464; *see also Binderup*, 836 F.3d at 369 (Hardiman, J., concurring) ("[T]he historical record leads us to conclude that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed.").
[104] *See Kanter*, 919 F.3d at 453, 464 (Barrett, J., dissenting) (citing *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010)).
[105] *Hammond*, 2023 WL 2319321, at *3.

endanger the public safety,"[106] reasoning that "[s]uch restrictions are 'lineal descendants' of historical laws banning dangerous people from possessing guns."[107] For this reason, the Court finds that the fact that domestic violence "was not even illegal when the Second Amendment was adopted, much less a basis for taking away someone's firearms," is not persuasive evidence that § 922(g)(9) is unconstitutional.[108] To the contrary, this evidence—along with evidence that domestic violence was not consistently disapproved of[109]—may suggest that although domestic violence *existed* at the time of the founding, it was not a "challenge[] . . . that preoccupied the Founders"[110] or widely perceived as a societal problem.[111] In other words, the Court is persuaded that under *Bruen*, legislatures may restrict firearm possession to groups viewed as dangerous in modern times, not only to those viewed as dangerous in 1791.[112]

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[106] 919 F.3d at 464–65 (Barrett, J., dissenting) (emphasis added) (citing *Skoien*, 614 F.3d at 641 ("[E]xclusions need not mirror limits that were on the books in 1791.")).

[107] *Id.* at 465 (quoting Transcript of Oral Argument at 77, *Heller*, 554 U.S. 570 (No. 07290)).

[108] *Hammond*, 2023 WL 2319321, at *6; *see also United States v. Jackson*, No. CR-22-59-D, 2022 WL 3582504, at *3 (W.D. Okla. Aug. 19, 2022) ("Legal scholars have commented on the paucity of evidence that American traditions reached within the home to interfere with domestic relationships, particularly the marital relationship.").

[109] *See Jackson*, 2022 WL 3582504, at *3 ("[I]n the United States, the common law recognized until the mid-1800's a 'right of chastisement' that allowed husbands to inflict corporal punishment on their wives."); *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, --- F. Supp. 3d ---, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022) ("Domestic abusers are not new. But until the mid-1970s, government intervention—much less removing an individual's firearms—because of domestic violence practically did not exist. A reason for that was how infrequently domestic abusers were prosecuted. . . . [A]ny prosecution of domestic violence charges [in the 18th century] 'were remnants of a much more extensive form of social policing that ended with the demise of the Puritan experiment.' . . . [E]ven in the late nineteenth century, many states still adhered to the belief that without serious violence, the government should not interfere in familial affairs." (quoting ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF AMERICAN SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 27 (1987))).

[110] *See Bruen*, 142 S. Ct. at 2132.

[111] As the Magistrate Judge observes, § 922(g)(9) was enacted to "close the dangerous loophole" that "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies" and therefore not subject to the federal prohibition on possession of firearms by felons. Dkt. 44 at 14 n.70 (citing *Hayes*, 555 U.S. at 426 (describing congressional statement in support of § 922(g)(9)'s enactment)). "Such concerns are well-supported by empirical evidence and statistics regarding domestic violence, recidivism by those convicted of misdemeanor crimes of domestic violence, and increased risks of serious harm and death posed when firearms are present in connection with domestic violence." *Id.* at 14.

[112] *Cf. United States v. Quiroz*, No. PE:22-CR-00104-DC, --- F. Supp. 3d ---, 2022 WL 4352482, at *8 (W.D. Tex. Sept. 19, 2022) ("Society, population density, and modern technologies are all examples of change that would make something [that was] unthinkable in 1791 a valid societal concern [today].").

Since *Bruen*, courts have unanimously rejected challenges to § 922(g)(9) for varying reasons,[113] with many grounding their analyses in a historical tradition of restricting firearm possession by groups perceived as dangerous, including domestic violence misdemeanants.[114] As one court recently stated: "The conclusion is clear that disarming persons deemed dangerous has been grounded in the heartland of acceptable gun regulation since our Nation's founding. Ignoring this history would disregard the admonition of the Supreme Court that 'while the Constitution protects against invasions of individual rights, it is not a suicide pact.'"[115]

Even courts that have held other § 922 subsections unconstitutional have reached similar conclusions. For example, in *United States v. Harrison*, which involved a challenge to 18 U.S.C. § 922(g)(3),[116] the court determined that "[d]ispossession on the basis of a conviction for [a crime involving past violent, forceful, or threatening conduct] comports with the original public understanding of the scope of the right to keep and bear arms."[117] The court reached this conclusion based on evidence of historical laws "limiting the right to carry a firearm while actively intoxicated[,] . . . surety statutes that were enacted in a few states in the mid-to-late nineteenth century[,] . . . [and] [l]aws targeting those who engaged in rebellion."[118] Noting that these laws were all "justified on the grounds that such persons posed a danger to public safety," the court concluded that these laws "demonstrate that limitations on the right to armed self-defense 'were tied to dangerousness.'"[119] In addition, the court mentioned that "the past conduct of . . . a

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[113] *United States v. Bruner*, No. CR-22-518-SLP, 2023 WL 2653392, at *2 (W.D. Okla. Mar. 27, 2023); *United States v. Porter*, No. CR 22-00277, 2023 WL 2527878, at *2–4 (W.D. La. Mar. 14, 2023); *United States v. Smith*, No. 22-CR-20351, 2023 WL 2215779, at *3–4 (E.D. Mich. Feb. 24, 2023); *United States v. Gleaves*, No. 3:22-cr-00014, --- F. Supp. 3d ---, 2023 WL 1791866, at *4 (Feb. 6, 2023); *Hammond*, 2023 WL 2319321, at *7; *United States v. Farley*, No. 22-CR-30022, 2023 WL 1825066, at *3 (C.D. Ill. Feb. 8, 2023); *Bernard*, 2022 WL 17416681, at *8; *United States v. Anderson*, No. 21-cr-13, 2022 WL 10208253, at *1 (W.D. Va. Oct. 17, 2022); *United States v. Nutter*, No. 21-cr-00142, --- F. Supp. 3d ---, 2022 WL 3718518, at *6–7 (S.D. W. Va. Aug. 29, 2022); *Jackson*, 2022 WL 3582504, at *3; *see also United States v. Hoeft*, No. 4:21-CR-40163-KES, 2023 WL 2586030, at *6–7 (D. S.D. Mar. 21, 2023) (denying as-applied challenge to § 922(g)(9) as premature).

[114] *See, e.g.*, *Nutter*, 2022 WL 3718518, at *7 (citing Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U.L. REV. 1187, 1239 (2015); Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1377 (2009); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995)); *Porter*, 2023 WL 2527878, at *3.

[115] *Smith*, 2023 WL 2215779, at *4 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

[116] This subsection prohibits possession of firearms by those who are "unlawful user[s] of or addicted to any controlled substance" as defined by the federal Controlled Substances Act.

[117] 2023 WL 1771138, at *4.

[118] *Id.* at *15.

[119] *Id.* (quoting *Folajtar v. Att'y Gen.*, 980 F.3d 897, 913 (3d Cir. 2020) (Bibas, J., dissenting)).

domestic-violence misdemeanant[] can demonstrate that such a person poses a significant risk of causing public injury."[120]

Likewise, the Fifth Circuit's reasoning in *United States v. Rahimi*[121] does not negate comparisons between § 922(g)(9) and historical regulations that evince a tradition of restricting firearm possession by classes of individuals perceived as dangerous.[122] In *Rahimi*, the Fifth Circuit reviewed several historical analogues to 18 U.S.C. § 922(g)(8), which prohibits possession of firearms by individuals who are subject to a domestic violence restraining order.[123] The historical regulations proffered by the government were similar to those proffered in this case, including "English and American laws (and sundry unadopted proposals to modify the Second Amendment) providing for disarmament of 'dangerous' people[.]"[124] In rejecting these historical regulations as potential precursors to § 922(g)(8), the Fifth Circuit was careful to focus on § 922(g)(8)'s four "key features": "(1) forfeiture of the right to possess weapons (2) after a *civil* proceeding (3) in which a court enters a protective order based on a finding of a 'credible threat' to *another specific person*, or that includes a blanket prohibition on the use, of threatened use, of physical force, (4) in order to protect *that person* from domestic gun abuse."[125]

The Fifth Circuit's description of § 922(g)(8) highlights crucial differences between that statute and § 922(g)(9). Unlike § 922(g)(8), § 922(g)(9) affects individuals who have been convicted in a criminal proceeding and does not "work[] to eliminate the Second Amendment right of individuals subject merely to a civil process."[126] Moreover, laws disarming "dangerous" classes of people have more utility as historical analogues to § 922(g)(9) than to § 922(g)(8) because, as the Fifth Circuit found, the purpose of these laws "was ostensibly the preservation of political and social order, not the protection of an *identified person* from the threat of domestic gun abuse posed by *another individual*."[127] The Court therefore is not persuaded that the Fifth Circuit's reasoning in *Rahimi* applies to this case.

For the reasons above, the Court rejects Padgett's objection that the Magistrate Judge erroneously concluded that § 922(g)(9) comports with a historical tradition of restricting firearm possession by those legislatures have deemed to be dangerous. The Court therefore declines to modify the R&R on this basis.

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[120] *Id.*
[121] 61 F.4th 443 (5th Cir. 2023).
[122] *See* Dkt. 48; Dkt. 49.
[123] 61 F.4th at 456–61.
[124] *Id.* at 456.
[125] *Id.* at 455 (internal quotation marks omitted) (emphasis added).
[126] *See id.* at 455 n.7.
[127] *Id.* at 457 (citation and internal quotation marks omitted) (emphasis added).

D. Conclusion

The Court concludes that the Magistrate Judge correctly determined that 18 U.S.C. § 922(g)(9) is not unconstitutional as applied to Padgett. Accordingly, the Court **ACCEPTS AND ADOPTS** the R&R at Docket 44 and **DENIES** the Motion at Docket 24.

Entered at the direction of the Honorable Timothy M. Burgess, United States District Judge.

DATE: April 18, 2023.

APPENDIX E

UNITED STATES DISTRICT COURT

District of Alaska

UNITED STATES OF AMERICA

v.

JOEL MICHAEL RYNO

JUDGMENT IN A CRIMINAL CASE

(For **Supervised Release**)

Case Number: 3:22-CR-00045-001-JMK

USM Number: 04424-510

Gary George Colbath
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) Count 3 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(9)	Prohibited Peron in Possession of a Firearm	04/16/2011	3
18 U.S.C. §§ 924(d), 28 U.S.C. 2461(c), and Rule 32.2	Criminal Forfeiture Allegation	N/A	N/A

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

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 1 and 2 of the Indictment

☐ is ☒ are dismissed on the motion of the United States.

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

11/2/2023
Date of Imposition of Judgment

/s/ Joshua M. Kindred
Signature of Judge

Joshua M. Kindred, United States District Judge
Name and Title of Judge

11/7/2023
Date

DEFENDANT: JOEL MICHAEL RYNO
CASE NUMBER: 3:22-CR-00045-001-JMK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

37 MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:
Designation to FCI Sheridan.

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

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

☐ at _____ ☐ a.m. ☐ p.m. 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 2 p.m. on _____.

☐ as notified by the United States Marshal.

☒ as notified by the Probation or Pretrial Services Office.

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

DEFENDANT: JOEL MICHAEL RYNO
CASE NUMBER: 3:22-CR-00045-001-JMK

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 YEARS

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 the location where 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 additional conditions on the attached pages.

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.

DEFENDANT: JOEL MICHAEL RYNO
CASE NUMBER: 3:22-CR-00045-001-JMK

SPECIAL CONDITIONS OF SUPERVISION

1. In addition to submitting to drug testing in accordance with the Violent Crime Control and Law Enforcement Act of 1994, at the direction of the probation officer the defendant shall obtain a substance abuse assessment and participate in any recommended treatment. The treatment program must be approved by the United States Probation Office and the program must include testing to determine whether the defendant has reverted to the use of drugs or alcohol. At the direction of the probation officer, the defendant may be required to pay for all or a portion of any treatment program. In addition to urinalysis testing that may be a part of a formal drug treatment program, the defendant shall submit up to 12 urinalysis tests per month.

2. The defendant shall submit to a warrantless search of person, residence, vehicle, personal effects, place of employment, and other property by a Federal probation or pretrial services officer or other law enforcement officer, based upon reasonable suspicion of contraband or a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation of supervision.

3. At the direction of the probation officer the defendant shall obtain a mental health assessment and participate in any recommended mental health treatment. The treatment program must be approved by the United States Probation Office. At the direction of the probation officer, the defendant may be required to pay for all or a portion of any treatment program.

//

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 _____

_____ _____

DEFENDANT: JOEL MICHAEL RYNO
CASE NUMBER: 3:22-CR-00045-001-JMK

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	**$** 100.00	N/A	N/A	N/A	N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must 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 nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine 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 Sheet 6 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 requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

DEFENDANT: JOEL MICHAEL RYNO
CASE NUMBER: 3:22-CR-00045-001-JMK

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $100.00 due immediately, balance due

☐ not later than _____, or

☒ In accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

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

C ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Any unpaid amount is to be paid during the period of incarceration at a rate of 50% of wages earned while in the custody of the Bureau of Prisons and during the period of supervision in monthly installments of not less than 10% of the defendant's gross monthly income or $25, whichever amount is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, District of Alaska. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetary Penalties (Sheet 5) page.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: Defendant shall forfeit his interest in the items listed on page 7 of the Plea Agreement (Dkt. 69).

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.

APPENDIX F

UNITED STATES DISTRICT COURT

District of Alaska

UNITED STATES OF AMERICA

v.

ALEX LEON PADGETT

JUDGMENT IN A CRIMINAL CASE

(For **Supervised Release**)

Case Number: 1:23-CR-00006-001-TMB

USM Number: 94810-509

Gretchen L. Staft
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment (Dkt. 2)

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(9), 18 U.S.C. § 924(a)(2)	Possession of Firearms by Prohibited Person	07/20/2021	1
18 U.S.C. § 924(d), 28 U.S.C. § 2461(c), and Rule 32.2(a)	Criminal Forfeiture Allegation	N/A	N/A

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

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____

☐ is ☐ are dismissed on the motion of the United States.

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

9/19/2023
Date of Imposition of Judgment

/s/ Timothy M. Burgess
Signature of Judge

Timothy M. Burgess, United States District Judge
Name and Title of Judge

9/22/2023
Date

DEFENDANT: ALEX LEON PADGETT
CASE NUMBER: 1:23-CR-00006-001-TMB

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

TIME SERVED

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

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

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

☐ at _____ ☐ a.m. ☐ p.m. 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 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

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

DEFENDANT: ALEX LEON PADGETT
CASE NUMBER: 1:23-CR-00006-001-TMB

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 YEARS

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 the location where 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 additional conditions on the attached pages.

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.

DEFENDANT: ALEX LEON PADGETT
CASE NUMBER: 1:23-CR-00006-001-TMB

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to a warrantless search of person, residence, vehicle, personal effects, place of employment, and other property by a Federal probation or pretrial services officer or other law enforcement officer, based upon reasonable suspicion of contraband or a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation of supervision.

2. In addition to submitting to drug testing in accordance with the Violent Crime Control and Law Enforcement Act of 1994, at the direction of the probation officer the defendant shall obtain a substance abuse assessment and participate in any recommended treatment. The treatment program must be approved by the United States Probation Office and the program must include testing to determine whether the defendant has reverted to the use of drugs or alcohol. At the direction of the probation officer, the defendant may be required to pay for all or a portion of any treatment program. In addition to urinalysis testing that may be a part of a formal drug treatment program, the defendant shall submit up to 12 urinalysis tests per month.

3. The defendant shall complete 200 hours of community work service during and as a condition of supervised release.

4. The defendant shall participate in the home confinement program for a period of 6 months and shall abide by all the assigned components of the program, which will include electronic monitoring or other location verification system. Specifically, you are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; Court-ordered obligations; attorney visits and court appearances; or other activities as pre-approved by the probation officer.

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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 _____

_____ _____

DEFENDANT: ALEX LEON PADGETT
CASE NUMBER: 1:23-CR-00006-001-TMB

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	**$** 100.00	N/A	WAIVED	N/A	N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must 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 nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine 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 Sheet 6 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 requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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

DEFENDANT: ALEX LEON PADGETT
CASE NUMBER: 1:23-CR-00006-001-TMB

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $100.00 due immediately, balance due

☐ not later than _____, or

☒ In accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

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

C ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of $_____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Any unpaid amount is to be paid during the period of incarceration at a rate of 50% of wages earned while in the custody of the Bureau of Prisons and during the period of supervision in monthly installments of not less than 10% of the defendant's gross monthly income or $25, whichever amount is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, District of Alaska. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetary Penalties (Sheet 5) page.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: Defendant agrees to forfeit his interest in the firearms outlined in the Indictment (Dkt. 2).

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.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALEX LEON PADGETT, Defendant.	Case No. 3:21-cr-00107-TMB-KFR

FINAL REPORT AND RECOMMENDATION TO DENY MOTION TO DISMISS

The Court recommends denial of Defendant's Motion to Dismiss Count 1 of the Indictment pursuant to *New York Rifle & Pistol Association, Inc., v. Bruen*, 142 S. Ct. 2111 (2022) at Docket 24. The Court has reviewed Defendant's *Bruen*-based motion, the Government's Response in Opposition at Docket 28, and Defendant's Reply at Docket 31. The Court has also considered Defendant's Objections at Docket 41 to the Initial Report and Recommendation at Docket 36. The Court finds the Government has met its burden of establishing that 18 U.S.C. § 922(g)(9), unlawful possession of a firearm by an individual previously convicted of a misdemeanor domestic violence crime, as applied to Defendant, is consistent with this Nation's historical tradition of firearm regulation and therefore does not violate the Second Amendment.

I. Facts and Procedural History

The Grand Jury returned an indictment on November 17, 2021, charging Defendant, Alex Leon Padgett, with possession of firearms by a prohibited person, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2).[1] As alleged by the government, Defendant was prohibited from possessing firearms under federal law because of his

[1] Doc. 2. Section 922(g)(9) prohibits the possession of firearms or ammunition by anyone "who has been convicted in any court of a misdemeanor crime of domestic violence." Under § 924(A)(2), the maximum term of imprisonment for a violation of § 922(g)(9) is 10 years.

prior misdemeanor domestic violence conviction.[2] Specifically, the indictment alleges that Defendant had previously been convicted on January 13, 2010, of assault in the fourth degree, in violation of AS § 11.41.230(a)(1) imposed by the District Court of Alaska, Case No. 1SI-09-00139.[3] According to Defendant's motion, in July 2021, Defendant possessed two guns, a Ruger M77 Hawkeye .30-06, and a Glock 17 9mm, one of which he used to shoot and kill a bear on his property and the other he had for personal protection.[4]

The Court arraigned Defendant on April 4, 2022, and ordered him released pending trial.[5] On September 30, 2022, Defendant filed this Motion to Dismiss. The Government responded in opposition on October 14, 2022.[6] Defendant replied on October 28, 2022.[7] The parties did not request oral argument. The Court finds the parties have sufficiently briefed the issue and that oral argument is not necessary.

Defendant's motion makes an as-applied challenge to 18 U.S.C. § 922(g)(9). Defendant asserts that the statute burdens his Second Amendment right to keep and bear arms. Defendant argues that he is among those presumptively protected by the Second Amendment, and that, pursuant to *Bruen*, the Government cannot meet its burden to identify a historical tradition that would have prohibited people with domestic violence misdemeanor convictions from possessing firearms.[8]

The Government argues that 18 U.S.C. § 922(g)(9) is constitutional as-applied to Defendant. The government states that the plain text of the Second Amendment does not cover individuals like Defendant because those convicted of misdemeanor crimes of domestic violence were outside the framer's conception of "the people" entitled to keep and bear arms. The government also argues that even if the Second Amendment protects Defendant, the statute is constitutionally permissible because

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[2] *Id.*
[3] *Id.*
[4] Doc. 24 at 8.
[5] Doc. 17.
[6] Doc. 28.
[7] Doc. 31.
[8] Doc. 24 at 36-37.

regulations analogous to Section 922(g)(9) that prohibited criminals and others deemed by the state as not law-abiding from possessing firearms existed at the time of the Second Amendment's adoption.[9]

II. Applicable Law

a. Federal Rule of Criminal Procedure 12(b)(3)

Rule 12(b)(3) of the Federal Rules of Criminal Procedure permits a defendant to challenge an indictment before trial where a "trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense."[10] "An indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true."[11] Here, Defendant does not dispute that the Indictment states an offense under § 922(g)(9), but instead challenges the statute as unconstitutional as applied to him. This issue can properly be decided as a matter of law before trial.[12]

b. 18 U.S.C. § 922(g)(9)

Section 922(g)(9) provides that it shall be unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce, any firearm or ammunition." A "misdemeanor crime of domestic violence" is defined as (1) "a misdemeanor under Federal, State, Tribal, or local law"; and (2)

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim."[13]

It is undisputed that Defendant's 2010 conviction of misdemeanor domestic violence

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[9] Doc. 28 at 11.
[10] *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010).
[11] *United States v. Todd*, 446 F. 3d 1062, 1067 (10th Cir. 2006).
[12] *United States v. Jackson*, -- F.Supp.3d --, 2022 WL 3582504, at *1 (W.D. Okla., 2022).
[13] 18 U.S.C. § 921(a)(33)(A)(i), (ii).

meets these criteria.

c. As-Applied Challenge

The distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court."[14] "[I]t does not speak at all to the substantive rule of law necessary to establish a constitutional violation," and therefore the same substantive constitutional analysis applies.[15]

III. Second Amendment Jurisprudence Prior to *Bruen*

The Second Amendment provides that "[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."[16] Like other constitutionally protected rights, the right to bear arms is "subject to certain reasonable, well-defined restrictions."[17] In other words, "[l]ike most rights, the right secured by the Second Amendment is not unlimited."[18]

In *District of Columbia v. Heller*, the Supreme Court extensively reviewed the pre- and post-Second Amendment history of firearms rights in the United States, and ultimately held that Washington, D.C.'s ban on handgun possession within the home violated the Second Amendment.[19] The Court highlighted the presumptive lawfulness of such regulatory measures described under 922(g), and stated "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[20] The Court also cautioned that it was not performing an "exhaustive historical analysis" of the full scope of the Second

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[14] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).
[15] *Bucklew v. Precythe, -- U.S. --*, 139 S. Ct. 1112, 1127 (2019); *see also Gross v. United States*, 771 F.3d 10, 14-15 (D.C. Cir. 2014) ("[T]he substantive rule of law is the same for both challenges."); *United States v. Coombes*, -- F.Supp.3d --, --, 2022 WL 4367056, at *10 (N.D. Okla., 2022).
[16] U.S. Const. amend. II.
[17] *Bruen*, 142 S. Ct. at 2156 (citing *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)).
[18] *Heller*, 554 U.S. at 626.
[19] *Id.* at 635.
[20] *Id.* at 626.

Amendment.[21] Two years later, in *McDonald v. City of Chicago*, the Court reiterated that same sentiment, stating, "[w]e made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures."[22]

The Ninth Circuit has recognized, and perhaps more clearly elaborated on the intention behind the category of "felons" described in *Heller*, noting that "the historical question has not been definitively resolved,"[23] however,

> most scholars of the Second Amendment agree that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]' that would protect society through 'defensive use of arms against criminals, oppressive officials, and foreign enemies alike,' and that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals).'[24]

Justice Barrett, while on the Seventh Circuit Court of Appeals agreed with this analysis. Writing in dissent in *Kanter v. Barr,* then-Judge Barrett wrote in her dissent that "history is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."[25] Although she disagreed with the panel majority's conclusion that even nonviolent felons may categorically "lose their Second Amendment rights solely because of their status as felons," then-Judge Barrett reasoned that history "does support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous."[26]

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[21] *Id.*

[22] 561 U.S. 742, 786 (2010) (quoting *Heller*, 554 U.S. at 626–27).

[23] *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 714–28 (2009) (maintaining that bans on felon gun possession are neither long-standing nor supported by common law in the founding era)).

[24] *Id.* (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 L. & Contemp. Probs. 143, 146 (1986)) (citations omitted) (hereinafter "Kates"); *see also* Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L.Rev. 461, 480 (1995) (hereinafter "Reynolds") (noting that felons "were excluded from the right to arms" because they were "deemed incapable of virtue").

[25] 919 F.3d 437, 451 (7th Cir. 2019), abrogated by *Bruen*, 142 S. Ct. 2111 (2022) (Barrett, J., dissenting).

[26] *Id.* at 464.

Under *Heller*, the Ninth Circuit as well as courts across the country consistently held that the Second Amendment's protections did not extend to the possession of firearms by felons or other non-law abiding citizens, including those convicted in any court of a misdemeanor crime of domestic violence.[27] In these courts' views, individuals with prior convictions for domestic violence crimes have proven themselves to be dangerous persons who are likely to recidivate and put their victims at risk.[28] Accordingly, there was a significant government interest in keeping firearms away from domestic violence misdemeanants that outweighed those individuals' right to keep and bear arms.

IV. *Bruen* Framework

After *Heller*, courts used a two-step test when considering whether a statute or regulation comported with the Second Amendment.[29] In *Bruen*, however, the Supreme Court held that the two-step test was "one step too many"[30] and instead announced a single-step analysis for firearms regulations: when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify any limit on an individual's right to keep and bear arms, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.[31] Simply positing that the regulation promotes an important interest is insufficient.[32]

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[27] *See United States v. Chovan,* 735 F.3d 1127, 1142 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154, 168 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011*); In re U.S.*, 578 F.3d 1195, 1200 (10th Cir. 2009); *United States v. Rogers,* 371 F.3d 1225, 1228–29 (10th Cir. 2004); *see also United States v. Hayes,* 555 U.S. 415 (2009) (discussing congressional purpose in enacting statute*)*.

[28] *See Chovan*, 735 F.3d at 1040-41.

[29] *See Bruen*, 142 S. Ct. at 2126–27 for a discussion of the two-step analysis.

[30] *Id*. at 2127.

[31] *Id*. at 2126.

[32] *Id*.

a. Constitutionality of § 922(g)(9) Post-*Bruen*

i. Prior Cases Interpreting § 922(g)(9) Are Clearly Irreconcilable with *Bruen*.

Cases within the Ninth Circuit after *Heller* but prior to *Bruen* upheld the Constitutionality of § 922(g)(9).[33] This Court is bound by these Ninth Circuit precedents unless they are "effectively overruled," which occurs when "the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority."[34] "The clearly irreconcilable requirement is a high standard."[35] "[I]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent."[36]

As explained below, while articulating a new framework for review of any gun regulation, *Bruen* did not effectively overrule *Heller* and post-*Heller* precedent. District Court's within the Ninth Circuit have used this fact to deny challenges to § 922(g)(1).[37] The holdings in these cases that Ninth Circuit precedent as it relates to § 922(g)(1) has not changed post-*Bruen* is largely due to the fact that the reasoning in these precedential felon-in-possession cases relied heavily on the Ninth Circuit's "examination…of historical gun restrictions."[38] This historical analysis in the context of § 922(g)(1) is not "clearly irreconcilable with the reasoning or theory" of *Bruen*."[39]

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[33] *See Fisher v. Kealoha*, 855 F.3d 1067, 1070-71 (9th Cir. 2017); *see also Chovan*, 735 F.3d at 1127.

[34] *Miller v. Gammie*, 335 F.3d 889, 890, 893 (9th Cir. 2003) (en banc).

[35] *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018) (quotation omitted).

[36] *Id.* (quotation omitted).

[37] *See United States v. Hill*, -- F.Supp.3d --, --, 2022 WL 4361917 (S.D. Cal. September 20, 2022); *see also United States v. Butts*, 2022 WL 16553037 (D. Mont. October 31, 2022); *United States v. Carleson*, No. 3:22-cr-00032-SLG (D. Alaska October 28, 2022); *United States v. Ridgeway*, 2022 WL 10198823 (S.D. Cal. October 17, 2022); and *United States v. Siddoway*, 2022 WL 4482739 (D. Idaho September 27, 2022), all relying on *Hill* to deny challenge to § 922(g) (1) prosecution.

[38] *Hill*, -- F.Supp.3d at --, 2022 WL 4361917, at *2; *see also* Supra at 24.

[39] *Hill*, -- F.Supp.3d at --, 2022 WL 4361917, at *3 (citing *Miller*, 335 F.3d at 893).

The conclusion does not apply to § 922(g)(9). This is so because unlike the reasoning described above, post-*Heller* and pre-*Bruen* § 922(g)(9) cases in the Ninth Circuit did not rely on a historical framework to uphold the dispossession of misdemeanor domestic violence defendants.[40] Indeed, in *Chovan*, the Ninth Circuit expressly stated that "because of 'the lack of historical evidence in the record, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors."[41] Because of this fact, the analysis relied on the two-part test disavowed in *Bruen*, and application of intermediate scrutiny to conclude that § 922(g)(9) is constitutional because it "is supported by an important government interest and substantially related to that interest[.]"[42]

Neither party briefed the issue of the continued viability of pre-*Bruen* precedent. Nonetheless, the Court finds that the two-part intermediate scrutiny test relied on by *Chovan* is clearly irreconcilable with *Bruen*'s rejection of such "means-end scrutiny."[43] As such, the Court finds that it is relieved of its obligation to follow otherwise binding Circuit precedent as it relates to its analysis of 18 U.S.C. § 922(g)(9).

ii. The Plain Text of the Second Amendment Likely Does Not Cover Defendant's Conduct.

The Second Amendment protects "the right of the people to keep and bear Arms[.]" However, "the Founders understood that not everyone possessed Second

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[40] *See United States v. Nutter*, -- F.Supp.3d —, --; 2022 WL 3718518, at *4 (S.D. W.Va. August 29, 2022) ("Because that [binding 4th Circuit] precedent relied in part upon the means-ends scrutiny rejected in *Bruen*, the Court finds that *Bruen* "constitutes an intervening decision that relieves this Court of its obligation to follow" otherwise binding Circuit precedent.") (citations omitted).

[41] 735 F.3d at 1137.

[42] *Chovan*, 735 F.3d at 1141; *see also Kealoha*, 855 F.3d at 1070-71. ("Thus, under intermediate scrutiny, the statute addressed a substantial governmental interest and was tailored sufficiently to satisfy intermediate scrutiny.") (citation omitted).

[43] *Bruen*, 142 S.Ct. at 2127.

Amendment rights."[44] Cases interpreting *Bruen* in the context of § 922(g)(1) have held that "the people" do not include those convicted of felonies.[45]

The government seeks to extend this limitation on "the people" to domestic violence misdemeanants, arguing that such individuals by virtue of their convictions "are neither 'law-abiding' or 'responsible,'" and are therefore not part of the "virtuous citizenry" permitted by the Second Amendment to carry weapons.[46] Defendant argues that the Second Amendment's reference to "the people" includes everyone, and does not distinguish between law-abiding individuals and others.[47]

Like § 922(g)(1), § 922(g)(9) is a status-based offense. As a result, critical to any post-*Bruen* analysis of the statute is a determination of who is among "the people" protected by the Amendment. Despite its change to the Second Amendment's analytical framework, nothing in *Bruen* indicates that the Supreme Court repudiated its earlier pronouncements that the Second Amendment's protections do not extend to those convicted of a misdemeanor crime of domestic violence.[48] The focus in

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[44] *Binderup v. Attorney General*, 836 F.3d 336, 357 (3rd Cir. 2016); *see also United States v. Quiroz*, -- F.Supp.3d --, --, 2022 WL 4352482, at *10 (W.D. Tex. Sept. 19, 2022) (explaining "this Nation does have a historical tradition of excluding specific groups from the rights and powers reserved to 'the people' ").

[45] *Range v. Attorney General United States*, -- F.4th --, --, 2022 WL 16955670, at *5 (3rd Cir. November 16, 2022) ("Our assessment confirms that individuals like Range, who commit felonies and felony-equivalent offenses, are not part of 'the people' whom the Second Amendment protects."); *see also United States v. Young*, 2022 WL 16829260 (W.D. Penn. November 7, 2022) ("In other words, as the Government contends, and this Court agrees, *Bruen*, *Heller* and *McDonald* dictate that Defendant's alleged conduct does not fall within the scope of the Second Amendment's protections due to his felony drug convictions."); *United States v. Riley*, -- F.Supp.3d --, --, 2022 WL 7610264, *10 (E.D.Va. October 13, 2022) ("A plain reading of the text demonstrates that "the people" remains limited to those within the political community and not those classified as felons."); *United States v. Collette*, -- F.Supp.3d --, --, 2022 WL 4476790 (W.D. Tex. September 25, 2022); but see *United States v. Carrero*, -- F.Supp.3d --, --, 2022 WL 9348792 (D. Utah October 14, 2022); *Coombes*, -- F.Supp.3d --, -- , 2022 WL 4367056, at *4.

[46] Doc. 28 at 6.

[47] Doc. 24 at 13-15.

[48] *Voisine v. United States*, 579 U.S. 686, 695 (2016).

Bruen was on "regulations impacting law-abiding citizens."[49] To the *Bruen* court, those "law-abiding citizens" were the individuals – "the people" - who held a Second Amendment right to possess firearms.[50]

Furthermore, *Bruen* does not displace *Heller*, which twice described status-based proscriptions on firearms possession by felons as both "long-standing" and "presumptively lawful."[51] Writing for the *McDonald* plurality, Justice Alito "repeat[ed] those assurances."[52] Indeed, *Bruen*'s holding is prefaced with "in keeping with *Heller*."[53] To conclude that *Bruen* dramatically altered the *Heller* landscape "would nullify *Bruen*'s careful attempts to clarify, 'reiterate,' and 'keep[ ] with *Heller*' and instead go toward dismantling 'the people' analysis that undergirds the *Heller* principles driving *Bruen*."[54] Because of this fact, *Bruen* clearly does not undermine prior holdings that felons are not among "the people" protected by the Second Amendment.[55] The concurring and dissenting opinions in *Bruen* all acknowledge as much.[56]

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[49] *Nutter*, -- F.Supp.3d at --, 2022 WL 3718518, at *4 (noting that such regulations "have a longstanding history."). In his opinion for the court, Justice Thomas describes the Plaintiffs in *Bruen* as "law-abiding, adult citizens," and uses the law-abiding qualifier no less than 11 separate times to discuss the nature of the right at issue.

[50] *Range*, -- F.4th at --, 2022 WL 16955670, at *5.

[51] *Heller*, 554 U.S. at 626–27 & n.26, 128; *see also Riley*, -- F.Supp.3d at --, 2022 WL 7610264, at *10; *see also United States v. Ingram*, -- F.Supp.3d -- , --, 2022 WL 3691350, at *2 (D.S.C. Aug. 25, 2022) ("The Court agrees with the government that *Bruen* clarified and 'reiterated[,]' rather than modified, the constitutional ruling in *Heller*, in the face of lower court rulings that failed to comport with its intended holding.").

[52] 561 U.S. at 786, 130 S.Ct. 3020.

[53] *Bruen*, 142 S.Ct at 2126,

[54] *Riley*, -- F.Supp.3d at --, 2022 WL 7610264, at *10 (comparing *Bruen*'s focus on law-abiding citizens immediately prior to making the overarching holding that, "consistent with *Heller* and *McDonald*, [ ] the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home") with *Heller* noting that the "the people" in the Second Amendment matches "the people" mentioned in six other provisions of the Constitution; "the term unambiguously refers to all members of the political community").

[55] *Range*, -- F.4th at --, 2022 WL 16955670, at *6.

[56] *See Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Nor have we disturbed anything that we said in *Heller* or *McDonald* ... about restrictions that may be imposed on the possession or carrying of guns."); *id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring)

There is a strong argument to be made based upon *Bruen*'s repeated references to "law-abiding citizens" that the Second Amendment's exclusion from "the people" includes those convicted of misdemeanors crimes of domestic violence. "[T]his Nation has a historical tradition of excluding felons *and those who abuse their rights to commit violence* from the rights and power of 'the people[.]'"[57] As detailed below, such exclusions were not limited to only those convicted of felonies.[58]

This conclusion is also supported by *Bruen*'s distinction between "may issue" and "shall issue" gun licensing regimes. All parties in *Bruen* agreed that the carrying of handguns publicly for self-defense by "ordinary, law-abiding citizens" was permissible.[59] The issue in *Bruen* was not the unfettered right of "ordinary, law-abiding citizens" to carry guns openly, but the limits of New York State's "may issue" licensing regime as it relates to those weapons. *Bruen* specifically did not call into question "shall issue" licensing regimes used in 43 states that "often require applicants to undergo a background check or pass a firearms safety course...[to] ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[60] That such "shall issue" schemes - which could deny someone a firearm if a background check determined they were not "law-abiding" - were expressly countenanced in *Bruen* necessarily indicates that the Court's

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("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations," including 'longstanding prohibitions on the possession of firearms by felons[.]' " (quoting *Heller*, 554 U.S. at 626, 128 S.Ct. 2783)); *see id.* at 2189 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting) ("I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding [of those firearm regulations deemed 'presumptively lawful'].").

[57] *Collette*, -- F.Supp.3d at -- , 2022 WL 4476790, at *7 (emphasis added).

[58] *Skoien*, 614 F.3d at 640 (discussing The Address and Reasons of Dissent of the minority of the Convention of the State of Pennsylvania to Their Constituents (1787) reprinted in Bernard Schwartz, 2 *The Bill of Rights: A Documentary History* 662, 665 (1971) (hereinafter "Schwartz"), which *Heller* identified as a "highly influential" "precursor" to the Second Amendment and provided that citizens may bear arms "unless for crimes committed, or real danger of public injury"); *id.* ("Many of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime.").

[59] *Bruen* 142 S. Ct. at 2122.

[60] *Id.* at 2138 n.9.

conception of "the people" distinguishes between those who are "law-abiding" and those who are not.[61]

Furthermore, Section 922(g)(9) contains significant procedural safeguards to narrow the class prohibited from possessing firearms to those convicted, after receiving due process of law, of domestic violence offenses with an element requiring the use or attempted use of physical force or threatened use of a deadly weapon.[62] It makes little sense to exclude from "the people" those who commit a non-violent felony, as *Bruen* repeatedly does,[63] but include within it those whose convictions necessarily require the use of force or a threatened use of a deadly weapon. Such individuals are precisely not the "loyal and well-disposed inhabitants" *Bruen* includes within the Second Amendment's protections.

Nonetheless, the Court declines to find that the plain text of the Second Amendment does not cover domestic violence misdemeanants. This is so for two reasons. First, the Ninth Circuit has previously rejected arguments that "domestic violence misdemeanants...have historically been restricted from bearing arms."[64] As a result, domestic violence misdemeanants are "entitled to some measure of Second Amendment protection to keep and bear arms."[65] Second, such a finding is

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[61] *See e.g., Range*, -- F.4th at --, 2022 WL 16955670, at *6 ("These criminal background checks that the Court indicated are constitutional are not limited to violent offenses; shall-issue statutes typically disqualify any person "prohibited from possessing a firearm under federal law." (citing Wash. Rev. Code Ann. § 9.41.070(1)(a) (2021); accord Colo. Rev. Stat. Ann. § 18-12-203(1)(c) (2021); Kan. Stat. Ann. § 75-7c04(a)(2) (2021); Miss. Code. Ann. § 45-9-101(2)(d) (2022); N.H. Rev. Stat. Ann. § 159:6(I)(a) (2021); N.C. Gen. Stat. Ann. § 14-415.12(b)(1) (2022)).

[62] 18 U.S.C. § 921(a)(33)(A)(ii).

[63] *See supra* 56.

[64] *Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013). While the holding in *Chovan* is no longer of precedential value in light of its conflict with *Bruen*, *see* supra, the Court still acknowledges the reasoning for that holding.

[65] *Id.*; *see also Jackson*, -- F.Supp.3d at --, 2022 WL 3582504, at *3 ("[T]he Court must determine whether the Second Amendment's plain text covers Defendant's conduct and, if so, whether the government has demonstrated that § 922(g)(9) is consistent with the United States' historical tradition of firearm regulation. The Court concludes that the answer to the first question is yes.").

unnecessary because, as articulated below, the Court finds that government has met its burden of demonstrating that § 922(g)(9) is part of the historical tradition of firearms regulation.

iii. A Prohibition Against Possession of Firearms by Those Convicted of Domestic Violence Crimes Is Consistent with the Nation's Historical Traditions.

Even if the Court were to determine that the plain text of the Second Amendment covered Defendant's conduct, Defendant's motion to dismiss must still fail. This is because the government has met its burden of demonstrating that Section 922(g)(9) is a "regulation [that] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[66] The Court finds that a prohibition on the rights of those convicted of misdemeanor crimes of domestic violence is "consistent with the Second Amendment's text and historical understanding."[67]

Regulations affecting the rights of those who have engaged in criminal conduct or who possessed characteristics that make them a danger in the eyes of the elected legislature "have a longstanding history."[68] Such laws are not inconsistent

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[66] *Bruen*, 142 S.Ct. at 2127.

[67] *Id.* at 2131.

[68] The Court notes, as the government does, that this history is sometimes ugly. At the time of the country's founding, there were "complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race" as well as people who "refused to swear loyalty oaths." Adam Winkler, Heller's *Catch-22*, 56 UCLA L. Rev. 1551, 1562–63 (2009) (hereinafter "Winkler"); *see also* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1239 (2015) ("[H]istory suggests that when the legislature restricts the possession of firearms by discrete classes of individuals reasonably regarded as posing an elevated risk for firearms violence, prophylactic regulations of this character should be sustained."); Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1377 (2009) (hereinafter "Larson") (citing historical examples for the proposition that "any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms.' "); Reynolds at 480 (application of the Second Amendment limited to "virtuous" citizens); Schwartz at 681 (Samuel Adams offered an unadopted amendment at the Massachusetts convention to

with "founding-era legislatures [who] categorically disarmed groups whom they judged to be a threat to the public safety."[69] Nothing in *Bruen* changes this fact.

Section 922(g)(9) criminalizes the possession of guns by individuals Congress has determined are dangerous.[70] Such concerns are well-supported by empirical evidence and statistics regarding domestic violence, recidivism by those convicted of misdemeanor crimes of domestic violence, and increased risks of serious harm and death posed when firearms are present in connection with domestic violence.[71] Moreover, allowing persons convicted of domestic violence crimes to possess firearms runs blatantly against the public safety goals of the Second Amendment, and the inherent desire to protect innocent, law abiding citizens – such as domestic violence victims - from criminals who would do them harm.[72] As the government pointed out in its opposition, "Congress sought [through § 922(g)(9)] to 'close this dangerous loophole' and 'establish [] a policy of zero tolerance when it comes to

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ratify the Constitution in which he recommended "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; *or to prevent the people ... who are peaceable citizens, from keeping their own arms* ... or to prevent the people from petitioning, in a peaceable and orderly manner ... or to subject the people to unreasonable searches and seizures" (emphasis added)).

[69] *Kanter*, 919 F.3d at 458 (7th Cir. 2019) (Barrett, J., dissenting); *see also* Doc. 28 at 9 (citing *Scarborough v. United States*, 431 U.S. 563, 572 (1977)).

[70] *See Hayes*, 555 U.S. at 426 (describing the Congressional statement that "'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies,'" and stating that "[b]y extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of § 922(g)(9) sought to 'close this dangerous loophole.'") (citations omitted).

[71] *See Id.* ("Firearms and domestic strife are a potentially deadly combination nationwide.") (citing Brief for Brady Center To Prevent Gun Violence et al. as Amici Curiae 8–15; Brief for National Network To End Domestic Violence et al. as Amici Curiae 2–8.); *see also Staten*, 666 F.3d at 161–67 (outlining the legislative purpose and empirical evidence supporting the § 922(g)(9) prohibition).

[72] *Bruen*, 142 S. Ct. 2111, 2145; *see also Booker*, 644 F.3d at 25 ("[K]eeping guns away from people who have been proven to engage in [domestic] violence ... is undeniably important." *1140 (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.")).

guns and domestic violence.'"[73]

Defendant states that there is no historic tradition in this case because there were no laws in the 18th Century prohibiting possession of firearms by those convicted of domestic violence.[74] However, this argument ignores two things. First, *Bruen* does not require "a historical twin" to find a regulation valid, only that the regulation have a "well-established and representative historical *analogue*."[75]

As detailed above, such historical analogues exist. While there may not have been a colonial equivalent of 18 U.S.C. § 922(g)(9), the historical record demonstrates that the regulation of individuals deemed dangerous by the legislature - like those who commit domestic violence crimes – was prevalent.[76] There was significant regulation of firearms in colonial America "designed to ensure responsible and safe gun ownership."[77] *Bruen* itself describes laws in founding-era Virginia, Massachusetts, and Tennessee that prohibited the carrying of weapons by those who "bear[] arms in a way that spreads 'fear' or 'terror' among the people."[78] Other founding-era regulations varied from the mundane, such as registration and safety requirements, to what is now rightly considered abhorrent - "complete bans on gun ownership by free blacks, slaves, Native Americans, and those of mixed race" and people who "refused to swear loyalty oaths."[79] Localized authority existed to

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[73] Doc. 28 at 10 (quoting *Booker*, 644 F.3d at 16 (internal quotation marks omitted) (emphasis added)).

[74] Doc. 24 at 23-26.

[75] *Bruen*, 142 S.Ct. at 2133 (emphasis in original).

[76] Doc. 28 at 10; *see also Hayes*, 555 U.S. at 427 ("As of 1996, only about one-third of the States had criminal statutes that specifically proscribed *domestic* violence.") (citation omitted). The absence of historical precedent may also be a result of the limited role women were allowed to play at the time of the drafting of the Second Amendment. "The absence of stronger laws may reflect the fact that the group most impacted by domestic violence lacked access to political institutions, rather than a considered judgment about the importance or seriousness of the issue." *Nutter*, -- F.Supp.3d at --, 2022 WL 3718518, at *5.

[77] *Id.* at --, *6.

[78] *Bruen*, 142 S. Ct. at 2144-45.

[79] Winkler at 1562–63 (2009); *see also* Doc. 28 at 13 (citing *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012); Robert

disarm or confine the mentally ill.[80] Section 922(g)(9) fits within this Nation's "historical tradition of excluding felons and those who abuse their rights to commit violence from the rights and power of 'the people[.]'"[81]

Second, it would lead to absurd results to suggest that only people convicted of crimes with exact historical analogues can be prohibited from possessing firearms. It makes no sense to preclude individuals who commit the modern-day equivalent of "affray or 'going armed to the terror of the people'"[82] from possessing a gun, but not someone who commits cyberstalking, a crime that can be equally terrifying but, because of that fact that the technology necessary to commit the crime was developed 200 years after the American Revolution, has no precise historical antecedent. *Bruen* recognizes this tension and specifically commands courts to use "analogical reasoning…to apply faithfully the balance struck by the founding generation to modern circumstances[.]"[83] Analogical reasoning supports the Court's finding.

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H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 157-60 (2007); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506-08 (2004) ("The law demonstrates that in a well-regulated society, the state could disarm those it deemed likely to disrupt society.").

[80] Larson at 1377 (2009) (citing authority for justices of the peace to confine the mentally ill).

[81] *Collette*, -- F.Supp.3d at -- , 2022 WL 4476790, at *7; *see also Binderup*, 836 F.3d at 349 ("The view that anyone who commits a serious crime loses the right to keep and bear arms dates back to our founding era."), abrogated on other grounds by *Bruen*; *Skoien*, 614 F.3d at 640 (discussing "Schwartz", which *Heller* identified as a "highly influential" "precursor" to the Second Amendment and provided that citizens may bear arms "unless for crimes committed, or real danger of public injury"); *id.* ("Many of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime.")

[82] *Bruen*, 142 S.Ct at 2145.

[83] *Id.* at 2133 n.7.

b. The Findings and Recommendations Are Consistent with the Overwhelming Majority of Court's to Have Considered § 922(g) Post-*Bruen*.

The court is unaware of any court in the Ninth Circuit that has analyzed § 922(g)(9) after *Bruen*. However, three out-of-circuit district courts have considered the constitutionality of the statute post-*Bruen*. In each instance, the Court upheld the statute and denied motions to dismiss.

In *United States v. Nutter*, the Court noted the importance of "the Supreme Court's repeated invocation of 'law-abiding citizens' in its recent Second Amendment jurisprudence," and found support for the statute in the historical tradition of laws prohibiting certain categories of persons from possessing firearms in the interest of public safety.[84] These historical categories were not limited to felons, but extended more broadly to "groups identified as dangerous," "classes of individuals reasonably regarded as posing an elevated risk for firearms violence," and "any person viewed as potentially dangerous."[85] As stated in *Nutter*, "[n]othing in the historical record suggests a popular understanding of the Second Amendment at the time of the founding that extended to preserving gun rights for groups who pose a particular risk of using firearms against innocent people."[86]

In similarly upholding the constitutionality of § 922(g)(9), the court in *United States v. Jackson* reasoned that "domestic violence misdemeanants can be viewed" as sufficiently similar to felons to permit prohibition for the same reasons, and relied on *Heller* for the proposition that disarming felons is not inconsistent with the Second Amendment.[87] The court also recognized that "the Supreme Court has repeatedly addressed the reach of § 922(g)(9) without questioning its

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[84] -- F.Supp.3d at --, 2022 WL 3718518, at *7-8.
[85] *Id.* at *7 (citations omitted).
[86] *Id.* at *8.
[87] -- F.Supp.3d at --, 2022 WL 3582504, at *3.

constitutionality."[88] The court in *United States v. Anderson* likewise upheld the constitutionality of § 922(g)(9) and its analogues under the Second Amendment.[89]

In addition, the Court's finding is consistent with the only appellate case to have thus far interpreted *Bruen*. In *Range v. Attorney General of the United States*, the Third Circuit upheld the constitutionality of § 922(g)(1), first holding that "the people" constitutionally entitled to bear arms are the "'law-abiding, responsible citizens' of the polity, a category that properly excludes those who have demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses, whether or not those crimes are violent."[90] The Third Circuit then went on to hold that even if the plain text of the Second Amendment covered the defendant's conduct, the government had met its burden of demonstrating that § 922(g)(1) was consistent with historical tradition.[91]

Nearly all district courts interpreting other prohibitions within § 922(g) post-*Bruen* have similarly found them constitutional under the Second Amendment. In dismissing challenges to § 922(g)(1) (felon in possession), § 922(g)(3) (possession of a firearm by users of controlled substances), § 922(g)(8) (possession of firearm by individual subject to domestic violence harassment order), and § 922(k) (possession of a firearm without a serial number), the courts overwhelmingly relied on the fact that the *Bruen* focuses its attention on "law-abiding citizens" to either conclude that those who had previously committed crimes were outside the amendment's conception of "the people," or that the statutes were within the Nation's historic tradition.[92] To date, the only cases identified by this Court that

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[88] *Id.* (citing *Voisine*, 579 U.S. at 692).
[89] *Anderson*, 2022 WL 10208253, at *1.
[90] *Range*, -- F.4th at --, 2022 WL 16955670.
[91] *Id.*
[92] *United States v. Teerlink*, 2022 WL 17093425 (D. Utah November 21, 2022); *United States v. Hill*, 2022 WL 17069855 (S.D. Tex. November 17, 2022); *Carleson*, No. 3:22-cr-00032-SLG (D. Alaska October 28, 2022); *Carrero*, -- F.Supp.3d at --, 2022 WL 9348792, at *1; *United States v. Price*, -- F. Supp. 3d --, --, 2022 WL 6968457, at *8 (S.D.W.Va. Oct. 12, 2022)

have granted relief post-*Bruen* involve cases charging individuals under indictment, who have not yet been convicted of a crime and are presumptively innocent, with possession of a firearm in violation of § 922(g),[93] and a single case finding § 922(g)(8) unconstitutional.[94]

(applying *Bruen* to find § 922(k)—a statute that makes possessing a firearm without a clear serial number illegal—unconstitutional while upholding § 922(g)(1)); *United States v. Daniels*, -- F.Supp.3d --, --, 2022 WL 5027574 (W.D.N.C. Oct. 4, 2022); *Ingram*, -- F.Supp.3d at --, 2022 WL 3691350, at *2; *United States v. King*, -- F.Supp.3d --, --, 2022 WL 5240928, at **4-5 (S.D.N.Y. Oct. 6, 2022); *United States v. Charles*, -- F.Supp.3d --, --, 2022 WL 4913900, at *12 (W.D. Tex. Oct. 3, 2022); *United States v. Harper*, -- F.Supp.3d --, 2022 WL 4595060 (N.D. Iowa Sept. 30, 2022); *United States v. Seiwert*, -- F.Supp.3d --, --, 2022 WL 4534605 (N.D. Ill. Sept. 28, 2022) (rejecting challenge of 922(g)(3) under *Bruen*); *United Siddoway*, -- F.Supp.3d --, --, 2022 WL 4482739 (D. Idaho Sept. 27, 2022); Order, *United States v. Jaime Perez*, No. 3:21-cr-508 (S.D. Cal. Sept. 26, 2022), Dkt. 78; *Collette*, -- F.Supp.3d at --, 2022 WL 4476790, at *5; Order, *United States v. Michael Angelo Delpriore, Jr.*, No. 3:18-cr-136-SLG (D. Alaska Sept. 23, 2022), Dkt. 314; *Coombes*, -- F.Supp.3d at --, 2022 WL 4367056, at *7; *Hill*, -- F.Supp.3d at --, 2022 WL 4361917; *United States v. Jackson*, -- F.Supp.3d --, --, 2022 WL 4226229, at *2 (D. Minn. Sept. 13, 2022); *United States v. Cockerham*, -- F.Supp.3d --, --, 2022 WL 4229314, at *2 (S.D. Miss. Sept. 13, 2022); Minute Entry, *United States v. Justin Patterson*, No. 7:19-cr-231 (S.D.N.Y. Sept. 9, 2022) (memorializing bench ruling); *United States v. Burrell*, -- F.Supp.3d --, --, 2022 WL 4096865, at *3 (E.D. Mich. Sept. 7, 2022); Order, *United States v. Vertis Alvin Nevens*, No. 2:19-cr-774 (C.D. Cal. Aug. 15, 2022), Dkt. 121; Minute Entry, *United States v. Maurice Deshawn Farris*, No. 1:22-cr-149 (D. Colo. Aug. 12, 2022), Dkt. 29; *Cf. United States v. Perez-Garcia*, -- F.Supp.3d --, --, 2022 WL 4351967 (S.D. Cal. Sept. 18, 2022) (rejecting defendant's motion to modify conditions of pre-trial release to permit him to possess a firearm in light of *Bruen*); *United States v. Kays*, -- F.Supp.3d --, 2022 WL 3718519 (W.D. Okla. Aug. 29, 2022) (rejecting constitutional challenge to Section 922(g)(8) and 922(n) post-*Bruen*); *Jackson*, -- F.Supp.3d --, 2022 WL 3582504, at *1; *United States v. Daniels*, -- F.Supp.3d --, 2022 WL 2654232 (S.D. Miss. July 8, 2022) (rejecting Section 922(g)(3) constitutional challenge in light of *Bruen*); *Pervez v. Becerra*, -- F.Supp.3d --, --, 2022 WL 2306962, at *2 n.2 (E.D. Cal. June 27, 2022) (declining to read *Bruen* as having changed longstanding prohibitions on the possession of firearms by felons and the mentally ill); *but see United States v. Gonzalez*, -- F.Supp.3d --, --, 2022 WL 4376074, at *2 (7th Cir. 2022) (deeming as-applied constitutional challenge under *Bruen* to invalidate § 922(g)(1) "frivolous" when challenger is considered a violent felon but leaving the question open as to how such a challenge would fare for a non-violent felon).

[93] *See United States v. Stambaugh*, -- F.Supp.3d --, --, 2022 WL 16836043 (W.D. Okla. November 14, 2022); *Quiroz*, -- F.Supp.3d at --, 2022 WL 4352482, at *1 (appeal filed on Sept. 21, 2022) (finding government had not met its burden under *Bruen* of demonstrating that Section 922(n), which prohibits those under felony indictment—but who have never been convicted of a felony, from obtaining a firearm—"aligns with this Nation's historical tradition" and is therefore unconstitutional).

[94] *United States v. Perez-Gallan*, 4:22-cr-00427-DC (W.D. Tex. November 10, 2022).

c. Section 922(g) As Applied to Defendant Is Constitutional.

Defendant argues in his motion that application of § 922(g), as applied to him, is unconstitutional. Defendant presents few facts to support his as-applied challenge, relying instead on conclusory statements that his "conduct – use of a firearm in defense of life and property - is plainly covered by the Second Amendment as it was understood when the Bill of Rights was ratified."[95] Defendant relies on *Heller* and its statement that the Second Amendment confers an "individual right to possess and carry weapons" in support of his argument.

As detailed above, *Heller* is more nuanced than Defendant posits. Neither it, nor *Bruen*, support the conclusion that Defendant, regardless of his criminal history, is allowed to possess weapons even if possession of those weapons is arguably necessary for protection of the home or family. Indeed, *Bruen* and *Heller* state precisely the opposite. To reach such a conclusion would eviscerate *Bruen*'s acceptance of reasonable gun regulations on those deemed dangerous by the legislature. Accordingly, there is no basis for Defendant's "as-applied" challenge.

V. Objections to Report and Recommendation

The Court filed its Initial Report and Recommendation on November 25, 2022.[96] After requesting and receiving an extension, Defendant filed his objections on December 16, 2022.[97] The government did not file objections, nor did they reply to Defendant's objections.

Defendant objects to the Court's Initial Report and Recommendation "in its entirety."[98] Defendant cites three specific objections to the Court's conclusion. The first is that the Court ignored "text, history, and precedent" to conclude that

[95] Doc. 24 at 16
[96] Doc. 36.
[97] Doc. 41.
[98] Doc. 41 at 2.

individuals with domestic violence convictions are "likely" not among those protected by the Second Amendment.[99]

The Court finds this objection to be primarily an attempt to relitigate arguments previously made in Defendant's opening brief and reply. In his Motion to Suppress, Defendant argued that "the people" was not limited to "law-abiding, responsible citizens," and discussed in detail his position that this reading comported with other uses of the phrase "the people" used elsewhere in the Constitution.[100] This argument is repeated in Defendant's Reply.[101] This is the argument raised by Defendant in his first objection, a fact Defendant acknowledges in his objection.[102]

Furthermore, Defendant is incorrect that the Court has ignored this issue. The Court's Report and Recommendation addresses the issue of who the Framers meant to include among "the people," calling it "critical to any post-*Bruen* analysis of [18 U.S.C. § 922(g)(9).]"[103] Accordingly, the Court declines to amend its factual findings and its conclusion as to this issue.

In his second objection, Defendant argues that the Court inconsistently applied Circuit precedent and objects to the Court's decision to not afford prior cases analyzing the Constitutionality of 18 U.S.C. § 922(g)(9) precedential weight. In response to this objection, the Court has not changed its conclusion, but has amended its Initial Report and Recommendation to clarify the analysis of this issue, adding the italicized language to the following sentence on page 8:

> As such, the Court finds that it is relieved of its obligation to follow otherwise binding Circuit precedent *as it relates to its analysis of 18 U.S.C. § 922(g)(9)*.

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[99] *Id.* at 2-4.
[100] Doc. 24 at 9, 13-16.
[101] Doc. 31 at 2.
[102] *See* Doc. 41 at 3 (Defendant writes in his discussion of *Range* and the 3rd Circuit's analysis of this issue, "[a]s Mr. Padgett explains at length in his motion[.]")
[103] *Supra* at 9.

Even if the Court were to apply precedential weight to the Ninth Circuit's prior conclusion that the historical tradition of the Second Amendment covered Defendant's conduct, it would not alter the recommendation in this case. As clearly stated in the Initial Report and Recommendation,

> "[e]ven if the Court were to determine that the plain text of the Second Amendment covered Defendant's conduct, Defendant's motion to dismiss must still fail [because...] the government has met its burden of demonstrating that Section 922(g)(9) is a 'regulation [that] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.'"[104]

The Court's discussion of an issue raised by neither party in its briefing and its conclusion as to that issue does nothing to alter the ultimate findings in this case.

Defendant's third objection, as with his first, merely reargues points previously made in his initial motion and reply brief. Specifically, Defendant disagrees with the Court's historical analysis of firearms regulations within the United States.[105] The Court finds no merit in this argument and declines to alter its Initial Report and Recommendation.

The Court also notes that since the filing of its Initial Report and Recommendation, there have been at least 16 district court opinions analyzing post-*Bruen* various subsections within 18 U.S.C. § 922. All have upheld the constitutionality of bans on the possession of weapons by those convicted of domestic violence crimes[106] and felonies,[107] those who are addicted to controlled

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[104] *Supra* at 13-16

[105] Doc. 41 at 5-6.

[106] *United States v. Bernard*, 202 WL 17416681 at *8 (N.D. Iowa Dec. 5, 2022) ("Thus, this Court joins every other court thus far in addressing Section 922(g)(9) in finding it constitutional.") (citing *Anderson*, *Nutter*, and *Jackson*).

[107] *United States v. Wondra*, 2022 WL 17975985 (D. Idaho Dec. 27, 2022); *United States v. Williams*, 2022 WL 17852517 (N.D. Ga. Dec. 22, 2022); *United States v. Dawson*, 2022 WL 17839807 (Dec. 21, 2022); *United States v. Goins*, -- F.Supp.3d --, 2022 WL 17836677 (E.D. Ky. Dec. 21, 2022); *United States v. Hunter*, 2022 WL 17640254 (N.D. Ala. Dec. 13, 2022); *United States v. Spencer*, 2022 WL 17585782 (E.D. Va. Dec. 12, 2022); *United States v. Wagoner*, 2022 WL 17418000 (W.D. Va. Dec. 5, 2022); *United States v. Grinage*, 2002 WL 17420390 (W.D. Tex. Dec. 5, 2022); *United States v. Cage*, 2022 WL 17254319 (S.D. Miss. Nov. 28, 2022).

substances,[108] and those in the country illegally.[109] District courts have also found constitutional bans on the possession of weapons with obliterated serial numbers[110] and bans on the sale of guns to individuals between the ages of 18 and 21.[111] Other courts in the Ninth Circuit have similarly found restrictions on large capacity magazines and prohibitions against weapons possession by those on pretrial release to be constitutional.[112]

Furthermore, in *United States v. Avila*, the Fifth Circuit declined after plain error review to find 18 U.S.C. 922(n), possession of a firearm by an individual under indictment, unconstitutional.[113] In so doing, the Fifth Circuit noted that such a conclusion may be appropriate upon *de novo* review.[114] However, such a result would be inconsistent with "several other federal district courts that confronted this issue post-*Bruen*."[115]

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[108] *United States v. Connelly*, 2022 WL 17829158 (W.D. Tex. Dec. 21, 2022); *United States v. Sanchez*, 2022 WL 17815116 (W.D. Tex. Dec. 19, 2022).

[109] *United States v. Carbajal-Flores*, 2022 WL 17753295 (N.D. Ill. Dec. 19, 2022).

[110] *United States v. Tita*, 2022 WL 17850250 (D. Md. Dec. 22, 2022); *United States v. Reyna*, 2022 WL 17714376 (N.D. Ind. Dec. 15, 2022).

[111] *Caleb Reese, et al. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 2022 WL 17859138 (W.D. La. Dec. 21, 2022).

[112] *Oregon Firearms Federation, Inc. v. Brown*, -- F.Supp.3d --, 2022 WL 17454829 (Dec. 6, 2022) (rejecting *Bruen* challenge to possession of large capacity magazines); *United States v. Perez-Garcia*, 2022 WL 17477918 (S.D. Cal. Dec. 6, 2022) (rejecting challenge to pretrial release condition).

[113] 2022 WL 1782287 at *1 (Dec. 21, 2022) (unpublished)

[114] *Id.*

[115] *Id.*

VI. Conclusion

The Court finds that the government has met its burden and demonstrated that § 922(g)(9) is consistent with this Nation's historical tradition of firearm regulation. As such, Defendant's conduct falls outside the Second Amendment's "unqualified command."[116] For the reasons stated above, the Court recommends Defendant's Motion to Dismiss at Docket 24 be **DENIED**.

DATED this 4th day of January, 2023, at Anchorage, Alaska.

s/ Kyle F. Reardon
KYLE F. REARDON
United States Magistrate Judge
District of Alaska

[116] *Bruen*, 142 S. Ct. at 2126; *Nutter*, -- F.Supp.3d at --, 2022 WL 3718518, at *3.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. JOEL MICHAEL RYNO, Defendant.	3:22-CR-00045-JMK-MMS **FINAL REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS [DKT. 30]**

I. Motion Presented

In the summer of 2022, the Supreme Court rejected a two-step, tiered scrutiny framework that a panoply of Courts of Appeal had adopted for Second Amendment cases. In its stead, the Supreme Court fashioned a framework based in textual analysis, history, and tradition. To state the obvious—this Judicial Officer is not a trained historian. Historians sift through the vast historical record, applying pedagogical historical methodologies, in an effort to reconstruct, or to understand, the past. To further state the obvious, the work of a historian is unconstrained by such exigencies as the Speedy Trial Clock. Historians need not provide definitive answers because the historical materials exist in a dialectic, and may not support any one conclusion. The federal judiciary is not similarly situated. Definitive conclusions must be reached. This need to provide conclusions for Cases and Controversies, heightens the risk of biasing a federal court's historical inquiry towards a result-driven conclusion. While the federal judiciary represents a unitary branch

of government, the individual courts which comprise the judiciary are heterogeneous. The Supreme Court is a well-staffed enterprise, located under one roof, that benefits from a broad swath of amicus curiae briefs. More importantly, the Supreme Court is vested with the ability to overturn judicial precedent. The ninety-four districts that comprise the "inferior Courts" are constrained by the speedy-trial clock, by varying degrees of available staff, and as it occurred here, by binding precedent that may be in conflict. Like the Supreme Court has since 2008, this Court will do what it can with what it has in the record. This Court notes that Magistrate Judge Kyle F. Reardon, in a trenchant and well-reasoned Report and Recommendation, has recommended denial of a separate, as-applied § 922(g)(9) challenge. *See United States v. Padgett*, Case No. 3:21-CR-00107-TMB-KFR (D. Alaska 2023).

To that end, this Court commends both parties for tackling the complex questions before this Court. Both parties thoroughly and zealously rose to the task of effectively surveying this Nation's Second Amendment history. This Court's historical approach is therefore simplified: this Court will rely on the cited history, on case law that interprets that history, and on an independent historical survey to ensure a careful review of the historical record. Because this is not a run-of-the-mill interpretation of a statute where the black-letter law speaks for itself, legislative history and history of ratification debates will not be excluded. Both parties also cite out-of-circuit cases and district court cases. The citations are good-faith efforts by both parties that, as a result, have created a robust consensus of persuasive authority. This Court will take the unusual step of referring to such authority to the extent that it bears relevance or analytical weight. In other words, the

historical record compiled by both parties has produced a sufficiently developed record to recommend a ruling on Ryno's Motion.

Bruen ultimately requires a different path from the tiered scrutiny framework, but it is a path that leads to the same conclusion. Ryno is part of "the people," and his conduct is therefore covered by the plain text of the Second Amendment; but the government has demonstrated that 18 U.S.C. § 922(g)(9), as-applied to Ryno, comports with our Nation's history and tradition because § 922(g)(9) is relevantly similar to historical analogues from the Founding era.

This Court hereby issues its Final Report and Recommendation regarding Ryno's Motion to Dismiss. Dkt. 30. Ryno's Motion to Dismiss should be **DENIED**. 28 U.S.C. § 636(b)(1)(B).

II. Factual and Procedural History

This Court reminds the parties that as-applied challenges require a set of particular facts to assess a statute's validity as to a particular litigant. Important here is that Ryno, in his reply brief, did not challenge the government's recitation of the facts. On that understanding, the following facts are drawn from party briefings and from the indictment. Dkt. 4; Dkt. 30; Dkt. 31.

Ryno has been twice convicted of misdemeanor crimes of domestic violence. Alaska Stat. Ann. § 11.41.230(a)(1) ("A person commits the crime of assault in the fourth degree if that person recklessly causes physical injury to another person."); Dkt. 4 at 2-3; Dkt. 30 at 4; Dkt. 31 at 2-3. In April 2019, Ryno was first convicted of domestic violence against his domestic partner at their shared residence, and in the presence of their child.

Dkt. 31 at 2. In December 2020, Ryno violated a condition of release when law enforcement stopped his vehicle and discovered that Ryno was in possession of a rifle and ammunition. Dkt. 4 at 1-2; Dkt. 30 at 4; Dkt. 31 at 3. Ryno's second conviction for domestic violence occurred in June 2021. Dkt. 4 at 2-3; Dkt. 31 at 3. Ryno again assaulted the same domestic partner, again in the presence of their child. Dkt. 31 at 3.

In February 2022, Ryno was on the premises of a "domestic violence disturbance" that law enforcement responded to. Dkt. 31 at 3; Dkt. 30 at 4. It is unclear whether Ryno was charged or convicted with another crime of domestic violence. What is clear is that Ryno had an "active search warrant" [*sic*] and notified law enforcement that he possessed a firearm and ammunition. The firearm was subsequently seized. *Id.*; *Id.* Two law enforcement agencies interviewed and advised Ryno of the importance of abiding by the long-term protective order from his 2019 conviction, which among other things, prohibited him from possessing firearms. *Id.*; *Id.* The government alleges that Ryno "believed he was able to possess firearms as part of that order." Dkt. 31 at 3. The relevant language of the protective order is as follows: "If you possess a firearm and ammunition while this order is in effect, you may be charged with a federal offense even if [certain] paragraphs of this order do not prohibit you from possessing these items [18 USC §922(g)]." [*sic*] *Id.* Two months later, law enforcement conducted a "welfare check" on a public highway, based on "a report of an individual passed out behind the wheel of a vehicle." Dkt. 31 at 4; Dkt. 30 at 4. Ryno was the vehicle's driver. *Id.*; *Id.* More firearms and ammunition were seized. *Id.*; *Id.*

The indictment, filed in May 2022, charges Ryno with three counts of possessing a firearm despite knowing he had been convicted of misdemeanor crimes of domestic violence. Dkt. 4; 18 U.S.C. § 922(g)(9); § 924(a)(2). Ryno has moved to dismiss the indictment because § 922(g)(9) is unconstitutional as applied to him.

Ryno argues that (1) *Bruen* has repudiated *Heller*'s "presumptively lawful" dicta and by extension repudiated case law that relied on the dicta; (2) this Court is therefore operating on a clean slate, and "a full historical analysis of a prohibition conducted under … *Bruen* can rebut *Heller's* presumptively lawful exceptions"; (3) "the people," under the Constitutional Amendments, includes members of the national community or alternatively, of the political community; (4) the phrase "law-abiding citizens" mentioned in Second Amendment jurisprudence, should not disqualify Ryno from "the people"; (5) there are no "distinctly similar" regulations from the founding era because 18 U.S.C. 922(g) was enacted in the 20th century; (6) the ratification debates around 1791 varied by state and cannot be historical analogues; (7) the theory of "unvirtuous citizenry" is not rooted in this Nation's history, and even if it were, the phrase erroneously refers to a collectivist view of civic rights; (8) disarmament laws that targeted "slaves, freed Blacks, and Native Americans" are tenuous and motivated by "racial hierarchies and [to] reduce the ability of disfavored groups [] to defend themselves"; (9) the history of rebellion and disloyalty are ill-suited, historical analogies; (10) and despite this being an as-applied challenge, "blanket prohibitions like § 922(g)(9) violate the Second Amendment." *See generally* Dkt. 30.

The government responds that (1) *Heller* and *Bruen* exclude Ryno from "the people" because the Second Amendment extends to "law-abiding, responsible citizens";

(2) *United States v. Vongxay*, 594 F.2d 1111, 1115 (9th Cir. 2010) has not been overruled and is not clearly irreconcilable; (3) on that understanding, this Court is bound by *Vongxay*'s reasoning that the right to bear arms was "inextricably tied to the concept of a virtuous citizenry"; (4) to demonstrate that 922(g)(9) is consistent with this Nation's history, it is important to understand the twentieth century "legislative history of § 922(g)(9) [which] shows that Congress intended to keep firearms out of the hands of a specific type of violent criminal—domestic abusers"; (5) a viable historical analogue to § 922(g)(9) is § 922(g)(1), which criminalizes the possession of firearms for felons; (6) *Heller* favorably cited a historical source that reasoned that *any* convicted criminal can be prohibited from bearing arms, or any citizen that is a "real danger of public injury" (7) many state constitutions that allowed a right to bear arms and a proposed amendment to the Constitution from the Massachusetts convention are relevant historical analogues; (8) there is a robust historical tradition of disarming citizens that were convicted of violent crimes; (9) a felon's forfeiture of their civic virtues is another historical analogue; (10) putting aside the patent and indefensible racist motivations "of disarming people the Framers deemed dangerous or untrustworthy, such as those unwilling to swear an oath of allegiance [], slaves, freed [B]lacks, and Native Americans," such historical analogues are nonetheless "quintessential features" of this Nation's history; (11) *Bruen* reiterated, and did not abrogate, the longstanding prohibitions on felons and the "mentally ill"; and (12) a chorus of district courts have upheld § 922(g)(1). *See generally* Dkt. 31.

This Court, in November 2022, held oral argument. Dkt. 39. Aside from Ryno's reply brief, no post-hearing briefs were filed. Dkt. 35; Dkt. 39. Supplemental briefing was ordered in February 2023. Dkt 50; Dkt. 51; Dkt. 53.[1]

III. *Heller* and Its Progeny

The Supreme Court has had three recent opportunities to develop Second Amendment jurisprudence: *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 749 (2010); and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

The first opportunity was the landmark case that conferred a pre-existing "individual right to keep and bear arms" for self-defense. *Heller*, 554 U.S. at 595. *Heller* first interpreted the prefatory clause as stating a purpose that neither limited nor expanded the operative clause. *Id.* at 577-78. Turning to the operative clause, the Court divided the clause into separate phrases, beginning with "right of the people." *Id.* at 579. "What is more, in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. In identifying the "political community," *Heller* seemingly narrowed a previous definition that instead included the "national community" as part of the People. *Id.* at 580-81. It may have also equated "political" with "national" because there was a "strong presumption that the Second Amendment right" belonged to "all Americans." *Id.* at 581; *see also Kanter v. Barr*, 919 F.3d 437, 453 (7th Cir. 2019) ("In addition to being

[1] For transparency purposes, language was altered in pages 19, 22-27 of this Report and Recommendation.

analytically awkward, the scope of the right approach is at odds with *Heller* itself. There, the Court interpreted the word 'people' as referring to all Americans.") (citation cleaned up).

Heller went on to address "Keep and Bear Arms." 554 U.S. at 581. "Keep arms" naturally meant to "have weapons." *Id.* at 582. "Bear Arms" was not tied to a military purpose, and instead, is "simply the carrying of arms." *Id.* at 589. The natural and idiomatic meanings of words or phrases were distilled from dictionaries, from historical sources, and most importantly, from the Constitution. In other words, *Heller* undertook a methodological approach to interpret the words as they were used at the time the Second Amendment was drafted[2]. *Id.*; *see also Bruen*, 142 S.Ct. at 2127 ("In *Heller*, we began with a textual analysis focused on the normal and ordinary meaning of the Second Amendment language.") (internal quotations omitted). Taken together, "the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it shall not be infringed." (internal quotations omitted) *Id.* at 592. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.*

The "law-abiding" phrase was first mentioned when the *Heller* majority addressed Justice Stevens' minority misinterpretation of *United States v. Miller*, 307 U.S. 174 (1939).

[2] *See also*, "In most cases, the meaning of a word is its use." *Philosophical Investigations*, Ludwig Wittgenstein (1953).

Miller, according to Justice Scalia, supported rather than contravened *Heller*'s ruling, "read[ing] *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 625. That passage recognized a limitation on the types of weapons covered by the Second Amendment. "Law-abiding citizens" was again mentioned to stress that *Heller*'s original understanding of the Second Amendment was unshaken by prior precedent, and especially so because neither the states nor the federal government had "significantly regulated the possession of firearms by law-abiding citizens." *Id.* at 625.

Yet the Second Amendment right "is not unlimited." *Id.* at 626. Tucked into this same paragraph was dicta admonishing courts that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" *Id.* This admonition, however, was not derived from "an exhaustive historical analysis" nor was there an analysis "of the full scope of the Second Amendment." *Id.* An accompanying footnote underscored that restrictions on felons and the mentally ill were "presumptively lawful regulatory measures, [serving] only as examples; our list does not purport to be exhaustive." *Id.* at 626-27 n.26. In striking down the firearm statute, *Heller* emphasized that "[l]ike the First [Amendment], it is the very *product* of an interest balancing by the people—which Justice BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home." (emphasis original) *Id.* at 635.

Both dissents understood *Heller*'s "law-abiding" dicta as a limitation on the class of persons that the Second Amendment protects. *Id.* at 644, 701-02. This limitation, the dissents contended, failed to "harmonize its conflicting pronouncements" because "the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions." *Id*; *see also Id.* at 652 ("Indeed, not a word in the constitutional text even arguably supports the Court's overwrought and novel description of the" law-abiding phrase); *see also Id.* at 721.

In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), the Supreme Court ruled local and state laws must comport with the Second Amendment, through its incorporation under the Due Process Clause of the Fourteenth Amendment. In 1868, as in 1791, "the right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified." *Id.* at 777; *see also Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("*McDonald* confirms that when state or local government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified.") (citation cleaned up). The part of the opinion pertinent to the phrase "law-abiding," emphasized that the Second Amendment ensures "the safety of other law-abiding members of" minority communities. *Id.* at 790. Nothing in *McDonald* cast doubt on the "longstanding regulatory measures" on felons or the mentally ill. *Id.* at 786.

Bruen represented a sea change in Second Amendment jurisprudence. The Supreme Court rejected a two-step, tiered scrutiny framework that a panoply of Courts of Appeals had adopted for Second Amendment cases. *Bruen*, 142 S. Ct. at 2127. Although the first step had been "broadly consistent with *Heller*," the second step had subjected an enumerated right to a judge-empowering test, that as a result, systematically ignored *Heller*'s text, history, and tradition framework. *Id.* at 2127, 2129. In its stead, the Supreme Court fashioned a framework that now turns on whether a defendant's conduct is covered by the plain text of the Second Amendment. *Id.* at 2126. If a defendant's conduct is covered, whether then the Constitution "presumptively protects that conduct." *Id.* . The burden then shifts to the government to demonstrate that the challenged "regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* There are two forms of historical inquiries: a "distinctly similar" inquiry and a "relevantly similar" inquiry. *Id.* at 2131-32.

A challenged regulation passes constitutional muster under the fairly straightforward historical inquiry when there is a showing of a "general societal problem that has persisted since the 18th century" and a distinctly similar historical regulation dating from the time of the Second Amendment's ratification. *Id.* If, for example, there is a general societal problem, but a lack of a distinctly similar historical regulation, the challenged regulation may be unconstitutional. Other relevant evidence that weighs against the constitutionality of a challenged regulation hinges on whether the societal problem was addressed through "materially different means," or if analogous regulations were proposed but "rejected on constitutional grounds." *Id.*

A similar inquiry applies to "modern regulations that were unimaginable at the founding." *Id. Bruen* instructs federal courts to reason by analogy, with two considerations at the forefront: how and why the challenged regulation burdens a "law-abiding citizen's right to armed self-defense." *Id.* at 2133. In other words, the modern regulation and the 18th century regulation must have imposed "a comparable burden" on an individual's right to self-defense; and the historical analogy between the two regulations must be "comparably justified." *Id.* "To be clear, analogical reasoning under the Second Amendment is neither a regulatory straitjacket nor a regulatory blank check. On the one hand, courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted. On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. So 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.* (citation cleaned up).

Bruen, however, stressed that "not all history is created equal." *Id.* at 2136. A federal court should first look to the historical period immediately before and after the Second Amendment's ratification. *Id.* English common-law and post-ratification history should be treated with some skepticism, and in the event that such history contradicts the Second Amendment, "the text controls." *Id.* at 2137; *See also Id.* at 2162-63 (J., Barrett concurring) (highlighting that *Bruen* "does not conclusively determine the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution."). With the historical framework clarified, *Bruen* ruled that the defendants were comfortably

within the ambit of "the people" because they were "two ordinary, law-abiding, adult citizens." *Id.* at 2134. *Bruen*, without much difficulty, also ruled that the defendants' proposed course of conduct was presumptively protected and was unrebutted by the government historical arguments. *Id.* at 2135.

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IV. The Plain Text of the Second Amendment

> 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.
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> - U.S. Const. amend. II.

To begin, this Court discounts the prefatory clause from its analysis because neither party has connected the idea of a militia to the underlying historical arguments, and admittedly, there is virtually no concern here regarding the elimination of a militia. Ryno's conduct meets *Heller*'s textual definition of bearing arms because the record indicates that he physically carried firearms, on at least three known occasions, outside the home. *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592). This Court can also reasonably conclude that Ryno kept firearms within the meaning of the Second Amendment because Ryno believed he could lawfully possess firearms despite the domestic violence protection order, and again, did so on three known occasions. *Id.* The parties do not dispute that Ryno was keeping and bearing arms.

The real crux is whether Ryno is part of the "people." On this point, this Court declines Ryno's invitation to constrain *Bruen*'s first step to a sole consideration of whether a defendant's conduct—and their conduct only— is presumptively protected. Implicit in *Bruen*'s textual inquiry is a consideration of the amendment's *plain text*. In other words, this Court will reconcile both the *what* and the *whom*; stated more fully, what conduct is being regulated and who can possess and carry firearms. This Court's approach is in accord with *Bruen*'s analytical approach. There the Supreme Court first ruled that the defendants were part of the people before turning to the regulated conduct. *Bruen*, 142 S. Ct. at 2134.

"The people" is admittedly a term of art that was not defined in the Constitution. *Heller*, 554 U.S. at 2791 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). It is important to remember, at this juncture, the basic premise that a "word or phrase is presumed to bear the same meaning throughout a text" to avoid "an interpretation that causes it to duplicate another provision or to have no consequence." *See* Antonin Scalia, & Bryan A. Garner, *Reading Law* 167, 170 & 174 (2012); *see also United States v. Coombes*, No. 22-CR-00189-GKF, 2022 WL 4367056, at 3 (N.D. Okla. Sept. 21, 2022). The phrase does appear in other parts of the Constitution. Moreover, *Heller* and *Bruen* emphasized that the principles of our Constitution do not change over time and must be faithfully applied as they existed at or around 1791 and 1868. *See Bruen*, 142 S.Ct. at 2132 ("Fortunately, the Founders created a Constitution—and a Second Amendment—intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs.") (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819) (citation cleaned up). This Court, therefore, begins with our Constitution.

The First Amendment provides a useful analytical model. The Assembly and Petition Clause emphasizes that "Congress shall make no law abridging … the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances." U.S. Const. amend. I. Instructive here is that the First Amendment excludes classes of speech, and not the speaker itself. *See Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 338 (5th Cir. 2013) (J. Jones, dissenting) ("Free speech, in the classic sense, is never subject to interest-balancing before it merits constitutional protection. Speech is protected categorically unless it fits within specifically defined classes, *e.g.*, obscenity, fraud, libel, and state secrets, that received no legal protection at the time of ratification of the Bill of Rights."); *see e.g., Bruen*, 142 S.Ct. at 2156 ("We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is now how the First Amendment works when it comes to unpopular speech or the free exercise of religion."). The breadth of this particular clause extends to the national community. *Heller*, 554 U.S. at 580 (quoting *Verdugo-Urquidez*, 494 U.S. at 265).

Another codified, pre-existing right that incorporates a broad class of persons is the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; *Heller*, 554 U.S. at 592. A felon, or as here, a violent misdemeanant, no matter how obstreperous they may be, is not categorically deprived of their right to challenge the reasonableness of a government seizure or search. *See Heller*, 554 U.S. at 645. It may be argued that an analogy between the Second and Fourth Amendment does not map efficiently because the

Fourth Amendment may be viewed as a protective right, as opposed to the Second Amendment's granting of an affirmative right. As *McDonald* and *Bruen* instruct, no precise analogy is required. Indeed, Second Amendment jurisprudence has favorably compared the two amendments, and perhaps so because the "right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783 (collecting cases); *see also Bruen*, 142 S.Ct. at 2126 n.3. Justice Stevens' dissent in *Heller*, 554 U.S. at 644, underscored this very point, emphasizing that the First and Fourth Amendments are "*not* so limited." *See e.g., United States v. Chovan*, 735 F.3d 1127, 1149 (9th Cir. 2013) (J. Bea, concurring); *see also United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at 9 (W.D. Tex. Nov. 10, 2022).

Other provisions in the constitution point to a broad interpretation of "the people." The Ninth and Tenth Amendment refer to a national community. *Heller*, 554 U.S. at 579-80 (quoting *Verdugo-Urquidez*, 494 U.S. at 265). Section 2, Article I of the Constitution vests "the People" with the right to elect political officials; or in other words, the political community. U.S. Const. Art. I, § 8.

The Supreme Court has concluded that the Second Amendment extends to, and is limited by, the members of the political community. *Heller*, 554 U.S. at 580-81. It is constitutionally appropriate for some classes of persons to be outright excluded from the political community and consequently, the Second Amendment's reach. *See Bruen*, 142 S.Ct. at 2161 (J. Kavanaugh concurring) ("Properly interpreted, the Second Amendment

allows a variety of gun regulations."); *see also United States v. Skoien*, 614 F.3d 638, 639-40 (7th Cir. 2010) ("That *some* categorical limits are proper is part of the original meaning.") (emphasis original). This Court therefore agrees with the government that *Bruen* did not abrogate or supplant *Heller* and *McDonald*'s list of longstanding prohibitions. It is true that *Heller*'s dicta, reiterated in *McDonald*, has caused some confusion among the lower courts. Indeed, then Judge Barrett's dissent in *Kanter v. Barr*, 919 F.3d 437, 445 (7th Cir. 2019) has leveled a persuasive, historical critique against sweeping felon-in-possession laws. The Third Circuit has also recently vacated a ruling that excluded *all* felons from "the people." *Range v. Att'y Gen. United States*, No. 21-2835, Order on Rehearing En Banc (3rd Cir. 2023). Dispositive here, however, is that the Supreme Court's dicta was endorsed by two separate majorities, the dicta grapples with novel, complex legal issues, and it is "dicta of the strongest sort." *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit,* 60 Hastings L.J. 1371, 1372 (2009). Justice Kavanaugh's concurrence in *Bruen* likewise restated the longstanding prohibitions on felons possessing firearms. *Bruen*, 142 S.Ct. at 2161 (J. Kavanaugh concurring). This Court is therefore bound by the dicta in *Heller* and *McDonald*.

On that understanding, it is undisputed that felons have traditionally lost their right to vote, serve on juries, and have lost the ability to hold political offices. *See Mai v. United States*, 974 F.3d 1082, 1093 (9th Cir. 2020) (citing 2 William Blackstone, *Commentaries* 377 and *United States v. McCane*, F.3d 573 1037, 1049 (10th Cir. 2009)). Consistent with this prohibition, the Ninth Circuit has reasoned that "the right to bear arms was inextricably

… tied to the concept of a virtuous citizenry that would protect society through defensive use of arms against criminals, oppressive officials, and foreign enemies alike, and that the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals)." *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). It is not clear why Ryno believes that his § 922(g)(9) case is the proper vehicle to overrule *Vongxay*, a § 922(g)(1)-related ruling. This Court reads the virtuous citizen theory to encompass the disarmament of felons and possibly the mentally ill. *See United States v. Yancey*, 621 F.3d 681, 684-85 (7th Cir. 2010). This Court therefore need not address this argument here because the "virtuous citizenry" theory does not reach Ryno—a misdemeanant who is part of the political community.

In *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013), the Ninth Circuit ruled that "by prohibiting domestic violence misdemeanants from possession, § 922(g)(9) burdens rights protected by the Second Amendment." *See also Duncan v. Bonta*, 19 F.4th 1087, 1142-43 (J., Bumatay dissenting) (*Chovan*'s "step one inquiry often pays lip service to *Heller*: it asks whether the law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the Second Amendment right.") (citation cleaned up). *Chovan*'s second step has since been abrogated, but step one is nonetheless "broadly consistent with *Heller*, which demands a test rooted in the Second Amendment text, as informed by history." *Bruen*, 142 S.Ct. at 2127. *Chovan*'s first step can be severed from its second step because both utilized different modes of analysis; and it is with that understanding that this Court concludes that it is still bound by *Chovan*'s step-one reasoning. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

This Court's conclusion that Ryno is part of the "people" is therefore informed by *Chovan*'s explicit ruling. Judge Bea's concurrence in *Chovan* also provides some critical distinctions between misdemeanants and felons: "As we have seen, in the Founding period, felonies historically resulted in disqualification from certain rights, but misdemeanors did not[.]" 735 F.3d at 1144-49.

A problem with this conclusion, as the government has shown, is the "law-abiding" phrase that has consistently appeared in all of the Supreme Court cases. The strongest passage on this point is *Bruen*'s application of its new test: "It is undisputed that petitioners []—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects." There are conflicting legal interpretations on this point. *See United States v. Rahimi*, No. 21-11001 2023 WL 1459240, at 3 (5th Cir. 2023). On the one hand, this Court agrees with the government that Ryno is not necessarily "law-abiding" by virtue of being twice-convicted. A pardon, expungement, or a dismissal of the conviction is required to fully remove a conviction. *Mai*, 974 F.3d at 1093 (citing generally 18 U.S.C. § 921(a)(20)(B)). On the other hand, the "law-abiding" phrase seemingly contravenes the Constitution's consistent definition of "the people," as interpreted by *Heller,* and the phrase may bear more relevance under *Bruen*'s second step. *Rahimi*, 2023 WL 1459240 at 4. This Court hastens to add that no system is perfect. All human enterprises, to include the federal judiciary, are at risk of error.

To provide a conclusion to the disparate and competing analytical threads: the "law-abiding" phrase should yield to the codified rights of the Constitution, binding case law,

and history; all of which point to Ryno as part of the political community, and therefore part of "the people."

V. This Nation's History and Tradition

A. Distinctly Similar Regulations

In 1932,[3] Congress enacted a law to control the use of "pistols and other dangerous weapons in the District of Columbia." Act of July 8, 1932, ch. 465, § 14, 47 Stat. 650, 650; *see also Binderup v. Att'y Gen. United States of America*, 836 F.3d 336, 390 (3rd Cir. 2016) (J., Fuentes concurring in part and dissenting in part). An offender was subject to prosecution if a "crime of violence" was committed while armed with a dangerous weapon. Act of July 8, 1932, ch. 465, § 14, 47 Stat. 650, 650. Crimes of violence were "[m]urder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping [*sic*], burglary, housebreaking, larceny, any assault with intent to kill, commit rape, or robbery assault with a dangerous weapon." *Id.* In 1938, Congress enacted the Federal Firearms Act ("FFA"), to address the interstate commerce of firearms. *United States v. Skoien*, 614 F.3d 638, 640-41 (7th Cir. 2010) (citing Federal Firearms Act, Pub.L. 75-785, 52 Stat. 1250, 1251); *see also Chovan*, 735 F.3d at 1137. The FFA's crime of violence definition mirrored the definition from the 1932 Act. *Id.*; *Id.* It was a federal crime for a person, convicted of a crime of violence, to "receive" any firearm or ammunition that was transported across

[3] From this Court's independent review, there are approximately fourteen state laws, from 1837 to 1931, that generally touched on or related to firearm regulation. Because it is the government's burden, this Court will discount these state laws altogether. *Bruen*, 142 S.Ct. at 2127 (reasoning that "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.").

state lines. *Skoien*, 614 F.3d at 640-41. The "ban on possession by *all* felons was not enacted until 1961," and notably, Congress there replaced the crime of violence definition with "crime punishable by imprisonment for a term exceeding one year." *Id.* (citing Pub.L. 87-342, 75 Stat. 757); *see also Quiroz*, 2022 WL 4352482 at 4-5; *see also United States v. Charles*, No. MO:22-CR-00154-DC, 2022 WL 4913900 at 3 (W.D. Tex. 2022). Moreover, the 1968 Act broadened its reach to include the "mentally ill" and habitual drug users. *See Yancey*, 621 F.3d at 683. The purpose of the 1968 Act was to assist law enforcement "in their fight against crime and violence" but cautioned that no restrictions were placed "on law-abiding citizens with respect" to the use and possession of firearms. Pub.L. No. 90-618, § 101, 82 Stat. 1213; *see also Chovan*, 735 F.3d at 1137. In 1996, Congress eventually became aware of a "dangerous loophole" in the 1968 Act that allowed domestic violence misdemeanants to possess firearms. 142 Cong. Rec. S2646–02 (1996) (statement of Sen. Lautenberg); *see also Id.* (statement of Senator Feinstein) (explaining that the Lautenberg Amendment was meant to "close th[e] dangerous loophole" that allowed domestic abusers charged with lesser offenses to escape firearm disqualification under § 922(g)(1)); *Hayes*, 129 S.Ct. at 1082; *Chovan*, 735 F.3d at 1139. Section 922(g)(9), a modern regulation "unimaginable at the founding," was thereby enacted. *Bruen*, 142 S.Ct. at 2133.

Whether 1938 or 1996, the weight of this historical evidence nonetheless indicates that § 922(g)(9) is a creature of the twentieth century. *McCane*, 573 at 1048 (J., Tymkovich concurring). In other words, "it is not clear that such prohibitions are so longstanding." *Chovan*, 735 F.3d at 1137. It is true that there was a longstanding concern to disarm dangerous people, but the inquiry here is whether there are *straightforward* examples from

the founding era regarding domestic violence misdemeanants. A Texas district court recently surveyed the past four centuries for the disarmament of domestic violence misdemeanants, concluding that "glaringly absent from the historical record—from colonial times until 1994—are consistent examples of the government removing firearms from someone accused (or even convicted) of domestic violence." *Perez-Gallan*, 2022 WL 16858516 at 6. This Court agrees. Other courts have undertaken a historical survey and arrived at the same or similar conclusion. *See United States v. Chester*, 628 F.3d 673, 680-81 (4th Cir. 2010) (collecting cases); *see also Skoien*, 614 F.3d at 650-51 (J., Sykes dissenting) ("[S]cholars disagree about the extent to which *felons* -- let alone misdemeanants-were considered excluded from the right to bear arms during the founding era… We simply cannot say with any certainty that persons convicted of a domestic-violence misdemeanor are wholly excluded from the Second Amendment right as originally understood.") (emphasis in original). Perhaps most important here is that the government's briefing relies heavily on reasoning by analogy. *See generally* Dkt. 31. For example, the subheadings of the government's briefing are categorized as (B)(1) "Section 922(g)(9): A Brief History," and (B)(2) "Historical Analogues to Section 922(g)(9)." Indeed, the government provides extensive reasoning in Section (B)(2) that analogizes § 922(g)(9) to felon disarmament, those convicted of violent crimes, the disloyal, and minority communities. This Court will therefore turn to the "relevantly similar" inquiry and assess each of the government's analogies in turn.

B. Relevantly Similar Regulations

In 17th Century England, the royal government disarmed citizens that it deemed to be "dangerous to the Peace of the Kingdom." *Kanter*, 919 F.3d at 456 (quoting Militia Act of 1662, 13 & 14 Car. 2, c. 3 § 1662)); *see also Nat'l Rifle Ass'n of America, Inc. v. Bureau of Alc. Tob. Fir.*, 700 F.3d 185, 200 (2012) (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)); *see also Rahimi*, 2023 WL 1459240 at 7-8. These English traditions greatly influenced early colonial America. Those who also refused to swear an oath of allegiance would be disarmed because they were "deemed likely to disrupt society." despite being "neither criminals nor traitors." Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 507-08 (2004); *Nat'l Rifle Ass'n*, 700 F.3d at 200. There is history from the 1770s that demonstrates that some states disarmed citizens that refused to take an oath of allegiance. *Nat'l Rifle Ass'n*, 700 F.3d at 201; *Kanter*, 919 F.3d at 457-58; *Perez-Gallan*, 2022 WL 16858516 at 11. The history of disarming loyalists does not explain how or why § 922(g)(9) can burden Ryno's right to carry and possess firearms for self-defense. *Bruen*, 142 S.Ct. at 2132-33. As *Kanter* aptly points out, any potential danger that loyalists present disappeared once they pledged their allegiance. 919 F.3d at 457-58. As mentioned before, a conviction remains a conviction unless the record is wiped clean. "In sum, founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety. But neither the convention proposals nor historical practices support a legislative power to categorically disarm felons [or, a fortiori, misdemeanants] because of their status." *Id.* This Court therefore concludes that the loyalist history is not relevantly similar because history

does not impose a comparable burden or a comparable justification to the disarmament of domestic violence misdemeanants. *Bruen*, 142 S.Ct. at 2133.

Neither does this Court find an apt comparison in the government's proffered analog of disarming slaves, freed Blacks, and Native Americans. *Id.* (reasoning that the two regulations must be "comparably justified."). This Court agrees with Ryno that "these racialized disarmament laws [are] far too attenuated" to be employed as historical analogies. Put simply—the government feared armed uprising from minority populations because such populations were stripped of fundamental rights, of their humanity, and perhaps most repugnant, were viewed as *property or fractions of persons*. *See Rahimi*, 2023 WL 1459240 at 8 ("The purpose of these dangerousness laws was the preservation of political and social order, not the protection of an identified person from the specific threat posed by another."). Employing or placing weight on America's sorry history now, to justify the disarmament of domestic violence misdemeanants, runs the risk of subverting our Constitutional governance. On this point, *Bruen* stressed that not all history is or should be regarded as equal. *Id.* at 2136. Pertinent here is that *Bruen*'s framework did not provide a "mechanism to distinguish unjust or unconstitutional traditions, such as the tradition of having race-based arm restrictions, from other traditions." *Duncan v. Bonta*, 19 F.4th 1087, 1125 (9th Cir. 2021) (J. Berzon concurring). This Court will therefore not analogize § 922(g)(9) to the government's proffered history.

The government's historical analogues to violent felons, or generally, "dangerous" persons, are a different story. Take, for example, the favorably cited minority proposal from Pennsylvania. *Heller*, 554 U.S. at 604; *Binderup*, 836 F.3d at 367; *Skoien*, 614 F.3d

at 640. The proposed language is historically relevant: "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, *reprinted in* Bernard Schwartz, 2 *The Bill of Rights: A Documentary History*, 663, 665 (1971). Samuel Adams' Amendment in Massachusetts also sheds light on the Second Amendment's understanding at the founding era, proposing that the "Constitution be never construed to authorize Congress to … prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms." *Heller*, 554 U.S. at 604, 658; *Binderup*, 836 F.3d at 367; *Kanter*, 919 F.3d at 454-66 (J., Barrett dissenting) (providing several definitions of peaceable, and relevant among them, "not violent; not bloody; not quarrelsome; not turbulent.") (citation cleaned up). This Court hastens to add that, as a formal approach, Ryno is correct that the ratification language was not enacted. *See Rahimi*, 2023 WL 1459240 at 8 ("But these proposed amendments are not reflective of the Nation's early understanding of the scope of the Second Amendment right."). A careful reading of *Bruen* and *Heller*, however, reveals that ratification language is not categorically excluded from analysis. There are shades of a functional approach in *Bruen* and *Heller* that require a broader degree of generality which, in turn, allow weight to be placed on ratification language. This Court, in other words, is employing a dispassionate historical inquiry that a faithful reading of *Bruen* requires as it relates to ratification language. *See Rahimi* 2021 WL 145920 at 9 n.9 and 10 (J. Ho concurring). On this point, this Court agrees with the government that the ratification language is a historical tool that informs, and does not contradict, a codified,

pre-existing right. *See* Dkt. 51 at 6 (citing *Heller*, 554 U.S. at 592). Reasonable minds can differ on this; and reasonable minds can differ on the weight placed as it relates to the regulation at issue. Under these circumstances, and *as-applied* to Ryno, the ratification language is an apt comparison that is consistent with the Second Amendment's jurisprudential backdrop.

These two historical sources, taken together, indicate that founding-era attitudes were concerned with disarming those who had a proclivity towards violence or those that risked injury to the public. *Kanter*, 919 F.3d at 456 (J., Barrett dissenting); *see also Binderup*, 836 F.3d at 368-68 (citing Stephen P. Halbrook, *The Founders' Second Amendment*, 190-215 (2008)) ("surveying the debates at the ratifying conventions and highlighting the commonplace understanding that dangerous persons could be disarmed."); *see also Rahimi*, 2021 WL 1452940 at 10-11 (J. Ho concurring) (reasoning that "our Founders firmly believed in the fundamental role of government in protecting citizens against violence, as well as the individual right to keep and bear arms—and that these two principles are not inconsistent but entirely compatible with one another"). Indeed, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns." *Kanter*, 919 F.3d at 451 (J., Barrett dissenting); *see also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) ("[A]ctual 'longstanding' precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that ... its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger."). The

government's historical analogues to § 922(g)(1) are also relevant. As previously mentioned, felons—particularly violent ones—were punished with "confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like." *Mai*, 974 F.3d at 1093 (citing 2 William Blackstone*, Commentaries* 377). It bears emphasis that *Vongxay* has explicitly ruled that violent "felons are categorically different from the individuals who have a fundamental right to bear arms." *Id.* (quoting *Vongxay*, 594 F.3d at 1115); *see also Chovan*, 735 F.3d at 1144-45 (citing *McCane*, 573 F.3d at 1049) ("[T]he application of § 922(g) to a violent felon … would appear appropriate under any Second Amendment reading. After all, felons lose out on fundamental rights such as voting and serving on juries[.]").

The government's recitation of the historical treatment of dangerous persons and felons is well-presented and a representative historical analogue. *Bruen*, 142 S.Ct. at 2133; *See Rahimi*, 2023 WL 1452940 at 11 (J. Ho concurring) ("Our laws contemplate the incarceration [and disarmament] of those who criminally threaten, but have not (yet) committed violence. After all, to the victim, such actions are not only life-threatening—they're [*sic*] life-altering."). These historical analogues are comparable to § 922(g)(9) as-applied to Ryno. *Id.* Inherent in § 922(g)(9) is the predicate offense that requires use or attempted use of physical force by an intimate partner, or by a person with whom the victim shares a child. 18 U.S.C. § 921(a)(33). Section 922(g)(9) is particularly pointed to classes of persons that are dangerous enough to be disarmed because the element of physical force, in other words, is power or violence against another's physical safety. Moreover, a brief

review of the facts in the record indicates that Ryno has a propensity to commit violence, and is therefore a danger to the public. This conclusion is further strengthened by the fact that, after being notified that he was prohibited from possessing firearms by virtue of his convictions, Ryno was found "passed out" on a *public* highway, and in possession of more firearms and ammunition. Taken together, this is the very definition of dangerousness as contemplated at the time of the Second Amendment's enactment. Then, as now, the burden on the Second Amendment right to self-defense is comparable because the disarmament of violent or dangerous persons, such as Ryno, ensures the safety of the public, and along with it, its community members, such as Ryno's domestic partners. Taken together, the historical analogues "pass constitutional muster." *Bruen*, 142 S.Ct. at 2133.

All told, the government has demonstrated that § 922(g)(9), as-applied to Ryno, is consistent with this Nation's tradition of firearm regulation, and Ryno therefore falls outside the Second Amendment's "unqualified command." *Id.* at 2126.

VI. Conclusion

For the reasons set forth above, Ryno's Motion to Dismiss should be **DENIED**. 28 U.S.C. § 636(b)(1)(B).

DATED this 22nd day of February, 2023, at Anchorage, Alaska.

s/ Matthew M. Scoble
CHIEF U.S. MAGISTRATE JUDGE

Pursuant to D. Alaska Loc. Mag. R. 6(a), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the CLOSE OF BUSINESS on March 8, 2023. Failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. Miranda v. Anchondo, et al., 684 F.3d 844 (9th Cir. 2012). The

Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation. United States v. Howell, 231 F.3d 615 (9th Cir. 2000). Objections and responses shall not exceed five (5) pages in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before the CLOSE OF BUSINESS on March 15, 2023. The parties shall otherwise comply with provisions of D. Alaska Loc. Mag. R. 6(a). Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

APPENDIX I

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 16, 2026

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

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

OCT 23 2026

FILED
DOCKETED
BY INITIAL

Re: Alex Leon Padgett and Joel Michael Ryno
v. United States
Application No. 26A523
(Your No. 23-2417, 23-3426)

Dear Clerk:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on October 16, 2026, extended the time to and including November 20, 2026.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by HC/DB
Howard Cook
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

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