No. ____

In The
Supreme Court of the United States

October Term, 2024

TORRENCE DENARD WHITAKER,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR A WRIT OF CERTIORARI

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In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-10693

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TORRENCE DENARD WHITAKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cr-80196-KAM-1

Before ROSENBAUM, NEWSOM, and GRANT, Circuit Judges.

PER CURIAM:

Torrence Whitaker appeals his conviction for possession of a firearm and ammunition as a convicted felon, arguing that 18 U.S.C. § 922(g)(1) violates the Second Amendment and the Commerce Clause, both facially and as applied to him. The government responds by moving for summary affirmance, arguing that § 922(g)(1) is constitutional under the Second Amendment and the Commerce Clause, both facially and as applied to Whitaker, under our binding precedent and that this precedent has not been overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting *en banc*.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

We review the constitutionality of a statute *de novo*. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010).

A criminal defendant's guilty plea does not bar a subsequent constitutional challenge to the statute of conviction. *Class v. United States*, 583 U.S. 174, 178 (2018).

The prior precedent rule requires us to follow a prior binding precedent unless it is overruled by this Court *en banc* or by the Supreme Court. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016). "To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point." *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quotation marks omitted). "In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." *Id.* "The prior panel precedent rule applies regardless of whether the later panel believes the prior panel's opinion to be correct, and there is no exception to the rule where the prior panel failed to consider arguments raised before a later panel." *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019).

Section 922(g) of Title 18 of the United States Code prohibits anyone who has been convicted of a crime punishable by more than one year of imprisonment from possessing a firearm or ammunition. 18 U.S.C. § 922(g)(1).

The Commerce Clause reads: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. We have "clearly held that 18 U.S.C. § 922(g) is constitutional under the Commerce Clause." *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017), *abrogated on other grounds*

by Erlinger v. United States, 144 S. Ct. 1840 (2024). We have also rejected as-applied challenges to 18 U.S.C. § 922(g), holding that the government proves a "minimal nexus" to interstate commerce where it demonstrates that the firearms were manufactured outside of the state where the offense took place and, thus, necessarily traveled in interstate commerce. *Wright*, 607 F.3d at 715-16. In *United States v. McAllister*, we explicitly rejected the argument that *United States v. Lopez*, 514 U.S. 549 (1995), rendered § 922(g)(1) unconstitutional as applied to the appellant, holding that § 922(g)(1)'s statutory requirement of a connection to interstate commerce was sufficient to satisfy the "minimal nexus" requirement that remained in binding precedent. 77 F.3d 387, 390 (11th Cir. 1996). Similarly, in *United States v. Scott*, we held that *United States v. Morrison*, 529 U.S. 598 (2000), did not abrogate *McAllister* because § 922(g)(1) contained an explicit statutory jurisdictional requirement that "immunizes § 922(g)(1) from Scott's facial constitutional attack," and *Morrison* did not compel a different conclusion than reached in *McAllister*. 263 F.3d 1270, 1273 (11th Cir. 2001).

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment right to bear arms presumptively "belongs to all Americans," but is not unlimited. 554 U.S. 570, 581, 626 (2008). The Supreme Court noted in *Heller* that, while it "[did] not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment, nothing in [the *Heller*] opinion should

be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." *Id.* at 581, 626. Courts of appeals adopted a "two-step" framework for assessing Second Amendment challenges following *Heller*: (1) determine whether the law in question regulates activity within the scope of the right to bear arms based on its original historical meaning; and (2) if so, apply means-end scrutiny to test the law's validity. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 18-19 (2022).

In *United States v. Rozier*, we relied on *Heller* in holding that § 922(g)(1) did not violate the Second Amendment, "even if a felon possesses a firearm purely for self-defense." 598 F.3d 768, 770 (11th Cir. 2010). We recognized that prohibiting felons from possessing firearms was a "presumptively lawful longstanding prohibition." *Id.* at 771 (quotation marks omitted). We stated that *Heller* suggested that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* We concluded that Rozier's purpose for possessing a firearm, and the fact that the firearm was constrained to his home, was immaterial because felons as a class could be excluded from firearm possession. *Id.*

In *Bruen*, the Supreme Court held that *Heller* does not support applying means-end scrutiny in the Second Amendment context. 597 U.S. at 19. Instead, a court must ask whether the firearm regulation at issue governs conduct that falls within the plain text of the Second Amendment. *Id.* at 17. If the regulation does govern such conduct, the court will uphold it so long as the government

"affirmatively prove[s] that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 19. The Supreme Court in *Bruen*, as it did in *Heller*, referenced the Second Amendment rights of "law-abiding, responsible citizens." *Id*. at 26, 38 n.9, 70; *Heller*, 554 U.S. at 635.

In *United States v. Dubois*, we rejected a defendant's Second Amendment challenge to § 922(g)(1). 94 F.4th 1284, 1291-93 (11th Cir. 2024). We noted that *Bruen*, like *Heller*, repeatedly described the right to bear arms as extending only to "law-abiding, responsible citizens." *Id*. at 1292-93. We then determined that *Bruen* did not abrogate our precedent in *Rozier* under the prior-panel-precedent rule because the Supreme Court made it clear that *Heller* did not cast doubt on felon-in-possession prohibitions and that its holding in *Bruen* was consistent with *Heller*. *Id*. at 1293. We noted that *Rozier* interpreted *Heller* as limiting the right to "law-abiding and qualified individuals," and as clearly excluding felons from those categories by referring to felon-in-possession bans as presumptively lawful. *Id*. (quotation marks omitted). We held that, because clearer instruction was required from the Supreme Court before we could reconsider § 922(g)(1)'s constitutionality, we were still bound by *Rozier*, and *Dubois*'s challenge based on the Second Amendment therefore failed. *Id*.

In *United States v. Rahimi*, the Supreme Court held that § 922(g)(8), which prohibits the possession of firearms by individuals subject to a domestic violence restraining order, did not facially violate the Second Amendment because regulations prohibiting

individuals who pose a credible threat of harm to others from misusing firearms are part of this country's historical tradition. 144 S. Ct. 1889, 1889, 1896, 1898, 1902 (2024). The Supreme Court noted that courts have "misunderstood" the *Bruen* methodology and stated that the Second Amendment permitted not just regulations identical to those in existence in 1791, but also those regulations that are "consistent with the principles that underpin our regulatory tradition" and are "relevantly similar to laws that our tradition is understood to permit." *Id.* at 1898-99 (quotation marks omitted). The Supreme Court noted that the right to bear arms "was never thought to sweep indiscriminately" and extensively detailed the historical tradition of firearm regulations, including the prohibition of classes of individuals from firearm ownership. *Id.* at 1897, 1899-1901. The Supreme Court held that § 922(g)(8) was constitutional as applied to Rahimi because the restraining order to which Rahimi was subject included a finding that he posed "a credible threat to the physical safety" of another, and the government provided "ample evidence" that the Second Amendment permitted "the disarmament of individuals who pose a credible threat to the physical safety of others." *Id.* at 1896-98. The Supreme Court noted that, "like surety bonds of limited duration," the restriction imposed on Rahimi's rights by § 922(g)(8) was temporary because it applied only while Rahimi was subject to a restraining order. *Id.* at 1902. The Supreme Court also rejected the government's proposition, in response to Rahimi's as-applied challenge, that citizens who are not "responsible" may be disarmed as a class, noting that

the term "responsible" is too vague to act as a rule and did not derive from caselaw. *Id*. at 1903.

Here, we grant the government's motion for summary affirmance because it is clearly right as a matter of law that Whitaker's challenges to the constitutionality of § 922(g)(1) are foreclosed by our binding precedents. *See Groendyke Transp.*, 406 F.2d at 1162; *McAllister*, 77 F.3d at 389-90. As Whitaker has conceded, his Commerce Clause arguments are foreclosed under *White*, *McAllister,* and *Scott*. *See White*, 837 F.3d at 1228; *Kaley*, 579 F.3d at 1255; *Gillis*, 938 F.3d at 1198; *McAllister*, 77 F.3d at 390; *Scott*, 263 F.3d at 1273. Our binding precedents in *Dubois* and *Rozier* similarly foreclose his Second Amendment Arguments. *See Rozier*, 598 F.3d at 770-71; *Dubois*, 94 F.4th at 1293. Neither *Bruen* nor *Rahimi* abrogated *Rozier* or *Dubois*. Accordingly, we affirm.

AFFIRMED.

A-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10693-FF

United States,
Appellee,

- versus -

Torrence Whitaker,
Appellant.
_______________________________/

GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1(a)(3) and 26.1-3, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the appellants' CIP, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the government's previous CIP.

Caruso, Michael

Colan, Jonathan D.

Dopico, Hector A.

Funk, Daniel

Gonzalez, Juan Antonio

Grove, Daren

Lacosta, Anthony W.

Lapointe, Markenzy

Marra, Hon. Kenneth A.

Matthewman, Hon. William

Matzkin, Daniel

McCabe, Hon Ryon M.

McCrae, M. Caroline

McMillan, John C.

Militello, Kristy

Reinhart, Hon Bruce E.

United States of America

Whitaker, Torrence Denard

/s/ Jonathan D. Colan
Jonathan D. Colan
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10693-FF

United States,
Appellee,

- versus -

Torrence Whitaker,
Appellant.
_____________________________/

GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

Appellee, the United States of America, respectfully requests summary affirmance of Whitaker's conviction, because his Second Amendment and Commerce Clause challenges to 18 U.S.C. § 922(g)(1) are foreclosed by binding precedent.

Procedural History

A federal grand jury in the Southern District of Florida indicted Appellant Torrence Whitaker, charging him with one count of violating 18 U.S.C. § 922(g)(1) by knowingly possessing a firearm and ammunition, in and affecting interstate commerce, knowing that he had previously been convicted of a felony (DE:5).

Whitaker moved to dismiss his indictment, arguing that § 922(g)(1) violated the Second Amendment both facially and as applied to him and that it exceeded Congress's Commerce Clause powers (DE:43). The government opposed

Whitaker's motion, arguing that both his Second Amendment and Commerce Clause arguments were precluded by binding precedent (DE:45). After Whitaker replied (DE:47), the district court denied the motion, addressing Whitaker's Second Amendment arguments but not directly addressing his Commerce Clause arguments (DE:48).

Whitaker subsequently pled guilty pursuant to a written plea agreement and factual proffer (DE:56), in which he admitted that on August 19, 2022, officers conducting a traffic stop "found a semiautomatic pistol in the right waist band of defendant WHITAKER'S pants" (DE:56:10). He also admitted that the 9-milimeter pistol was loaded with 17 rounds of ammunition and that the pistol and ammunition were all manufactured outside the State of Florida (DE:56:10, 12). Whitaker further admitted that at the time he had previously been convicted of multiple felony offenses (DE:56:11-12).

The district court imposed judgment against Whitaker, sentencing him to serve a 52-month imprisonment term and three years' supervised release and to pay a $100 assessment (DE:70).

Whitaker filed a timely notice of appeal (DE:77) and remains incarcerated.

Argument

Though the "question [of] the Government's power to constitutionally prosecute" his offense is not waived by his guilty plea, *Class v. United States*, 583 U.S. 174, 181-82 (2018), Whitaker's Second Amendment and Commerce Clause arguments are foreclosed by binding precedent. His conviction should be summarily affirmed.

Summary disposition is appropriate in cases "in which the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[1] *See, e.g.*, *United States v. Solomon*, No. 23-10480, 2023 WL 6568132, at *3 (11th Cir. Oct. 10, 2023) ("Given our binding precedent, we conclude that there is no substantial question as to the outcome of this appeal; therefore, summary affirmance is appropriate.").

I. Section 922(g)(1) survives Second Amendment challenge under all circumstances.

Whitaker's Second Amendment argument is squarely foreclosed by this Court's recent decision in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024).

[1] In *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent the decisions of the former Fifth Circuit rendered before October 1, 1981.

Dubois reaffirmed *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010), in holding that "'statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment.'" *Id.* at 1292 (emphasis added) (quoting *Rozier*, 598 F.3d at 771). *Dubois* rejected the argument that the Supreme Court's *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), decision undermined *Rozier*. "*Bruen* did not abrogate *Rozier*." *Id.* at 1293.

Since *Dubois*, this Court has treated the constitutionality of § 922(g)(1) as settled law, rejecting both facial and as-applied challenges (*contra* Whitaker Br. at 20, asserting that as-applied challenges are not precluded). *See United States v. Dunlap*, No. 23-12883, 2024 WL 2176656, at *2 (11th Cir. May 15, 2024) (holding that *Dubois* "conclusively forecloses" the appellants' facial and as-applied challenges). This includes granting summary affirmance. *See United States v. Kirby*, No. 24-10142, 2024 WL 2846679, at *1 (11th Cir. June 5, 2024) ("grant[ing] the government's motion for summary disposition, since it is 'clearly right as a matter of law' that § 922(g)(1) is constitutional," quoting *Groendyke Transp.*, 406 F.2d at 1162).

Although the Supreme Court has granted review, vacated, and remanded cases from other circuits that had split on the question of as-applied Second Amendment challenges to § 922(g)(1), for further review in light of *United States v. Rahimi*, 602

U.S. --, 2024 WL 3074728 (U.S. June 21, 2024),[2] the Supreme Court has taken no position so far that would undermine *Dubois* as binding precedent in this Circuit. Indeed, this Court applied *Dubois* as controlling precedent after *Rahimi*. *See United States v. Causey*, No. 22-12014, 2024 WL 3102872, at *3 (11th Cir. June 24, 2024).

However the Third, Eighth, and Tenth Circuits rule on remand, and if and when the Supreme Court were to address the issue when it returns to that Court, nothing has yet changed this Circuit's binding law. "[T]he grant of certiorari alone is not enough to change the law of this circuit or to justify this Court in granting [relief] on the possibility that the Supreme Court may overturn circuit law." *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004), *abrogated on other grounds by Hill v. McDonough,* 547 U.S. 573 (2006). "To date, the law in this Circuit, which has not been modified by Supreme Court decision, mandates a denial of relief to petitioner on this issue." *Jones v. Smith*, 786 F.2d 1011, 1012 (11th Cir. 1986).

Until and unless *Dubois* is overturned by this Court en banc or by the Supreme Court, it remains binding law. Ruling otherwise would be "contrary to the unequivocal law of this circuit … because grants of certiorari do not themselves

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[2] *Garland v. Range*, --S. Ct.--, 2024 WL 3259661 (U.S. July 2, 2024), *Jackson v. United States*, --S. Ct.--, 2024 WL 3259675 (U.S. July 2, 2024), and *Vincent v. Garland*, --S. Ct.--, 2024 WL 3259668 (U.S. July 2, 2024).

change the law." *Schwab v. Sec'y, Dep't of Corr.*, 507 F.3d 1297, 1298 (11th Cir. 2007).

Section 922(g)(1) is not susceptible to either a facial or as-applied Second Amendment challenge, because it is constitutional "under any and all circumstances." *Dubois*, 94 F.4th at 1292.

II. Section 922(g)(1) is within Congress's Commerce Clause powers.

Similarly, this Court has "clearly held that § 922(g) is constitutional under the Commerce Clause." *United States v. Longoria*, 874 F.3d 1278, 1283 (11th Cir. 2017) (affirming a defendant's § 922(g)(1) conviction). *See also United States v. Stancil*, 4 F.4th 1193, 1200 (11th Cir. 2021) (§ 922(g)(1) "is within Congress's Commerce Clause powers").

And here, too, the Court has treated the issue as settled law, rejecting facial and as-applied challenges in unpublished decisions. *See United States v. Ordaz*, No. 21-13423, 2024 WL 471966, at *1 (11th Cir. Feb. 7, 2024) (rejecting facial and as-applied Commerce Clause challenge); *United States v. Williams*, No. 21-10079, 2022 WL 402927, at *1 (11th Cir. Feb. 10, 2022) (same). The Court has likewise granted summary affirmance against a Commerce Clause challenge. *See Kirby*, No. 24-10142, 2024 WL 2846679, at *1.

CONCLUSION

For these reasons, the United States of America respectfully requests that this Court grant summary affirmance of Whitaker's § 922(g)(1) conviction.

Respectfully submitted,

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Certificate of Compliance

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,203 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

Certificate of Service

I HEREBY CERTIFY that on July 8, 2024, a true copy of the foregoing was filed electronically with the Eleventh Circuit Court of Appeals' Internet web at www.ca11.uscourts.gov using CM/ECF, and electronically served on Assistant Federal Public Defender M. Caroline McCrae, Counsel for Whitaker.

/s/ Jonathan D. Colan
Jonathan D. Colan
Assistant United States Attorney

A-3

No. 24-10693-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

TORRENCE DENARD WHITAKER,
Defendant/Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Torrence Denard Whitaker
Case No. 24-10693-J

Appellant, Torrence Denard Whitaker, files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Caruso, Michael, Former Federal Public Defender

Dopico, Hector, Interim Federal Public Defender

Gonzalez, Juan Antonio

Grove, Daren, Assistant United States Attorney

Lacosta, Anthony W

Lapointe, Markenzy, United States Attorney

Marra, Hon Kenneth A., United States District Judge

Matthewman Hon William, United States Magistrate Judge

Matzkin, Daniel, Chief, Appellate Division, United States Attorney

McCabe, Hon Ryon M., United States Magistrate Judge

McCrae, M. Caroline, Assistant Federal Public Defender

McMillan, John, Assistant United States Attorney

Militello, Kristy, Assistant Federal Public Defender

Reinhart, Hon Bruce E, United States Magistrate Judge

United States of America, Plaintiff/Appellee

Whitaker, Torrence, Defendant/Appellant

s/M. Caroline McCrae
M. Caroline McCrae

RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

Appellant, Torrence Denard Whitaker, through undersigned counsel, respectfully responds to the government's motion for summary affirmance, by asking the Court to deny the motion for the following reasons:

1. On July 8, 2024, the government filed a motion for summary affirmance, arguing that both Mr. Whitaker's Second Amendment (*i.e.*, his as-applied and facial) arguments, and his Commerce Clause arguments, were "foreclosed by binding precedent," namely, *United States v. Dubois*, 94 F. 4th 1284 (11th Cir. 2024), and *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017).

2. While Mr. Whitaker concedes that his Commerce Clause arguments are currently foreclosed by binding Circuit precedent, and as noted in the brief, he is simply preserving them for further Supreme Court review that is decidedly not the case for his Second Amendment arguments. His post-*Bruen* Second Amendment arguments should be decided as a matter of first impression by this Court now.

3. As the government correctly acknowledges, summary affirmance

is only appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as if more frequently the case, the appeal is frivolous." *Groendyke Transp. Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). But the government incorrectly ignores that an appeal can only be deemed "frivolous" if it is "without arguable merit either in law *or fact*." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (emphasis added). Even prior to the Supreme Court's decision in *United States v. Rahimi*, 144 S.Ct. 1889, 2024 WL 3074728 (June 21, 2024) (22-915), that could not be said for Mr. Whitaker's as-applied (fact-based) challenge for the reasons set forth at length in Issue I of the Initial Brief and disregarded entirely in the government's motion. And indeed, *Rahimi* simply further confirms the "arguable merit" of Mr. Whitaker's as-applied post-*Bruen* challenge.

Notably, even prior to *Rahimi*, the two unpublished decisions cited by the government as support for summary affirmance—*United States v. Dunlap*, No. 23-12883, 2024 WL 2176656, at *2 (11th Cir. May 15, 2024) and *United States v. Kirby*, No. 24-10142, 2024 WL 2846679, at *1 (11th Cir. June 5, 2024)—were distinguishable and of no persuasive value for

this case. Specifically, in *Dunlap* the Court reviewed Second Amendment claims deferentially under the plain error standard since the defendant (unlike Mr. Whitaker) raised his facial and as-applied challenges for the first time on appeal. *See* 2024 WL 2176656, at *2. Here, by contrast, both Mr. Whitaker's facial and as-applied challenges were articulated meticulously below, and therefore are reviewable *de novo* by the Court.

Moreover, in *Kirby*, the defendant (quite unlike Mr. Whitaker) did not articulate an as-applied challenge based on his prior record at all. He articulated a facial challenge only, expressly conceding not only that *Dubois* controlled that challenge, but that *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010) controlled post-*Bruen*, and that he was raising his facial *Bruen* challenge only "for purposes of further review" since it was "currently foreclosed by this Court's binding precedent." *Kirby* Initial Brief, DE 17:5, 7, 12; Response to Govt's Motion for Summary Affirmance, DE 25:1.

This case is nothing like *Dunlap* and *Kirby*. The arguments, issues, and standard of review here are completely different. But more importantly, both *Dunlap* and *Kirby* were rendered pre-*Rahimi*. The panels that rendered those cases did not have the benefit of the Supreme

Court's detailed guidance in *Rahimi* about the *Bruen* methodology. However, this Court does have *Rahimi's* guidance and must follow that guidance now.

4. In *Dubois*, the Court declined to conduct the new two-step analysis for Second Amendment challenges mandated by *Bruen*. In continuing to adhere to its pre-*Bruen* decision in *Rozier* holding § 922(g)(1) facially constitutional, it explained: "We require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)." *Dubois*, 94 F.4th at 1293. But indeed, in *Rahimi* the Supreme Court has provided very clear instruction to this Court as to the post-*Bruen* required methodology in multiple respects. And all that instruction directly undercuts the assumptions, reasoning, and approach of both *Rozier* and *Dubois* for the post-*Bruen* as-applied challenge raised in Issue I here. To the extent the government claims *Rozier* and *Dubois* "foreclose" Mr. Whitaker's post-*Bruen* as-applied challenge, *Rahimi* proves that contention wrong for multiple reasons.

First, the Supreme Court made undeniably clear in *Rahimi* that (1) *Bruen* indeed set forth a new methodology for Second Amendment

analysis that lower courts must follow, and (2) *Rahimi* has now "clarified" that methodology. In fact, every member of the *Rahimi* Court was in agreement on those points. *See* 2024 WL 2024 WL 3074728, at *6 (Roberts, C.J., writing for the majority) ("As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court *must ascertain* whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully *the balance stuck by the founding generation* to modern circumstances.") (internal citations to *Bruen* omitted; emphasis added).[1]

[1] *See also id.* at **12-13 (Sotomayor, J. joined by Kagan, J., concurring) ("The Court's opinion clarifies an important methodological point" – namely, that "courts applying *Bruen* should 'conside[r] whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition;" "The Court today *clarifies Bruen's historical inquiry*") (internal citations to *Bruen* omitted) (emphasis added); id. at **14-15, 17 (Gorsuch, J., concurring) (under *Bruen*, "*[T]ext and history' dictate* the contours of [the Second Amendment] right;" the government *must establish* that, "in at least some of its applications, the challenged law 'impose[s] a comparable burden on the right of armed self-defense' to that imposed by a historically recognized regulation," and that "the burden imposed by the current law 'is comparably justified;" "Among all the opinions issued in this case, its central messages should not be lost. The Court *reinforces the focus on text, history, and tradition, following exactly the path we described in Bruen*") (internal citations to *Bruen* omitted) (emphasis added); *id.* at **19, 21, 28 (Kavanaugh, J.,

It cannot be disputed that *Rozier* did not comply with *Bruen*'s later-announced text/history/tradition methodology. Nor did *Dubois*. Neither panel considered the text of the Second Amendment. Nor did they require the government to identify any Founding era analogues, so that the Court could determine whether they were "comparably justified" and imposed a "comparable burden." Rather, *Dubois* adhered too rigidly to *Rozier* which had avoided all textual and historical analysis by following *Heller*

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concurring) ("the historical approach examines the laws, practices, and understandings *from before and after ratification*," but in using preratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated;" in today's opinion the court builds on *Bruen's* "relevantly similar" standard) (emphasis added); *id*. at **29-30 (Barrett, J., concurring) ("courts *must examine our tradition of firearm regulation*," and "[a] regulation is constitutional only if the government *affirmatively proves* that it is 'consistent with the Second Amendment's text and historical understanding;'" "evidence of 'tradition' unmoored from original meaning is not binding law;" "'[a]nalogical reasoning' under *Bruen* demands a wider lens: Historical regulations reveal a principle not a mold") (internal citations omitted); id. at **30-31 (the Court adopted a "*new legal standard in Bruen*," and "*Bruen is now binding law*;" "*The tests we established bind lower court judges*;" pointing to *Dubois* as one example of lower courts calling out for more guidance; today's effort "*expound[ing] on the history-and-tradition inquiry that Bruen requires*" was to clear up "'misunderst[andings]'") (internal citations omitted; emphasis added); id. at **34-35 (Thomas, J., dissenting) (*Bruen* "laid out the *appropriate framework* for assessing whether a firearm regulation is constitutional," and "as the Court [today] recognizes," whether that modern regulation "violates the Second Amendment mandate") (emphasis added).

dicta on "presumptively lawful" purportedly "longstanding prohibitions." That dicta-based approach is not permitted after *Bruen* and *Rahimi*.

Second, and relatedly, the *Rahimi* Court squarely "reject[ed] the Government's contention" that legislatures can disarm anyone who is not "responsible." 2024 WL 3074728, at *11. And notably, the *Dubois* panel expressly accepted that now-definitively-rejected contention. *See Dubois*, 94 F.4th at 1293 (underscoring that "*Bruen*, like *Heller* repeatedly described the [Second Amendment] right as extending only to 'lawabiding responsible citizens") (citations omitted).

Chief Justice Roberts, writing for the Court in *Rahimi*, declared the government's chosen term—"responsible"—to be "vague," and clarified that such a dividing line predicated on that term does not "derive from our case law." 2024 WL 3074728, at *11. Indeed, he explained, while *Heller* and *Bruen* did use the term "responsible," they did so simply to "describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right." Those opinions "said nothing about the status of citizens who were not 'responsible,'" because "[t]he question was simply not presented." *Id.*

Importantly, the government derived its proposed "responsible"

limitation pressed in *Rahimi* from the same place that its supposed rule for § 922(g)(1) that "non-law-abiding" people can be disarmed: passages in *Heller* and *Bruen* that use those words. *See* Solicitor General's merits brief in *Rahimi*, 2023 WL 5333645, at **11-13 (Aug. 14, 2023). Accordingly, if "responsible" is out as a relevant Second Amendment principle, "law-abiding" is necessarily out as well. Importantly for this case, *Rahimi* puts the "law-abiding, responsible citizen" principle expressly followed by *Dubois*, to rest once and for all.

Third, although in one instance toward the end of the *Rahimi* majority opinion, Chief Justice Roberts acknowledged the "presumptively lawful" dicta in *Heller* (followed in *Rozier* and *Dubois*), the full statement and context are crucial in assessing the significance of this single reference. The Chief Justice stated:

> Rahimi argues *Heller* requires us to affirm, because Section 922(g)(8) bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an 'absolute prohibition on handguns ... in the home.' 554 U.S., at 636; Brief for Respondent at 32. But *Heller* never established a categorical rule that the Constitution prohibits regulations that forbid firearm possession in the home. In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' 554 U. S., at 626, 627, n. 26. Op. 15.

Here, the Court was simply saying that *Rahimi* over-read *Heller*, which on its own terms did not support his position that all gun bans in the home are unconstitutional. The Court was not independently endorsing the idea that felon-disarmament bans are lawful—simply noting that *Heller* did not support Rahimi's position. Indeed, the Court later confirmed that, as in *Heller* and *Bruen*, it was "not 'undertak[ing] an exhaustive historical analysis ... of the full scope of the Second Amendment,'" and that it was "only" holding that people who pose a credible threat to others may be disarmed. 2024 WL 3074728, at *11.

These statements counsel against reading this single, passing reference to *Heller* as a "holding" about § 922(g)(1). It was not. *See also id*. at *9 (making clear that the Court was expressly declining to decide whether categorical bans like § 922(g)(1), referenced in *Heller*, were actually lawful); *id*. at *6 (Gorsuch, J., concurring) ("Nor do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not "responsible."' ... Not a single Member of the Court adopts the Government's theory.")

Indeed, the *Rahimi* Court's rejection of the government's "responsible" standard further confirms that this passing reference to the *Heller* dicta does not confirm the lawfulness of § 922(g)(1), as applied to Mr. Whitaker. The government came up with the "responsible, law-abiding citizens" test by seizing on stray comments in *Bruen* and *Heller* about the challengers in those cases. Yet *Rahimi* makes clear that by referring to "responsible" citizens, *Bruen* and *Heller* "said nothing about the status of citizens who were not 'responsible.'" 2024 WL 3074728, at *11. Those cases did not address that question, and the government erred by trying to fashion the references to "responsible" citizens into a rights-restricting rule. In other words, courts should not latch on to dicta and asides in the Supreme Court's Second Amendment cases and improperly elevate them to a "holding" that, without any analysis or explanation, severely restricts the scope of a fundamental, enumerated constitutional right. Yet, that is exactly what this Court (if it were to continue to rigidly adhere to *Rozier* and *Dubois*) would be doing by over-reading *Rahimi*'s reference to *Heller*'s dicta as a "holding" about the constitutionality of § 922(g)(1).

The Third Circuit made a similar point in its decision in *Range v.*

Att'y Gen. United States, 69 F.4th 96 (3d Cir. 2023) (en banc). There, the Third Circuit noted that *Heller* had said the District of Columbia's gun law "would be unconstitutional 'under any of the standards of scrutiny that we have applied to enumerated constitutional rights.'" *Id.* at 100. But *Bruen* subsequently made clear that *Heller*'s reference to "standards of scrutiny" did not mean Second Amendment claims were subject to means-ends scrutiny. Therefore, the Third Circuit wrote, courts must be "careful not to overread" stray comments in the Supreme Court's Second Amendment cases that are not relevant to the holding, such as "references to 'law-abiding, responsible citizens.'" *Id.* at 101.

Rahimi vindicated that caution. And this Court should be equally "careful not to over-read" the brief allusion to *Heller*'s dicta, which was not in any way necessary to *Rahimi*'s holding. Notably, Justice Thomas—the author of *Bruen*—was clear in his dissent, and no one in the majority disagreed, that the "passing reference in *Heller* to laws banning felons and others from possessing firearms" was "dicta," and "[a]s for *Bruen*, the Court used the phrase "ordinary, law-abiding citizens" merely to describe those who were unable to publically carry a firearm in New York." 2024 WL 3074728, at *45 n.1 (Thomas, J., dissenting).

Finally, and related to the above point, the Court must also be careful not to over-read *Dubois* to bar all post-*Bruen* as-applied challenges as the government urges in its motion. Indeed, even if *Dubois* could be read (as the government wrongly contends) to reject every possible as-applied post-*Bruen* challenge to § 922(g)(1) without considering either text, historical regulations that might possibly be Founding era "analogues" for § 922(g)(1), or a defendant's prior record, *see* Motion at 3 (claiming that based on *Dubois*, § 922(g)(1) survives Second Amendment challenge under all circumstances"), that position was squarely rejected by *Rahimi*. In holding that *Rahimi*'s facial challenge failed because the statute "is constitutional as applied to the facts of Rahimi's own case," 2024 WL 3074728, at *6, the Supreme Court necessarily and squarely rejected the position the government took at the *Rahimi* oral argument that as-applied challenges are unavailable in Second Amendment cases "if and when they come." (Official Transcript at 44). In making clear that the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987) applies to Second Amendment challenges, the Supreme Court necessarily recognized that as-applied Second Amendment challenges are permitted. *See Rahimi* at

1898 ("[T]o prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications.").

Notably, although an as-applied challenge to § 922(g)(1) was not before the Court in *Rahimi*, at the oral argument Justice Gorsuch stated in response to the government's now-provably-wrong assertion that the Court should never entertain as-applied Second Amendment challenges, that there may indeed "be an as-applied if it's a lifetime ban." (OA Tr. at 43). And that—of course—is the exact issue before the Court here.

6. If *Rahimi* has merely bolstered Mr. Whitaker's as-applied challenge in Issue I—which it certainly has for all of the above reasons—that in and of itself is a sufficient reason to reject the government's ill-founded, jump-the-gun request for summary affirmance. But notably, *Rahimi* has also bolstered Mr. Whitaker's facial challenge in Issue II. For indeed, *Rahimi* severely uncuts *Dubois* on facial constitutionality, due to the majority's laser-focus on the temporary nature of the disarmament under a restraining order, in identifying the two Founding era analogues that were both "comparably justified" and imposed a "comparable burden."

As explained by Justice Gorsuch, the Court was prohibited by the

Article III "case and controversy" requirement from reaching out in advisory fashion to resolve the constitutionality of any other statute (including § 922(g)(1)). *See* 2024 WL 3074728, at *17. But the Court did nonetheless confirm an important Second Amendment methodological point directly applicable to § 922(g)(1): namely, that under *Bruen*'s "relevantly similar" approach to analogical reasoning, the government must be able to identify a Founding era regulation that not only had a "comparable justification" but also imposed a "comparable burden"—that is, the Founding era regulation must have both a comparable "why" and "how" to the modern one for the latter to be constitutional under the Second Amendment. *See id.* at *14 (Gorsuch, J., concurring).

Quite different than § 922(g)(8) which imposes only temporary disarmament—a point repeatedly emphasized in the *Rahimi* majority opinion—the burden posed by § 922(g)(1) is *for life*. And the government at no time, in any case before any court at any level, has ever been able to identify any Founding-era analogue disarming anyone for life. Thus, the government will never be able to satisfy the "how" component of the "relevantly similar" analysis, which *Bruen* held, and *Rahimi* has confirmed, must be applied in every Second Amendment case going

forward.

For all of the above reasons, undersigned counsel asks that the Court entertain full adversarial briefing on both Issues I and II raised by Mr. Whitaker, and hear oral argument before deciding whether it is bound to follow *Dubois* post-*Rahimi* on both Second Amendment challenges raised below and herein, or rather, whether the *Rozier/Dubois* approach has been undermined to the point of abrogation by *Rahimi*. But, at the very least, the Court should find that *Rahimi* has confirmed that summary affirmance is inappropriate for Issue I. The as-applied issue herein is hardly frivolous; indeed, it is even more well-founded now that *Rahimi* has confirmed the only identifiable tradition of firearm regulation dating to the Founding in this country, is one that "temporarily" disarms an individual "found" by a court to pose a "credible threat." And there has never been such a finding by any court for Mr. Whitaker, who has only ever been convicted of categorically non-violent crimes.

WHEREFORE, the appellant, Torrence Denard Whitaker, respectfully requests that the Court deny the government's motion for summary affirmance, and issue a notice advising counsel of the new

schedule for the government to file its Answer Brief and Mr. Whitaker to file his Reply Brief.

Respectfully submitted,

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER

By: *s/ M. Caroline McCrae*

M. Caroline MCrae
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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 27(d)(2)(A), because it contains 3,178 words, excluding the parts of the pleading exempted by Fed. R. App. P. 32(f).

This motion also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook font.

s/ M. Caroline McCrae
M. Caroline McCrae

CERTIFICATE OF SERVICE

I HEREBY certify that on July 18, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day via CM/ECF on Daniel Matzkin, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132.

s/M. Caroline McCrae
M. Caroline McCrae

A-4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10693

United States,
Appellee,

- versus -

Torrence Whitaker,
Appellant.
________________________________/

GOVERNMENT'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY AFFIRMANCE

Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1(a)(3) and 26.1-3, the undersigned certifies that the list set forth below is a complete list of the persons and entities who have an interest in the outcome of this case.

Caruso, Michael

Colan, Jonathan D.

Dopico, Hector A.

Funk, Daniel

Gonzalez, Juan Antonio

Grove, Daren

Lacosta, Anthony W.

Lapointe, Markenzy

Marra, Hon. Kenneth A.

Matthewman, Hon. William

Matzkin, Daniel

McCabe, Hon Ryon M.

McCrae, M. Caroline

McMillan, John C.

Militello, Kristy

Reinhart, Hon Bruce E.

United States of America

Whitaker, Torrence Denard

/s/ Jonathan D. Colan
Jonathan D. Colan
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 24-10693

United States,
Appellee,

- versus -

Torrence Whitaker,
Appellant.
______________________________/

GOVERNMENT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Federal Rule of Appellate Procedure 27(a)(4), the United States replies to Appellant Torrence Whitaker's response to the government's motion for summary affirmance, to address his arguments concerning the Supreme Court's decision in *United States v. Rahimi*, 602 U.S. --, 2024 WL 3074728 (U.S. June 21, 2024). Whitaker's response ignores this Court's explanation in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), discussing *why* the Supreme Court's latest Second Amendment jurisprudence did not disturb this Court's binding precedent in *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010). As a panel of this Court has now recognized, "[t]he Supreme Court's recent decision in *United States v. Rahimi*, … does not change our analysis." *United States v. Johnson*, No. 23-11885, 2024 WL 3371414, at *3 (11th Cir. July 11, 2024) (unpublished).

Whitaker relies on the Supreme Court's "new methodology" in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), that *Rahimi* has "now clarified" (Response at 4-5 (internal quotation omitted)). But *Dubois* addressed *Bruen's* new historical methodology and explained why it "did not abrogate *Rozier*." *Dubois*, 94 F.4th at 1293.

Bruen's new framework preserved *Heller's* initial inquiry into whether conduct is plainly protected by the Second Amendment. *Bruen*, 597 U.S. at 17 (recognizing that this step is "[i]n keeping with" *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008)). *Bruen* changed only the second inquiry, examining whether a regulation of protected conduct was permissible. It replaced the means/ends balancing of interests test employed in some circuits—but never this Circuit in upholding § 922(g)(1)—with an analysis of whether a restriction is consistent with historical understanding.

Dubois recognized that this Circuit "never actually applied the second, means-end-scrutiny step." *Dubois*, 94 F.4th at 1292 (citing *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1052–53 (11th Cir. 2022) (Newsom, J., concurring)). Instead, *Rozier* ruled that felons categorically were a "certain class[] of people" without firearm possession rights protected by the Second Amendment. 598 F.3d at 771.

Whitaker is wrong in arguing that courts "must" apply the second step historical inquiry (Response at 5). *Bruen* only requires a historical analysis of

allowed restrictions if a claimant first establishes the threshold requirement that "the Second Amendment's plain text covers [the] individual's conduct." 597 U.S. at 24. Because this Court disqualified felons from Second Amendment protection at the first step, it never needed to proceed to the second step.

Thus *Rahimi's* clarification of how to apply *Bruen's* new second-step historical methodology had no effect on *Rozier*. Whatever the Supreme Court in *Rahimi* said about the rights of other people considered not responsible enough to possess firearms, it reaffirmed *Heller's* acknowledgment that prohibitions on actual convicted felons possessing firearms are "presumptively lawful." *Rahimi*, 144 S. Ct. at 1902 (citing *Heller*, 554 U.S. at 626, 627, n. 26).

Dubois squarely held that "*Bruen* did not abrogate *Rozier*." 94 F.4th at 1293. And this Court has continued to rely on *Rozier* and *Dubois* since *Rahimi*. *See Johnson*, No. 23-11885, 2024 WL 3371414, at *3; *United States v. Causey*, No. 22-12014, 2024 WL 3102872, at *3 (11th Cir. June 24, 2024) (unpblished). Though *Causey* and *Johnson* reviewed § 922(g)(1) convictions only for plain error, they recognized *Rozier's* and *Dubois's* rulings as binding holdings of this Court. *Bruen* claimants like Whitaker "cannot establish any error, plain or otherwise" until and unless *Rozier* and *Dubois* are overruled by this Court en banc or the Supreme Court. *See United States v. Coleman*, No. 22-13095, 2024 WL 1156270, at *4 (11th Cir. Mar. 18, 2024) (unpublished) (relying on *Rozier* and *Dubois*).

In this Circuit, it is clearly right as a matter of law that § 922(g)(1) is constitutional "under any and all circumstances." *Dubois*, 94 F.4th at 1292 (quoting *Rozier*, 598 F.3d at 771).

Respectfully submitted,

Markenzy Lapointe
United States Attorney

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Certificate of Compliance

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 629 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B).

Certificate of Service

I HEREBY CERTIFY that on July 19, 2024, a true copy of the foregoing was filed electronically with the Eleventh Circuit Court of Appeals' Internet web at www.ca11.uscourts.gov using CM/ECF, and electronically served on Assistant Federal Public Defender M. Caroline McCrae, Counsel for Whitaker.

/s/ Jonathan D. Colan
Jonathan D. Colan
Assistant United States Attorney

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA	§	**JUDGMENT IN A CRIMINAL CASE**
	§	
v.	§	
	§	Case Number: **9:22-CR-80196-KAM(1)**
TORRENCE DENARD WHITAKER	§	USM Number: **41638-510**
	§	
	§	Counsel for Defendant: **M. Caroline McCrae**
	§	Counsel for United States: **John McMillan**

THE DEFENDANT:

☒	pleaded guilty to count(s)	**One of the Indictment on December 1, 2023**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	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**
18:922(g)(1) and 924(a)(8) - Unlawful Transport Of Firearms	8/19/22	1

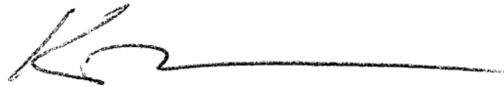
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ 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.

February 23, 2024
Date of Imposition of Judgment



Signature of Judge

KENNETH A. MARRA
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

February 23, 2024
Date

DEFENDANT: TORRENCE DENARD WHITAKER
CASE NUMBER: 9:22-CR-80196-KAM(1)

IMPRISONMENT

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

52 months as to Count One.

☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant be designated to an institution in South Florida.

☒ 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: TORRENCE DENARD WHITAKER
CASE NUMBER: 9:22-CR-80196-KAM(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (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 which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

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

DEFENDANT: TORRENCE DENARD WHITAKER
CASE NUMBER: 9:22-CR-80196-KAM(1)

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature ______________________________ Date ____________________

DEFENDANT: TORRENCE DENARD WHITAKER
CASE NUMBER: 9:22-CR-80196-KAM(1)

SPECIAL CONDITIONS OF SUPERVISION

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

DEFENDANT: TORRENCE DENARD WHITAKER
CASE NUMBER: 9:22-CR-80196-KAM(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00		

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* 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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ 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 the schedule of payments page 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:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** 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: TORRENCE DENARD WHITAKER
CASE NUMBER: 9:22-CR-80196-KAM(1)

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 payments of $100.00 due immediately.

It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several
See above for 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 forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

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.

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CR-80196-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TORRENCE DENARD WHITAKER,

Defendant.
_________________________________/

MOTION TO DISMISS INDICTMENT

The defendant, Torrence Denard Whitaker, through undersigned counsel, hereby moves to dismiss the indictment pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure, and in support thereof, states:

First, Title 18, United States Code Section 922(g)(1), either on its face or as applied to Mr. Whitaker's specific case, violates the Second Amendment. *See New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022) (upholding the constitutional right to carry a handgun in public, and ruling that restrictions on protected conduct must be consistent with America's historical tradition of firearm regulation.); *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (*en banc*) (vacating a § 922(g)(1) conviction because, as applied, there was no showing of a historical tradition of regulation); *United States v. Bullock*, Case No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) (dismissing a § 922(g)(1) charge for the same reason).

Second, because § 922(g)(1) regulates purely instrastate conduct, its enactment exceeded Congress's Commerce Clause authority, and it is thus unconstitutional.

FACTUAL BACKGROUND

On August 19, 2022, Mr. Whitaker was pulled over by officers with the Riviera Beach Police Department who were conducting high visibility traffic enforcement. (DE 3: 4). The officers allegedly pulled the vehicle over for having window tint that was too dark. (DE 3: 4). The owner of the vehicle was in the passenger seat of the vehicle. Ultimately, the officers allegedly recovered a firearm from Mr. Whitaker's waistband after Mr. Whitaker disclosed its presence in response to questioning by law enforcement. (DE 3: 4). Upon further questioning, Mr. Whitaker explained he had the firearm, because just a couple of days before, "a dude shot at [him] the other day because [the other person] said [Mr. Whitaker] said something to his wife." (DE 32-1: 8). Mr. Whitaker affirmed that he had the firearm for his and his significant other's protection. (DE 32-1: 8). There is no allegation that the firearm was purchased in interstate commerce or that it was used in any commercial transaction.

At the time of the incident in this case, Mr. Whitaker allegedly had previously been convicted in Florida of the following felonies: burglary of a dwelling (Palm Beach County: 1997CF009219A), burglary of a dwelling (Palm Beach County: 1997CF012288A), grand theft and fleeing or attempting to elude (Palm Beach County: 1999CF012398A), passing a forged or altered bank note or check draft (Pasco County: 2002CF004764), grand theft (Palm Beach County: 2003CF009843), possession of a firearm by a convicted felon (Palm Beach County: 2004CF012948A),

possession of cocaine (St. Lucie County: 2013CF002175A), tampering with evidence and possession of cocaine (St. Lucie County: 2014CF001856A), possession of oxycodone (Martin County: 2018CF001646), and uttering forged bills, checks, drafts, or notes, and grand theft (Palm Beach County: 2018CF010469A).

ARGUMENT

I. BOTH ON ITS FACE OR AS APPLIED TO MR. WHITAKER, SECTION 922(g)(1) VIOLATES THE SECOND AMENDMENT

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. Last year, in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court for the first time set forth a general test for assessing the constitutionality of firearm restrictions in which it rejected means-ends scrutiny and adopted a two-step "test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. Two principles underlie the test. F*irst*, where "the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. *Second*, regulations on protected conduct may then only stand if the Government can "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* Here, because Mr. Whitaker's alleged conduct is covered by the plain text of the Second Amendment, and because the Government cannot demonstrate that § 922(g)(1) is—either facially, or alternatively, as applied to Mr. Whitaker—consistent with

America's historical tradition of firearm regulation, the indictment must be dismissed.

A. The Second Amendment's plain text covers Mr. Whitaker's alleged conduct. (Step One of the *Bruen* Analysis)

The plain text of the Second Amendment guarantees the right (1) "of the people," (2) "to keep and bear," (3) "arms." *Heller*, 554 U.S. at 579–95. Mr. Whitaker's conduct falls squarely into each category, so it is presumptively protected.

1. Mr. Whitaker is among "the people" protected under the Second Amendment

As a preliminary matter, Mr. Whitaker—a lifelong citizen and resident of the United States—is unambiguously part of "the people." In *District of Columbia v. Heller*, the Supreme Court stated that "the people" in the Second Amendment "unambiguously refers" to "*all* Americans" and "*all* members of the political community"—"*not an unspecified subset*." 554 U.S. 570, 579–81 (2008) (emphasis added). In fact, aside from in the Second Amendment, "[t]he unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times:" once "in the First Amendment's Assembly–and–Petition Clause" and again "in the Fourth Amendment's Search–and–Seizure Clause." *Heller, id.* at 579. Per *Heller*, the phrase has the same meaning each time, and "refers to a class of persons who are part of the national community or who have otherwise developed sufficient connections with this country to be considered part of that community." *Id.* at 580 (quoting *United States v. Verdugo–Urquidez,* 494 U.S. 259, 265 (1990)); ("'[T]he people' in the Second Amendment has the same meaning as it carries in other parts of the Bill of Rights").

This interpretation accords with the plain meaning of the word "people" at the time the Bill of Rights was adopted: "[t]he body of persons who compose a community, town, city or nation" – a term "comprehend[ing] all classes of inhabitants." II Noah Webster, *An American Dictionary of the English Language* (1828).

Moreover, just as the Second Amendment does not "draw ... a home/public distinction with respect to the right to keep and bear arms," *Bruen*, 142 S.Ct. at 2134, it also does not draw a felon/non-felon distinction. *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1046 (11th Cir. 2022) (describing felons as "indisputably part of 'the people'" under the Second Amendment); *see also United States v. Meza-Rodriguez*, 798 F.3d 664, 671 (7th Cir. 2015) (holding that a person's criminal record is irrelevant in determining whether the person is among "the people" protected under the Second Amendment; noting that the amendment "is not limited to such on-again, off-again protections"); *Folajtar v. Attorney Gen. of the United States*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting) ("Felons are more than the wrongs they have done. They are people and citizens who are part of 'We the People of the United States.'").

In view of these considerations, judges in this district and others have found that convicted felons are, in fact, part of "the people." *See, e.g., United States v. Pierre*, Case No. 1:22-CR-20321-JEM/Becerra, Report and Recommendations by Judge Becerra, DE 53:17-20 (S.D. Fla. Nov. 28, 2022) (concluding that a felon "is included in the Second Amendment's 'of the people'"); *United States v. Hester*, Case No. 22-20333-CR-Scola, DE 39:1-10, 27:2-12 (S.D. Fla. Jan. 27, 2023) (the same); *see also*

Range, 69 F.4th at 103 ("*Heller* and its progeny lead us to conclude that Bryan Range remains among "the people" despite his 1995 false statement conviction.").

2. The right to "keep" and "bear" arms includes the right to possess a firearm outside the home

With regards to the Second Amendment's guarantee of a right to "keep" and "bear" arms, the Court recognized in *Heller* that the word "keep" means "[t]o have in custody" or to "retain in one's power of possession," and the word "bear" means to "carry." 554 U.S. at 582; 584. And *Bruen* in turn established that the right to "bear" arms includes carrying arms in public outside the home. 142 S. Ct. at 2134-35 ("To confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections.") Thus, it is indisputable that Mr. Whitaker's alleged possession of a firearm in a car is covered by the right to "bear" arms.

3. The right to keep and bear "arms" includes the right to possess both a handgun and ammunition

Finally, the term "arms" refers to "[w]eapons of offense, or armour of defense." *Heller*, 554 U.S. at 581. The Supreme Court has construed the term as "extend[ing]…to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. And the Court has specifically held that the term protects the right to possess "handguns," *id.* at 629, which *were* in "common use" at the founding. *Id.* at 627. Ammunition is likewise part of the "arms" protected by the Second Amendment because "ammunition is necessary for [] a gun to function as intended." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of*

N.J., 910 F.3d 106, 116 (3d Cir. 2018); *Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("without bullets, the right to bear arms would be meaningless").

Because Mr. Whitaker's alleged conduct is squarely covered by a right of "the people" to "bear" "arms," it is presumptively protected by the Second Amendment.

B. There is no historical tradition of firearm regulation to justify Mr. Whitaker's disarmament under § 922(g)(1) in this case. (Step Two of the *Bruen* Analysis)

Where, as here, an individual's conduct is shown to be presumptively protected by the plain text of the Second Amendment, a restriction can only stand where the Government shows that such a restriction "is consistent with the Nation's historical tradition of firearm regulation," that is, the tradition in existence "when the Bill of Rights was adopted in 1791." *Bruen*, 142 S. Ct. at 2126. Here, the Government cannot meet that burden as to § 922(g)(1) generally, nor could it meet that burden as to Mr. Whitaker, whose prior convictions are non-violent. *See Bullock*, 2023 WL 4232309, at *2 (finding no historical tradition to justify applying § 922(g)(1), which "was enacted in 1938, not 1791 or 1868," to a person with aggravated assault and manslaughter convictions).

1. The Government bears the burden of showing a tradition

As a preliminary matter, *Bruen* prescribed two ways of conducting the required historical inquiry for regulations of presumptively protected conduct. *First*, where a statute is directed at a "longstanding" problem that "has persisted since the 18th century," *Bruen* directs a "straightforward" inquiry: if there is no historical tradition of "distinctly similar" regulation, the regulation at issue is unconstitutional. *Bruen*,

142 S. Ct. at 2131 (conducting this straightforward" inquiry to strike down New York's restriction on public carry of guns). *Second*, where a statute is directed at "unprecedented societal concerns or dramatic technological changes," or problems that "were unimaginable at the founding," then and only then are courts empowered to reason "by analogy." *Id.* at 2132. Both guns and felons were indisputably prevalent at the time the Bill of Rights was passed, rendering the problem addressed by § 922(g)(1) clearly "longstanding." In fact, prior to the American Revolution, many of the colonies were heavily populated with convicts that were sent there from England. *See, e.g.*, Encyclopedia Virginia, "Convict Labor during the Colonial Period," *available at* encyclopediavirginia.org/entries/convict-labor-during-the-colonial-period/ (last visited August 11, 2023) (noting that as of 1776, Virginia alone housed at least 20,000 British convicts). Notably, in 1751, Ben Franklin even wrote a satirical article entitled "Rattle-Snakes for Felons," criticizing the way England had been ridding itself of its felons by sending them to the colonies to grow their population, and suggesting that rattlesnakes be sent back to England as "suitable returns for the human serpents sent us by our Mother Country." Bob Ruppert, "The Rattlesnake Tells the Story," JOURNAL OF THE AMERICAN REVOLUTION (Jan. 2015). And courts, recognizing this history, have analyzed the federal felon-in-possession law under the "straightforward" analysis directed by *Bruen*. *See, e.g. Range*, 69 F.4th at 106 (conducting the historical analysis and concluding that "the Government has not shown that the Nation's historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm.").

In assessing, by this straightforward analysis, whether the Government has met its burden to "establish the relevant tradition of regulation," this Court must apply the following three principles. *Bruen*, 142 S. Ct. at 2135, 2149 n.25. *First*, where, as here, a challenged regulation addresses a general societal problem that has persisted since the 18th century, that regulation is unconstitutional unless the Government shows a tradition of "distinctly similar historical regulation" since that time. *Id.* at 2126. *Second*, if there *is* "distinctly similar historical regulation," the Government must show that such regulation is prevalent, such that it "is consistent with the Nation's historical tradition of firearm regulation." *Id.* "[A] single law in a single State" is not enough; instead, a "widespread" historical practice "broadly prohibiting" the conduct in question is required. *Id.* at 2137-38; 2142-45 (expressing doubt that regulations in even three of the thirteen colonies "could suffice."). *Third*, a "longstanding" tradition is one that accounts for time. Per *Bruen*, "when it comes to interpreting the Constitution, not all history is created equal" because "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," which in the case of the Second Amendment, was in 1791. *Id.* at 2136.

In short, to meet the *Bruen* Step Two inquiry, there must be historical regulation "distinctly similar" to § 922(g)(1) that was prevalent and "longstanding," and that applied generally or specifically to those like Mr. Whitaker. As is further described below, courts have been looking, but no such longstanding tradition exists.

2. The Government cannot meet its burden because there is no longstanding tradition of permanently depriving a felon—let alone one like Mr. Whitaker—from possessing a firearm

The Third Circuit (sitting *en banc*) and the Southern District of Mississippi (Judge Carlton W. Reeves, Chair of the U.S. Sentencing Commission, presiding), in *Range* and *Bullock*, recently undertook analyses of the historical traditions relevant to § 922(g)(1) in light of *Bruen*, and both courts came to the same conclusion: that the federal felon-in-possession statute was unconstitutional as applied to the defendants in those cases. *Range*, 69 F.4th at 448 (invalidating § 922(g)(1) as applied to a person convicted of making false statements on a foodstamps application); *Bullock*, 2023 WL 4232309, at *1 (invalidating § 922(g)(1) as applied to a person convicted of aggravated assault and murder). Consistent with these cases, this Court should find that § 922(g)(1) is unconstitutional on its face, or unconstitutional as applied to Mr. Whitaker, whose prior convictions are all non-violent. *See also United States v. Rahimi*, (5th Cir. 2023) (finding § 922(g)(8) facially unconstitutional, noting that the "question presented in this case is *not* whether prohibiting possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal…[but] whether 18 U.S.C. § 922(g)(8), a specific statute that does so, is constitutional.") (*cert. granted* in *United States v. Rahimi*, 2023 WL 4278450 (June 30, 2023)).

First, federal law has only included a general prohibition on firearm possession for individuals convicted of crimes punishable by over a year beginning in 1961. *Range*, 69 F. 4th at 104 (citing An Act To Strengthen The Federal Firearms Act, Pub.

L. No. 87-342, 75 Stat. 757 (1961)). Even the earliest version of that statute, which applied exclusively to certain violent criminals, was only enacted in 1938, well after the Bill of Rights was adopted (1791) and also, to the extent it is relevant, well after the Fourteenth Amendment was enacted (1868). *Id.* (citing The Federal Firearms Act of 1938, Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938)).

Second, looking beyond federal law, scholars and historians maintain that in fact, "no colonial or state law in eighteenth century America formally restricted"—much less prohibited, permanently and under pain of criminal punishment—"the ability of felons to own firearms." 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, 1374 (2009); *accord* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009) ("Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I."); Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 Tex. Rev. L. & Pol. 245, 291 (2021) (noting the lack of "any direct authority whatsoever" for the view that felons were, "in the Founding Era, deprived of firearm rights"); Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U.L. Rev. 1187, 1217 (2015) (describing claims that felon-in-possession statutes are consistent with the Second Amendment's original meaning as "speculation," noting "advocates of this view have not identified framing-era

precedents to support their" claims); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) ("The Founding generation had no laws … denying the right [to possess firearms] to people convicted of crimes. Bans on ex-felons possessing firearms were first adopted in the 1920s and 1930s, almost a century and a half after the Founding.").

Third, judges too have recognized that there is no historical tradition of permanent felon disarmament:

- The Third Circuit, sitting *en banc*, *see Range*, 69 F.4th at 104 (reversing a § 922(g)(1) convicting after (i) noting that even the earliest 1938 version of the law covered only those convicted of serious violent crimes like "murder, rape, kidnapping, and burglary," (ii) rejecting the Government's attempt to justify modern felony-status-based disarmament based on older laws disarming groups based on race, religion or political status, and (iii) rejecting the Government's argument that Founding Era traditions of punishing certain nonviolent offenders with death—which would, to be sure, be more serious than disarmament—did not mean there was a tradition of disarmament).

- Judge Reeves, in *Bullock*, 2023 WL 4232309 (dismissing a § 922(g)(1) charge against a 57-year-old who had been convicted of aggravated assault and manslaughter after a bar fight when he was 31, after undertaking an exceptionally detailed review of the rationales on which courts had been upholding § 922(g)(1) charges after *Bruen* and ultimately finding that "[m]issing from [the Government's brief], in sum, is any example of how American history supports § 922(g)(1), much less the number of examples *Bruen* requires to constitute a well-established tradition.").

- Judge (now Justice) Barrett of the Seventh Circuit, *see Kanter*, 919 F.3d at 458 (canvassing the historical record of founding-era firearm regulations and concluding, "no[] historical practice supports a legislative power to categorically disarm felons because of their status as felons"); *id.* at 451 ("Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons"); *id.* at 464 ("History does not support the proposition that felons lose their Second Amendment rights solely because of their status as felons.").

- Judge Tymkovich of the Tenth Circuit, *see United States v. McCane*, 573 F.3d 1037, 1047–49 (10th Cir. 2009) (Tymkovich, J., concurring) (questioning whether felon dispossession laws have a "'longstanding' historical basis," noting "recent authorities have *not* found evidence of longstanding dispossession laws" but instead show such laws "are creatures of the twentieth – rather than the eighteenth – century").

- Judge Traxler of the Fourth Circuit, *see United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) ("Federal felon dispossession laws … were not on the books until the twentieth century").

Evidently, courts have looked extensively and found no support for a "longstanding" historical tradition of gun bans on felons, and that is because no such tradition exists in this country. Thus, pursuant to *Bruen*, § 922(g)(1) is facially unconstitutional. But this Court need not reach so far—the issue in this case would be disposed with a ruling that there is no historical tradition to support application of § 922(g)(1) as to Mr. Whitaker, a person who has never been convicted of a violent felony. Even assuming a portion of those prior convictions were based on constitutionally-appropriate restrictions on Mr. Whitaker's Second Amendment rights, there is no tradition in this country that would suggest that those prior convictions support a permanent ban on his possession of a firearm now. Section § 922(g)(1) is thus unconstitutional as applied.

II. TITLE 18, UNITED STATES CODE SECTION 922(g) EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE BY ALLOWING THE FEDERAL GOVERNMENT TO REGULATE PURELY INTRASTATE CONDUCT THAT DOES NOT SUBSTANTIALLY EFFECT INTERSTATE COMMERCE

Mr. Whitaker respectfully moves this Honorable Court to dismiss the indictment against him, because 18 U.S.C. § 922(g) exceeds Congress' limited powers

under the Commerce Clause, both on its face and as applied to Mr. Whitaker's alleged conduct in this case. Mr. Whitaker recognizes that the Eleventh Circuit has rejected this claim. *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996) and *United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001). Mr. Whitaker therefore respectfully raises the following arguments in order to preserve this claim for further review.

A. The Federal Government is one of limited and enumerated powers; the general police power resides in the States.

"[T]he principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States, is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 607, 618 n.8 (2000) (citations and internal quotation marks omitted). In *United States v. Lopez*, 514 U.S. 549 (1995), then-Chief Justice Rehnquist explained:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite." Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse form either front." *Ibid.*

Lopez, 514 U.S. at 552.

By the Framers' intentional design, "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods

involved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 617 (citation omitted). Hence, the federal government may enact and enforce criminal laws only insofar as they fall within one of Congress' specifically enumerated powers under Article I. *See Bond v. United States*, 572 U.S. 844, 876-77 (2014) ("'The Constitution confers upon Congress . . . not all governmental powers, but only discrete, enumerated ones.'") (alteration and citation omitted).

B. Congress may not regulate noneconomic, intrastate criminal activity unless that activity "substantially affects" interstate commerce.

This case involves Congress' power "[t]o regulate Commerce . . . among the several States," under U.S. CONST. art. I, § 8, cl. 3. In *Lopez*, the Court surveyed the history of the Court's Commerce Clause jurisprudence and identified three broad categories of activities which Congress may regulate pursuant to the Clause: First, "Congress may regulate the use of the channels of interstate commerce." *Id.* Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce." *Id.* Third, and relevant here, Congress may regulate "those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-559.

With respect to the third category, the Court acknowledged that its case law "has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Id.* at 559 (citations omitted). The Court concluded that the proper analysis is whether the targeted activity "substantially affects" interstate commerce. *Id.*

In *Lopez*, the Court invalidated the Gun-Free School Zones Act, formerly codified at 18 U.S.C. § 922(q). The Court found that the Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 515 U.S. at 561. It was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. It contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* And the Court found no congressional findings regarding the impact of intrastate firearms possession on interstate commerce. *Id.* at 562.

The Court rejected the government's argument that "the presence of guns in schools poses a substantial threat to the educational process" by threatening the learning environment, which would in turn result in a "less productive citizenry" and "have an adverse effect on the Nation's economic well-being." *Id.* at 564. The government conceded that such reasoning would allow Congress to "regulate not only violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* Following such reasoning, the Court found it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* To accept the government's arguments would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States"; "require [the Court] to conclude that the Constitution's enumeration

of powers does not presuppose something not enumerated"; and accept "that there will never be a distinction between what is truly national and what is truly local." *Id.* at 567-68 (citations omitted). "This" the Court was "unwilling to do." *Id.* at 568.

C. *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996) *and United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001), were wrongly decided.

Shortly after *Lopez* was decided, the Eleventh Circuit faced the question of whether 18 U.S.C. § 922(g) similarly exceeded Congress' authority under the Commerce Clause, and held that it did not. *United States v. McAllister*, 77 F.3d 387, 389 (11th Cir. 1996). The Eleventh Circuit found that § 922(g) was distinguishable from the section invalidated in *Lopez* (§ 922(q)), based on the presence of the statutory jurisdictional element:

> The [*Lopez*] Court relied on the fact that [§ 922(q)] "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at ---, 115 S. Ct. at 113. In contrast, § 922(g) makes it unlawful for a felon to possess 'in or affecting commerce," any firearm or ammunition. 18 U.S.C. § 922(g) (emphasis added). This jurisdictional element defeats McAllister's facial challenge to the constitutionality of § 922(g)(1).

McAllister, 77 F.3d at 389-90 (footnote omitted). The court also denied McAllister's as-applied challenge to the statute. Specifically, the Court rejected McAllister's argument "that *Lopez* marks a significant change, rendering suspect the 'minimal nexus' requirement established by the Court in *Scarborough*." 77 F.3d at 390.

In *Scarborough v. United States*, 431 U.S. 563 (1977), the Court held that proof that a firearm had previously traveled in interstate commerce was sufficient to satisfy the requirement, under the predecessor statute to § 922(g), that a defendant had

possessed a firearm "in commerce or affecting commerce." The Court found that, in drafting the statute, "Congress intended no more than a minimal nexus requirement." *Id.* at 577. The case was decided, however, purely an issue of statutory construction: "The issue [was] whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required nexus between the possession of a firearm by a convicted felon and commerce." *Id.* at 564 (emphasis added).

Nonetheless, the *McAllister* Court found that "nothing" in the Supreme Court's constitutional holding in *Lopez* suggested that held the statutory ruling in Scarborough "should be changed:"

> In contrast to § 922(q), § 922(g) is an attempt to regulate guns that have a connection to interstate commerce; the statute explicitly requires such a connection. When viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals. Nothing in *Lopez* suggests that the 'minimal nexus' test should be changed.

McAllister, 77 F.3d at 390.

Five years later, the appellant in *United States v. Scott*, 263 F.3d 1270, 1271 (11th Cir. 2001), argued that *McAllister*'s holding had been abrogated by the intervening decisions in *United States v. Morrison*, 263 F.3d 1270 (2000), and *Jones v. United States*, 529 U.S. 848 (2000).

In *Morrison*, the Court held that part of Violence Against Women Act, which prohibited intrastate gender-related violence, exceeded Congress' power under the Commerce Clause. 529 U.S. at 617-18. The Court reaffirmed that "[t]he Constitution

requires a distinction between what is truly national and what is truly local," and that the regulation of violent crime is traditionally a matter for the States. *See id.* at 619. The Court also "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 618.

In *Jones*, the Court held that a private dwelling, not used for any commercial purpose, did not fall within the ambit of the federal arson statute, 18 U.S.C. § 844(i). *Jones*, 529 U.S. at 855. The Court rejected the government's argument that the building was "used" in commerce because the owner "used" the residence as collateral to obtain a loan, and "used" the residence to obtain a casualty insurance policy. The qualification that the building is "used" in an activity affecting commerce, the Court held, "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 855.

The Court again expressed concern that adopting the government's argument would eliminate the distinction between state and federal activities:

> Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. . . . If such connections sufficed to trigger § 844(i), the statute's limiting language, 'used in' any commerce-affecting activity, would have no office.

Id. at 857.

Although the case was ultimately decided as a matter of statutory construction,

the Court found its interpretation was appropriate, "[g]iven the concerns brought to the fore in *Lopez*," and the constitutional questions that would arise if the "'traditionally local criminal conduct,' in which petitioner Jones engaged," were rendered "a matter for federal enforcement." *Jones*, 529 U.S. at 858 (citation omitted).

In *Scott*, the Eleventh Circuit held that "nothing in *Morrison* or *Jones* alters the reasoning upon which *McAllister* is moored;" that *McAllister* "relied on the jurisdictional element of § 922(g) to sustain the statute under *Lopez*;" and that *Morrison* did not compel a different result. *Scott*, 263 F.3d at 1274. The opinion did not address *Morrison*'s repudiation of the 'aggregate effects' theory, on which the *McAllister* opinion also relied. *See McAllister*, 77 F.3d at 390 ("When viewed in the aggregate, a law prohibiting the possession of a gun by a felon stems the flow of guns in interstate commerce to criminals."). The court held that "*Jones*['] purely statutory holding likewise does not alter *McAllister*." *Scott*, 263 F.3d at 1274.

Hence, despite the facts that (1) *Scarborough* similarly approved of a "minimal nexus" test solely as a matter of statutory construction; (2) *Lopez* held, as a matter of constitutional law, that noneconomic intrastate activity may only be federally regulated if it substantially affects interstate commerce; and (3) *Morrison* expressly rejected of the aggregate "costs of crime" rationale invoked in *McAllister*, the Eleventh Circuit continues to hold that a conviction under § 922(g) may rest on a minimal nexus to interstate commerce. These holdings simply cannot be squared with the holdings of *Lopez* and *Morrison*, or the analysis in *Jones*. The Supreme Court has clearly held that Congress may not regulate noneconomic, intrastate criminal activity

unless that activity "substantially affects" interstate commerce. A statutory element requiring a minimal nexus to commerce is insufficient to overcome these constitutional rulings. The Eleventh Circuit's precedents holding otherwise are contrary to Supreme Court authority, and should be overruled.

D. Numerous circuit judges (and two Supreme Court Justices) have called for a reexamination of the issue herein.

Although the Circuit Courts of Appeals have generally agreed that *Lopez* left *Scarborough* intact, there has long been a chorus of dissenting voices from judges around the country, expressing doubt as to the constitutionality of § 922(g).

In *United States v. Rawls*, 85 F.3d 240, 242 (5th Cir. 1996), a panel of the Fifth Circuit hesitantly ruled that it was bound by *Scarborough* to affirm § 922(g)(1). However, all three members of the *Rawls* panel joined in a specially concurring opinion expressing significant doubt as to the constitutionality of the statute. *See Rawls*, 85 F.3d at 243 (Garwood, J., joined by Weiner, and E. Garza, J.J., specially concurring) ("If the matter were *res nova*, one might well wonder how it could rationally be concluded that the mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce."). Another judge of the Fifth Circuit later disagreed with the *Rawls* panel's treatment of *Scarborough*, and opined that "the precise holding in *Scarborough* is in fundamental and irreconcilable conflict with the rationale of" *Lopez*. *See United States v. Kuban*, 94 F.3d 971, 976, 977-78 (5th Cir. 1996) (DeMoss,

J., dissenting in part) (finding that "[t]he 'minimal nexus' of *Scarborough* can no longer be deemed sufficient under the *Lopez* requirement of substantially affecting interstate commerce").

In the Ninth Circuit, four judges dissented from the denial of rehearing in a case involving a similarly-worded statute prohibiting the possession of body armor, 18 U.S.C. § 931. *United States v. Alderman*, 593 F.3d 1141 (9th Cir. 2010) (O'Scannlain, J., dissenting from the order denying rehearing en banc, joined by Paez, Bybee, and Bea, Circuit Judges). Judge O'Scannlain wrote:

> The majority opinion allows Congress to punish possession offenses, as long as the enacting statute includes a mere recital purporting to limit its reach to good sold or offered for sale in interstate commerce. The majority's opinion makes *Lopez* superfluous. Insert a jurisdictional recital, the majority in effect says, and Congress need not worry about whether the prohibited conduct has a 'substantial relation to interstate commerce.'

Id. (citation omitted). When the case reached the Supreme Court, Justice Thomas echoed these concerns in an opinion dissenting from the denial of certiorari:

> Joining other Circuits, the Court of Appeals for the Ninth Circuit has decided that an "implic[it] assum[ption] of constitutionality in a 33-year old statutory interpretation opinion "carve[s] out" a separate constitutional place for statutes like the one in this case and pre-empts a "careful parsing of post-*Lopez* case law." 565 F.3d 641, 645, 647, 648 (2009) (citing *Scarborough v. United States*, 431 U.S. 563 . . . (1977)). That logic threatens the proper limits on Congress' commerce power and may allow Congress to exercise police powers that our Constitution reserves to the States.

Alderman v. United States, 562 U.S. 1163 (Thomas, J., joined by Scalia, J., dissenting from the denial of certiorari).

More recently, seven judges of the Fifth Circuit voted in favor of rehearing *en banc* the same constitutional challenge to § 922(g) presented herein. *See United States v. Seekins*, 52 F.4th 988 (5th Cir. 2022) (noting that seven judges voted in favor of rehearing *en banc* and nine voted against), *cert. denied*, No. 22-6853 (U.S., June 23, 2023).

These dissenting and specially concurring judges are correct. The Eleventh Circuit's precedents affirming § 922(g) are out of line with Supreme Court authority, and should not be followed. Mr. Whitaker's alleged possession of the firearm had no effect on interstate commerce whatsoever, let alone the "substantial" effect that the Supreme Court's Commerce Clause precedents require. Title 18 U.S.C. § 922(g) is unconstitutional both on its face and as applied to Mr. Whitaker's alleged conduct, and the indictment should be dismissed.

CONCLUSION

For the foregoing reasons, because § 922(g)(1) violates the Second Amendment and Commerce Clause, or alternatively, because the statute at the very least cannot be applied to Mr. Whitaker's conduct without running afoul of his Second Amendment rights, this Court should dismiss the indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on August 11, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/M. Caroline McCrae
M. Caroline McCrae

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-80196-CR-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TORRENCE DENARD WHITAKER,

Defendant.
_______________________________________/

ORDER ON MOTION TO DISMISS INDICTMENT

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss Indictment [DE 43]. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

Defendant, Torrence Denard Whitaker, has been charged with being a felon in possession of firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). Defendant has moved the Court to dismiss the charge against him on the basis that the laws prohibiting a person convicted of non-violent felonies from possessing a firearm or ammunition are unconstitutional. Defendant relies for his position on the most recent decision of the United States Supreme Court, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), addressing the rights of individuals under the Second Amendment to the United States Constitution. The Court, however, feels compelled to reject Defendant's well-presented arguments.

The issue presented in this motion has been litigated throughout this Circuit and elsewhere. The Court need not repeat in great detail all of the reasons that have been articulated

by numerous courts in rejecting Defendant's position. Suffice it to say that this Court concludes the *Bruen* decision did not undermine or abrogate the holding of the Eleventh Circuit Court of Appeals in *United States v. Rozier,* 598 F.3d 768 (11th Cir. 2010). The court in *Rozier* held that despite the right of an individual under the Second Amendment to possess a handgun for self-defense recognized in *District of Columbia v. Heller*, 554 U.S. 570 (2008), "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Rozier,* 598 F.3d at 771.

In *Rozier,* the court placed reliance upon the statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626-27. This assurance was reiterated by the Supreme Court two years later in *McDonald v. City of Chicago, Ill.,* 561 U.S. 742 (2010), where the Court stated:

> It is important to keep in mind that *Heller,* while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.' 554 U.S., at 626. We made it clear in *Heller* that our holding 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.' *Id*., at 626 – 627. We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.

McDonald, 561 U.S. at 786.

While Defendant contends the decision in *Bruen* altered the landscape in this regard, this Court concludes that a reading of the language used in the opinion of the Court, as well as the statements made in two of the concurring opinions, demonstrates that *Bruen* did not change the law with regard to the ability of convicted felons to possess firearms and ammunition.

The Court's opinion in *Bruen* opened with the following statement:

> In *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, *law-abiding citizen* to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, *law-abiding citizens* have a similar right to carry handguns publicly for their self-defense.

Bruen, 142 S. Ct. at 2122 (emphasis added). Hence, the Court's opening description of the Second Amendment right to bear arms recognized in the *Heller* and *McDonald* decisions is placed in the context of a "law-abiding citizen." Then, ten other times throughout the opinion, the Court reemphasizes the "law-abiding citizen" theme.

> Brandon Koch and Robert Nash are law-abiding, adult citizens of Rensselaer County, New York..

Bruen, 142 S. Ct. at 2124–25.

> While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense.

Bruen, 142 S. Ct. at 2132–33.

> It is undisputed that petitioners Koch and Nash – two ordinary, law-abiding Adult citizens—are part of 'the people' whom the Second Amendment protects.

Bruen, 142 S. Ct. at 2134.

> And in light of the text of the Second Amendment, along with the Nation's history of firearm regulation, we conclude below that a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense.

Bruen, 142 S. Ct. at 2135.

> Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.

Bruen, 142 S. Ct. at 2138.

> To be clear, nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'a general desire for self-defense is sufficient to obtain a [permit].' *Drake v. Filko*, 724 F.3d 426, 442 (CA3 2013) (Hardiman, J., dissenting). Because these licensing regimes do not require applicants to show an atypical need for armed self-defense, they do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry. *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'

Bruen, 142 S. Ct. at 2138 n. 9.

> None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.

Bruen, 142 S. Ct. at 2150.

> For instance, when General D. E. Sickles issued a decree in 1866 pre-empting South Carolina's Black Codes—which prohibited firearm possession by blacks—he stated: 'The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons.... And no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms.' Cong. Globe, 39th Cong., 1st Sess., at 908–909

Bruen, 142 S. Ct. at 2152.

> Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to "demonstrate a special need for self-protection distinguishable from that of the general community" in order to carry arms in public.

Bruen, 142 S. Ct. at 2156.

> New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.

Bruen, 142 S. Ct. at 2156.

The concurring opinions of Justices Alito and Kavanaugh reenforced that concept.

Justice Alito stated:

> The Court's exhaustive historical survey establishes that point very clearly, and today's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose.

Bruen, 142 S. Ct. at 2157 (Alito, J., concurring).

> Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald v. Chicago*, 561 U.S. 742, about restrictions that may be imposed on the possession or carrying of guns.

Bruen, 142 S. Ct. at 2157 (Alito, J., concurring).

> Our decision, as noted, does not expand the categories of people who may lawfully possess a gun.

Bruen, 142 S. Ct. at 2157 (Alito, J., concurring).

> And while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense.

Bruen, 142 S. Ct. at 2158 (Alito, J., concurring).

> I reiterate: All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense and that the Sullivan Law, which makes that virtually impossible for most New Yorkers, is unconstitutional.

Bruen, 142 S. Ct. at 2159 (Alito, J., concurring).

> This brings me to Part II–B of the dissent, *post*, at 2168 - 2174, which chastises the Court for deciding this case without a trial and factual findings about just how hard it is for a law-abiding New Yorker to get a carry permit.

Bruen, 142 S. Ct. at 2159 (Alito, J. concurring).

> *Heller* correctly recognized that the Second Amendment codifies the right of ordinary law-abiding Americans to protect themselves from lethal violence by possessing and, if necessary, using a gun.

Bruen, 142 S. Ct. at 2161 (Alito, J., concurring).

> Those features of New York's regime—the unchanneled discretion for licensing officials and the special-need requirement—in effect deny the right to carry handguns for self-defense to many 'ordinary, law-abiding citizens.'

Bruen, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

> *Second*, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment 'is neither a regulatory straightjacket nor a regulatory blank check.' *Ante*, at 2133. Properly interpreted, the Second Amendment allows a 'variety' of gun regulations. *Heller*, 554 U.S. at 636, 128 S.Ct. 2783. As Justice Scalia wrote in his opinion for the Court in *Heller*, and Justice ALITO reiterated in relevant part in the principal opinion in *McDonald*:
> 'Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.... [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'

Bruen, 142 S. Ct. at 2162 (Kavanaugh, J., concurring).

The repeated references to "law-abiding citizens" could not have been accidental or a coincidence. This Court concludes that the *Bruen* Court went out of its way to make clear that laws which restrict the right of convicted felons to possess firearms and ammunition were not

being disturbed. Hence, this Court concludes that *Rozier* is still good law and must be applied in this case.

In view of the foregoing, Defendant's Motion to Dismiss is DENIED.

DONE AND ORDERED in West Palm Beach, Florida this 18th day of September, 2023.

KENNETH A. MARRA
United States District Judge

Copies provided to:

All counsel