NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

MARCUS RAMBO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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2024 WL 3534730
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United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Marcus Albert RAMBO, Defendant-Appellant.

No. 23-13772
|
Non-Argument Calendar
|
Filed: 07/25/2024

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:23-cr-20149-CMA-1

Attorneys and Law Firms

Jonathan Colan, Daniel Matzkin, U.S. Attorney Service - SFL, Miami, FL, U.S. Attorney Service - Southern District of Florida, Miami, FL, for Plaintiff-Appellee.

Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, Federal Defender Organization - Southern District of Florida, Srilekha Jayanthi, Michael Caruso, Federal Public Defender's Office, Miami, FL, for Defendant-Appellant.

Before Grant, Brasher, and Abudu, Circuit Judges.

Opinion

PER CURIAM:

***1** Marcus Rambo appeals his conviction for possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). He argues that § 922(g)(1) is unconstitutional under the Commerce Clause and the Second Amendment, both facially and as applied to his conduct. The government, in turn, moves for summary affirmance.

We review the constitutionality of a statute de novo. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). Summary disposition is appropriate when "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." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). [1]

Our binding precedent holds that 18 U.S.C. § 922(g) is constitutional under the Commerce Clause and the Second Amendment. In *United States v. McAllister*, we held that "§ 922(g)(1) is not an unconstitutional exercise of Congress's power under the Commerce Clause," explaining that the statute's requirement of a connection to interstate commerce was sufficient to satisfy the "minimal nexus" requirement of the Commerce Clause. 77 F.3d 387, 389-90, 391 (11th Cir. 1996). The government proves a "minimal nexus" to interstate commerce if it demonstrates—as Rambo concedes it did here—that the firearm was manufactured outside of the state where the offense took place and, thus, necessarily traveled in interstate commerce. *Wright*, 607 F.3d at 715–16. And in *United States v. Dubois*, we reaffirmed our earlier precedent holding that under *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." 94 F.4th 1284, 1292 (11th Cir. 2024) (quoting *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010)).

The prior precedent rule requires us to follow a prior binding precedent unless and until it is overruled by the Supreme Court or by this Court sitting en banc. *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," and it must "actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel." *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009) (quotation omitted). And to do that, "the later Supreme Court decision must 'demolish' and 'eviscerate' " each of the prior precedent's "fundamental props." *Dubois*, 94 F.4th at 1293 (quotation omitted). So, for example, our precedent relying on *Heller* for the proposition that "felons are categorically 'disqualified' from exercising their Second Amendment right" was not abrogated by a later Supreme Court decision (*New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)) that "repeatedly stated that its decision was faithful to *Heller*." *Id.*

***2** The same principle applies here. Rambo concedes that his Commerce Clause arguments are currently foreclosed by this Court's binding precedents. And our binding precedents in *Dubois* and *Rozier* similarly foreclose his Second Amendment arguments. The Supreme Court's decision

in *United States v. Rahimi* did not abrogate *Dubois* or *Rozier* because it did not "demolish" or "eviscerate" the "fundamental props" of those precedents. *Rahimi* did not discuss § 922(g)(1) at all, nor did it undermine our previous interpretation of *Heller*. To the contrary, *Rahimi* reiterated that prohibitions "like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' " *United States v. Rahimi*, 144 S. Ct. 1889, No. 22-915, slip op., at 15 (June 21, 2024) (quoting *Heller*, 554 U.S. at 626).

Because the government is "clearly correct as a matter of law" that § 922(g)(1) is constitutional under the Commerce Clause and the Second Amendment facially and as applied to Rambo, we GRANT its motion for summary affirmance. *See Groendyke Transp.*, 406 F.2d at 1162.

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2024 WL 3534730

Footnotes

1 *Groendyke Transportation* is binding precedent in the Eleventh Circuit under *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

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A-2

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13772

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARCUS ALBERT RAMBO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:23-cr-20149-CMA-1

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before GRANT, BRASHER, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

A-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 23-13772-DD

United States,
Appellee,

- versus -

Marcus Rambo,
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.

Altonaga, Hon. Cecilia M.

Bryn, Brenda G.

Caruso, Michael

Colan, Jonathan D.

Damian, Hon. Melissa

Dopico, Hector A.

Gonzalez, Juan A.

Jayanthi, Srilekha

Keller, Zachary A.

Kirkpatrick, Lynn

Koffosky, Jacob

Lapointe, Markenzy

Lopez, Bernardo

Louis, Hon. Lauren Fleischer

Maloney, Julia

Matzkin, Daniel

Mollison, Kathleen

Rambo, Marcus A.

Reid, Hon. Lisette M.

Taylor, Kathleen

Torres, Hon. Edwin G.

Zloch, Hon. William T.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 23-13772-DD

United States,
Appellee,

- versus -

Marcus Rambo,
Appellant.
_____/

GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

Appellee, the United States of America, respectfully requests summary affirmance of the district court's judgment of conviction, because Rambo's facial and as-applied Constitutional challenges to 18 U.S.C. § 922(g)(1) are controlled by binding precedent.

Procedural History

A federal grand jury in the Southern District of Florida indicted Appellant Marcus Rambo, 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:3).

Rambo moved to dismiss his indictment, arguing that § 922(g)(1) violated the Second Amendment's right to bear arms and fell outside Congress's Commerce Clause powers (DE:29). The government opposed Rambo's motion, arguing that

both his Second Amendment and Commerce Clause arguments were precluded by binding precedent (DE:33). After the parties exchanged further pleadings on the issues (DE:35, 37), the district court denied Rambo's motion, citing this Court's decision in *United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010), addressing Second Amendment challenges to § 922(g)(1) (DE:38). The district court's order did not address Rambo's Commerce Clause arguments.

Rambo pled guilty (DE:61:12), "admit[ting] that he possessed [a] Glock 23 handgun … on or about August 12, 2022 [and] that he knew he was a convicted felon at the time of the August 12 traffic stop, having been previously convicted of a crime whose maximum prison sentence exceeds one year in length" (DE:44:2).

The district court imposed judgment against Rambo, sentencting him to serve a 30-month imprisonment term and three years' supervised release and to pay a $100 assessment and a $1,000 fine (DE:54).

Rambo filed a timely notice of appeal (DE:55) and remains incarcerated.

Argument

Both Rambo's Second Amendment arguments and his Commerce Clause arguments are foreclosed by binding precedent. The district court's denial of his motion and entry of judgment 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.

This Court's recent decision in *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), reaffirmed *Rozier's* 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 (*compare* Rambo Br. at 22, asserting that as-applied challenges are not precluded). *See United States v.*

[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.

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).

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 Rambo's § 922(g)(1) conviction.

Respectfully submitted,

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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 820 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 June 12, 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 Brenda G. Bryn, Counsel for Rambo.

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

A-4

No. 23-13772-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

MARCUS RAMBO,
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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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Marcus Rambo
Case No. 23-13772-D

Appellant, Marcus Rambo, 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.

Altonaga, Hon. Cecilia M.

Bryn, Brenda

Caruso, Michael

Colan, Jonathan

Damian, Hon. Melissa

Dopico, Hector A.

Jayanthi, Srilekha

Keller, Zachary A.

Kirkpatrick, Lynn

Koffosky, Jacob

Lapointe, Markenzy

Matzkin, Daniel

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Louis Fleisher, Hon. Lauren

Maloney, Julia

Matzkin, Daniel

Mollison, Kathleen

Rambo, Marcus Albert

Reid, Hon. Lisette M.

Taylor, Kathleen

Torres, Hon. Edwin G.

United States of America

Zloch, Hon. William T.

s/Brenda G. Bryn
Brenda G. Bryn

RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR SUMMARY AFFIRMANCE

Appellant, Marcus Rambo, 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 June 12, 2024, the government filed a motion for summary affirmance, arguing that both Mr. Rambo's Second Amendment arguments, and his Commerce Clause arguments, were "foreclosed by binding precedent," namely, *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024).

2. While Mr. Rambo 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). Notably, that could *not* be said for Mr. Rambo's as-applied (fact-based) challenge even prior to the Supreme Court's decision on Friday in *United States v. Rahimi*, ___ S.Ct. ___, 2024 WL 3074728 (June 21, 2024) (22-915) for the reasons set forth at length in Issue I of the Initial Brief and disregarded entirely in the government's motion. But indeed, *Rahimi* simply further confirms the "arguable merit" of Mr. Rambo's as-applied post-*Bruen* challenge.

4. Notably, even prior to *Rahimi*, it was clear that 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. Rambo) raised his facial and as-applied challenges for the first time on appeal. *See* 2024 WL 2176656, at *2. Here, by contrast, both Mr. Rambo'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. Rambo) 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 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 in those cases did not have the benefit of the Supreme Court's

detailed guidance in *Rahimi* about the *Bruen* methodology. But this Court now does, and must follow that guidance.

5. 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 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. Rambo'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 *Bru*en, "[*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., concurring) ("the historial approach examines the laws, practices, and understandings *from before and after ratification*," but in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated;" in today's opinion the court

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 to rigidly to *Rozier* which had avoided all textual and historical analysis by following *Heller* dicta on "presumptively lawful" purportedly "longstanding prohibitions." That dicta-based approach is ***not*** permitted after *Bruen* and *Rahimi*.

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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).

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 'law-abiding 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. Rambo. 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 State*s, 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-abiidng 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 fact, in making clear that the "no set of circumstances" standard from *United States v. Salerno*, 481 U.S. 739, 745 (1987) indeed applies to Second Amendment challenges, the Supreme Court necessarily recognized that as-applied Second Amendment challenges *are* permitted. *See id.* ("[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. Rambo'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. Rambo'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. Rambo, 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. Rambo, who has only ever been convicted of categorically non-violent crimes.

WHEREFORE, the appellant, Marcus Rambo, 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. Rambo to file his Reply.

Respectfully submitted,

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER

By: *s/ Brenda G. Bryn*
Brenda G. Bryn
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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 2,741 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/ Brenda G. Bryn
Brenda G. Bryn

CERTIFICATE OF SERVICE

I HEREBY certify that on June 24, 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 Jonathan Colan, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132.

s/Brenda G. Bryn
Brenda G. Bryn

A-5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 23-13772-DD

United States,
Appellee,

- versus -

Marcus Rambo,
Appellant.
_____/

GOVERNMENT'S REPLY IN SUPPRT 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.

Altonaga, Hon. Cecilia M.

Bryn, Brenda G.

Caruso, Michael

Colan, Jonathan D.

Damian, Hon. Melissa

Dopico, Hector A.

Gonzalez, Juan A.

Jayanthi, Srilekha

Keller, Zachary A.

Kirkpatrick, Lynn

Koffosky, Jacob

Lapointe, Markenzy

Lopez, Bernardo

Louis, Hon. Lauren Fleischer

Maloney, Julia

Matzkin, Daniel

Mollison, Kathleen

Rambo, Marcus A.

Reid, Hon. Lisette M.

Taylor, Kathleen

Torres, Hon. Edwin G.

Zloch, Hon. William T.

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 23-13772-DD

United States,
Appellee,

- versus -

Marcus Rambo,
Appellant.
_____/

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

Pursuant to Federal Rule of Appellate Procedure 27(a)(4), the United States replies to Appellant Marcus Rambo's response to the government's motion for summary affirmance to address Rambo's argments concerning the Supreme Court's intervening decision in *United States v. Rahimi*, 602 U.S. --, 2024 WL 3074728 (U.S. June 21, 2024).

Contrary to Rambo's argument that "*Rahimi* simply further confirms the 'arguable merit' of Mr. Rambo's as-applied post-*Bruen*[1] challenge" (Rambo Response at 2), nothing in *Rahimi* called into question this Court's binding precedent against Rambo's claim. Indeed, the Supreme Court re-affirmed its statement in *United States v. Heller*, 554 U.S. 570 (2008), that "prohibitions, like those on the

[1] *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Rahimi*, 2024 WL 3074728, at *10 (quoting *Heller*, 554 U.S., at 626, 627, n. 26).

Heller's recognition of felon firearm possession bans, such as 18 U.S.C. § 922(g)(1), was the basis for this Court's binding decisions in *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010), and now *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), 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).

Rambo is incorrect in asserting that as-applied challenges to § 922(g)(1) remain an open question under *Rozier*. As a panel of this Court previously recognized, treating the question as settled law in an unpublished decision, the "reasoning in *Rozier* applies equally to [an] as-applied challenge and thus forecloses it." *Flick v. Att'y Gen.*, 812 F. App'x 974, 975 (11th Cir. 2020). This is so because *Rozier* held that "statutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people" and that "Rozier, by virtue of his felony conviction, falls within such a class." *Rozier*, 598 F.3d at 771. "The circumstances surrounding Rozier's possession of a firearm in violation of § 922(g)(1) are irrelevant." *Id.* at 772. *See Flick*, 812 F. App'x at 975.

The question is not whether Rambo is a responsible person or a threat to others, as was at issue in *Rahimi*. He is categorically disqualified from Second Amendment protection because he is a convicted felon. The existence of any factual scenario in which a law would be constitutional precludes a facial challenge to a law, but a law that is constitutional in *all* circumstances precudes even an as-applied challenge.

Rambo's supplemental authority letter mischaracterizes the import of the Department asking the Supreme Court to resolve the issue raised in *Garland v. Range*, Supreme Court Case No. 23-374, and other cases addressing as-applied challenges to § 922(g)(1). The existence of contrary decisions in other circuits does not negate the fact that the validity of § 922(g)(1) is clearly right under this Circuit's binding precedent. The Department's supplemental brief to the Supreme Court notes that "*Rahimi* undermines the reasoning of" the contrary decisions from other courts, like the Third Circuit in *Range v. Att'y Gen.*, 69 F.4th 96, 99, 106 (3d Cir. 2023) (en banc) (sustaining an as-applied challenge). Supplemental Brief For The Federal Parties, Nos. 23-374, 23-683, 23-6170, 23-6602, and 23-6842, at 5.[2] *Rahimi* does not undermine this Circuit's *Rozier* or *Dubois* decisions. *See id.* at 8-9 ("*Rahimi* casts no doubt on the Eighth and Tenth Circuits' decisions upholding Section 922(g)(1)

[2] https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf.

….”). The Department is asking the Supreme Court to harmonize the contrary decisions elsewhere with the law already in place in this Circuit. The Department has consistently argued that the Second Amendment permits Congress to categorically “disarm persons who are not law-abiding,” Brief of the United States, *United States v. Rahimi*, 2023 WL 6051053, *20, namely “those who have committed serious crimes defined by the felony-level punishment that can attach to those crimes,” Transcript of Oral Argument, *United States v. Rahimi*, No. 22-915, at 5.[3]

Nor is Rambo correct in arguing that *Rahimi’s* discussion of *Bruen’s* methodology undermines *Rozier’s* preclusive effect (Rambo Response at 4). *Rahimi’s* clarification of *Bruen’s* two-step process has no bearing on *Rozier* because this Court had “never actually applied the second, means-end-scrutiny step” that *Bruen* rejected in favor of the historical analysis *Rahimi* addressed. *See Dubois*, 94 F.4th at 1292. “*Bruen* did not abrogate *Rozier*.” *Dubois*, 94 F.4th at 1293.

Dubois did not need to conduct *Bruen’s* second-step historical analysis, because *Rozier* ruled at the first step that felon possession was not protected by the Second Amendment. *See Dubois*, 94 F.3d at 1293. *Bruen* only requires a historical analysis of allowed restrictions if a claimant first establishes the threshold

[3] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-915_986b.pdf.

requirement that "the Second Amendment's plain text covers [the] individual's conduct." 142 S. Ct. at 2129-30. *Rozier* held otherwise and obviated the need to proceed to step two.

Because § 922(g)(1) is constitutional "under any and all circumstances," *Dubois*, 94 F.4th at 1292, the facts of Rambo's as-applied challenge are irrelevant. This issue is controlled by binding precedent, and Rambo's conviction should be summarily affirmed.

Respectfully submitted,

Markenzy Lapointe
United States Attorney

By: /s/ Jonathan D. Colan

Jonathan D. Colan
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Miami, Florida 33132-2111
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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 851 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 June 25, 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 Brenda G. Bryn, Counsel for Rambo.

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

A-6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

23-20149-CR-ALTONAGA/DAMIAN

CASE NO._____

18 U.S.C. § 922(g)(1)
18 U.S.C. § 924(d)(1)

UNITED STATES OF AMERICA

v.

MARCUS ALBERT RAMBO,

Defendant.

_____/

INDICTMENT

The Grand Jury charges that:

On or about August 12, 2022, in Miami-Dade County, in the Southern District of Florida, the defendant,

MARCUS ALBERT RAMBO,

knowingly possessed a firearm and ammunition in and affecting interstate commerce, knowing that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of Title 18, United States Code, Section 922(g)(1).

FORFEITURE ALLEGATIONS

1. The allegations of this Indictment are hereby re-alleged and by this reference fully incorporated herein for the purpose of alleging forfeiture to the United States of America of certain property in which the defendant, **MARCUS ALBERT RAMBO**, has an interest.

2. Upon conviction of a violation of Title 18, United States Code, Section 922(g), or any other criminal law of the United States, as alleged in this Indictment, the defendant shall forfeit

to the United States any firearm and ammunition involved in or used in the commission of such offense, pursuant to Title 18, United States Code Section 924(d)(1).

All pursuant to Title 18, United States Code, Section 924(d)(1) and the procedures set forth at Title 21, United States Code, Section 853, as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL

[redacted]

FOREPERSON

MARKENZY LAPOINTE
UNITED STATES ATTORNEY

ZACHARY A. KELLER
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

MARCUS ALBERT RAMBO,

_____/
Defendant.

CASE NO.: _____

CERTIFICATE OF TRIAL ATTORNEY

Superseding Case Information:
New Defendant(s) (Yes or No) _____
Number of New Defendants _____
Total number of counts _____

Court Division (select one)
☒ Miami ☐ Key West ☐ FTP
☐ FTL ☐ WPB

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. §3161.
3. Interpreter: (Yes or No) No
   List language and/or dialect: _____
4. This case will take 2 days for the parties to try.
5. Please check appropriate category and type of offense listed below:

(Check only one)		(Check only one)
I	☒ 0 to 5 days	☐ Petty
II	☐ 6 to 10 days	☐ Minor
III	☐ 11 to 20 days	☐ Misdemeanor
IV	☐ 21 to 60 days	☒ Felony
V	☐ 61 days and over	

6. Has this case been previously filed in this District Court? (Yes or No) No
   If yes, Judge _____ Case No. _____
7. Has a complaint been filed in this matter? (Yes or No) No
   If yes, Magistrate Case No. _____
8. Does this case relate to a previously filed matter in this District Court? (Yes or No) No
   If yes, Judge _____ Case No. _____
9. Defendant(s) in federal custody as of N/A
10. Defendant(s) in state custody as of N/A
11. Rule 20 from the _____ District of _____
12. Is this a potential death penalty case? (Yes or No) No
13. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to August 8, 2014 (Mag. Judge Shaniek Maynard? (Yes or No) No
14. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to October 3, 2019 (Mag. Judge Jared Strauss? (Yes or No) No
15. Did this matter involve the participation of or consultation with now Magistrate Judge Eduardo I. Sanchez during his tenure at the U.S. Attorney's Office, which concluded on January 22, 2023? No

By: _____
Zachary A. Keller
Assistant United States Attorney
Court ID No. A5502767

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

Defendant's Name: MARCUS ALBERT RAMBO

Case No:

Count #: 1

Possession of a Firearm and Ammunition by a Convicted Felon

Title 18, United States Code, Section 922(g)(1)

* **Max. Term of Imprisonment:** 15 years
* **Mandatory Min. Term of Imprisonment (if applicable):** n/a
* **Max. Supervised Release:** 3 years
* **Max. Fine:** $250,000

***Refers only to possible term of incarceration, supervised release, and fines. It does not include restitution, special assessments, parole terms, or forfeitures that may be applicable.**

A-7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI

CASE NO. 23-20149-CR-ALTONAGA

UNITED STATES OF AMERICA,
Plaintiff,
v.

MARCUS ALBERT RAMBO,
Defendant.
_____/

MOTION TO DISMISS INDICTMENT

Mr. Rambo is charged with knowingly possessing a firearm and ammunition in interstate commerce after previously being convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). DE 3. He respectfully submits that, for the following two reasons, this Court should dismiss the indictment pursuant to Fed. R. Crim. P. 12(b)(3).

First, § 922(g)(1), either on its face or as applied to Mr. Rambo'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

Per the discovery, the key alleged facts are as follows. On August 12, 2022, at around 10 PM, patrol officers conducted a traffic stop on a car that had window tints appearing to contravene state law. There were five individuals in the car, with Mr. Rambo in the back row behind the passenger seat and two others seated next to him. After officers turned on their indicator lights, the driver pulled over and Mr. Rambo complied with orders to step out. Officers observed a firearm on the floor near where Mr. Rambo's feet had been. 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, Mr. Rambo was on supervision after pleading guilty to a 2018 violation of § 922(g). *United States* v. *Rambo*, Case No. 19-CR-20013-MGC, DE 21 (judgment). Mr. Rambo also had three earlier adult convictions: (i) a 2012 conviction (when he was 17) for carrying a concealed weapon, possession of cannabis, and possession of a firearm by a minor (F13-006100); (ii) a 2013 conviction for carrying a concealed firearm (F13-011862); and (iii) a 2015 conviction for battery on a corrections officer by "touch or strike" (F15-015978).[1] *See* Case No. 19-CR-200130-MGC, DE 18, ¶¶ 25-27 ("2018 PSI") (can be made available); Ex. A (2015 Information).

[1] The 2018 PSI erroneously treats the 2015 battery on a law enforcement officer by "touch or strike" as a crime of violence. *See United States v. Curtis Johnson*, 559 U.S. 133 (2010) (holding it is not). Mr. Rambo has no convictions for any crime of violence.

ARGUMENT

I. Section § 922(g)(1), either on its face or as applied to Mr. Rambo and his conduct, 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. Rambo'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. Rambo—consistent with America's historical tradition of firearm regulation, the indictment must be dismissed.

A. The Second Amendment's plain text covers Mr. Rambo'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. Rambo's

conduct falls squarely into each category, so it is presumptively protected.

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

As a preliminary matter, Mr. Rambo—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. Rambo'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. Rambo's alleged conduct is squarely covered by a right of "the people" to "bear" "arms," it is presumptively protected by the Second Amendment.

B. <u>There is no historical tradition of firearm regulation to justify Mr. Rambo's disarmament under § 922(g)(1) in this case</u>. (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. Rambo, whose prior convictions are non-violent and are in fact themselves largely similar possession offenses. *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 accessed July 12, 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. Rambo. 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. Rambo—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. Rambo, whose prior convictions are all non-violent and almost all for violations of regulations on the possession of a firearm, the contours of which are precisely the issue following *Bruen* and in this motion. *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. Rambo, a person who has never been convicted of a violent offense, and nearly all of whose prior convictions relate to the possession of a firearm, the very right at issue in the first place. Even assuming a portion of those prior convictions were based on constitutionally-appropriate restrictions on Mr. Rambo's Second Amendment rights, there is no tradition in this country that would suggest that those prior instances of improper possession support a permanent ban on his possession of a firearm now. Section § 922(g)(1) is thus unconstitutional as applied.

II. Congress exceeded its Commerce Clause power in enacting § 922(g), which allows the Federal Government to regulate purely intrastate conduct that does not substantially effect interstate commerce.

Section 922(g) is also unconstitutional on its face or as applied here because it exceeds Congress' limited powers under the Commerce Clause. Mr. Rambo recognizes

that the Eleventh Circuit has rejected this claim, and thus respectfully raises the following argument for purposes of further review. *United States* v. *McAllister*, 77 F.3d 387 (11th Cir. 1996) and *United States* v. Scott, 263 F.3d 1270 (11th Cir. 2001).

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). And by the Framers' 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.")

B. Congress may not regulate noneconomic, intrastate criminal activity unless it "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 *United States v. Lopez*, the Court surveyed the history of the Court's Commerce Clause jurisprudence and identified three broad categories of activities which Congress may regulate under it:

(i) use of the channels of interstate commerce, (ii) instrumentalities of interstate commerce, and, (iii) relevant here, activities that *substantially affect* interstate commerce." *Id.* at 558-559 (emphasis added).

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. And the Court rejected, for lack of a limiting principle as to Commerce Clause applicability, 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 thus adversely effect "economic well-being." *Id.* at 564.

C. United States v. McAllister *and* United States v. Scott *were wrongly decided.*

Shortly after *Lopez* was decided, the Eleventh Circuit faced the question of whether § 922(g) similarly exceeded Congress' Commerce Clause authority, 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, which makes firearm possession "in or affecting commerce" unlawful. *McAllister*, 77 F.3d at 389-90 (quoting § 922(g)). The court also denied *McAllister*'s as-applied challenge, rejecting the 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 had held that proof that a firearm had previously traveled in interstate commerce was sufficient to satisfy the jurisdictional requirement as to a predecessor of § 922(g). *Id.* But in so ruling, the Court found that, "Congress intended no more than a minimal nexus requirement," when they drafted the statute, and made its decision based only on statutory interpretation rather than a constitutional backstop. *Id.* at 577. Nonetheless, the *McAllister* Court found that "nothing" in *Lopez*'s constitutional holding suggested *Scarborough*'s statutory ruling "should be changed:"

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 the 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. And 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. But 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.

McAllister and *Scott* 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" after *Lopez*).

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.

Id. (citation omitted). Justice Thomas agreed:

> 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).

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 forrehearing *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 Mr. Rambo's alleged firearm possession had no effect on interstate commerce

whatsoever, let alone the "substantial" effect required by the Constitution.

CONCLUSION

As described above, 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. Rambo's conduct without running afoul of his Second Amendment rights, this Court should dismiss the indictment against him.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on **July 12, 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/ *Srilekha Jayanthi*

RAMBO

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI- DADE COUNTY, FLORIDA SPRING TERM, 2015

THE STATE OF FLORIDA v.

MARCUS ALBERT RAMBO

Defendant(s)

FILED
AUG 25 2015
CLERK

INFORMATION FOR

1. BATTERY/POLICE OFFICER/FIREFIGHTER/ CORRECTIONS
784.07(2)(B) & 784.03 FEL 3D

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

KATHERINE FERNANDEZ RUNDLE, State Attorney of the Eleventh Judicial Circuit, prosecuting for the State of Florida, in the County of Miami-Dade, by and through her undersigned Assistant State Attorney, under oath, Information makes that:

ADAMS-PL,WAYNE-WR :JD 08/20/2015
Circuit Court Direct File
Jail No. 150131058 ,Bkd: 5/26/2015 , CIN: 0981633, B/M, DOB: 8/14/1994

F15015978
De La O (F015)

(Defendant:)

COUNT 1

MARCUS ALBERT RAMBO, on or about August 04, 2015, in the County and State aforesaid, did unlawfully, feloniously and knowingly commit a battery upon Officer T. McMillan, a duly qualified Correctional/Probational Officer, while said person was then and there engaged in the lawful performance of duties, by actually and intentionally touch or strike said person against said person's will,in violation of s. 784.03, s. 784.07(2)(b),, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(CC#: F15015978)

STATE OF FLORIDA, COUNTY OF MIAMI-DADE:

Personally known to me and appeared before me, the Assistant State Attorney of the Eleventh Judicial Circuit of Florida whose signature appears below, being first duly sworn, says that the allegations set forth in this Information are based upon facts which have been sworn to as true by a material witness or witnesses, and which if true, would constitute the offenses therein charged, and that this prosecution is instituted in good faith.

M Strozier

Assistant State Attorney/Bar #: 547166
1350 NW 12th Ave., Miami, FL (305) 547-0100

Sworn to and subscribed before me this 21 day of Aug., 2015.

CIRCUIT & COUNTY COURTS CLERK IN GOD WE TRUST Dade County, Florida

By _____
~~Deputy Clerk for Clerk of the Courts, or~~
Notary Public

NOTARY PUBLIC STATE OF FLORIDA
SINTYA F. URIARTE
MY COMMISSION # EE 179611
EXPIRES: April 6, 2016
Bonded Thru Budget Notary Services

A-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-20149-CR-CMA

UNITED STATES OF AMERICA

v.

MARCUS ALBERT RAMBO,

Defendant.
_____/

UNITED STATES' RESPONSE IN OPPOSITION TO
THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

The Defendant's two bases for dismissal are foreclosed by controlling Eleventh Circuit law. He first asks this Court to hold 18 U.S.C. § 922(g)(1) unconstitutional by stretching *Bruen*—which affirmed law-abiding citizens' right to bear arms—far past its breaking point so that it might cover felons too. In so doing, however, he disregards that the Eleventh Circuit established § 922(g)(1)'s constitutionality in *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir.), *cert. denied*, 560 U.S. 958 (2010), and that *Bruen* did nothing to undermine or unsettle that controlling law. Indeed, the Defendant's Motion does not so much as cite *Rozier*, when *Rozier* was one of two cases—and the only Eleventh Circuit case—that this Court cited in its prior denial of a Second Amendment *Bruen* challenge to § 922(g)(1). *See United States v. Joseph Olson*, No. 22-20525, DE 33 at 1 (S.D. Fla. Jan. 5, 2023) (Altonaga, C.J.). The Defendant then asks this Court to find § 922(g)(1) unconstitutional under the Commerce Clause, but here he acknowledges that binding Eleventh Circuit law holds otherwise. *See* Mot. at 4 (citing *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996); *United States v. Scott*, 263 F.3d 1270 (11th Cir. 2001)). This Court should not follow the Defendant where he would lead on either front, instead hewing to well-settled Eleventh Circuit law—and this Court's correct prior decision in *Olson*—by denying the Motion.

I. As the Eleventh Circuit Correctly Held in *Rozier*, Section 922(g)(1) is Constitutional.

A. *Bruen* Does Not Undermine Controlling and Correctly Reasoned Eleventh Circuit Law That Holds Section 922(g)(1) Constitutional.

On the first issue, the Defendant's Motion correctly begins with the two-step test set forth in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), to assess the constitutionality of a firearm restriction. The first step asks the court to decide whether the restricted conduct is covered by "the Second Amendment's plain text," with that type of conduct "presumptively protect[ed]" by the Second Amendment. *Bruen*, 142 S. Ct. at 2127; *see* Mot. at 3. For conduct that is presumptively protected, courts must move to the second step, where "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.'" Mot. at 3 (quoting *Bruen*, 142 S. Ct. at 2127). The Defendant is mistaken, however, in claiming that *Bruen* set forth this basic analytical framework "for the first time." *Id.* Rather, the *Bruen* Court's framework preserved the initial inquiry that the Supreme Court set forth in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), expressly preserving *Heller*'s first step while merely clarifying its second step, *see Bruen*, 142 S. Ct. at 2126 (recognizing that this first step is "[i]n keeping with" *Heller*). And indeed, the Defendant's coverage of that first step is framed by quoting *Heller*, the case that first articulated it. *See* Mot. at 3 (quoting *Heller*, 554 U.S. at 579-85).

That distinction matters because the Eleventh Circuit has already ruled on the first step that *Bruen* preserved from *Heller* for § 922(g)(1), and the circuit court's holding on that front is dispositive. In *Rozier*, the Eleventh Circuit held that felon possession is not covered by the Second Amendment's plain text. Specifically, the *Rozier* court applied *Heller* to examine "the initial question" of "whether one is *qualified* to possess a firearm" under the Second Amendment, *Rozier*, 598 F.3d at 770 (emphasis in original), and held that felons categorically were a "certain class[] of people" whose firearm

possession was not protected by the Second Amendment, *id.* at 771. The Eleventh Circuit later explained that "being a member of 'the people' to whom the Second Amendment applies as a general matter is a *necessary* condition to enjoyment of the right to keep and bear arms, but it is not alone *sufficient*," *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1044 (11th Cir. 2022) (emphasis in original), and that "the Second Amendment's text shows that it codified what the *Heller* Court called a 'pre-existing right' … and that right's particular history demonstrates that it extended (and thus extends) to some categories of individuals, but not others," *id.* (quoting *Heller*, 554 U.S. at 592, 603). And contrary to Defendant's assertion that *Jiminez-Shilon* held that the Second Amendment "does not draw a felon/non-felon distinction," Mot. at 5, Judge Newsom's controlling opinion recognized that "certain groups of people—even those who might be among 'the people'—may be 'disqualified from' possessing arms without violating the Second Amendment." 34 F.4th at 1044.

This binding Eleventh Circuit law establishes that only people with a pre-existing right to bear arm had that right protected by the Second Amendment and that felons do not belong to that group of people. *Bruen* could only have undermined that conclusion if it had withdrawn or clarified *Heller's* preservation of the longstanding restrictions on felon possession relied on in *Rozier.* But "*Bruen* didn't overrule this aspect of *Heller*; in fact, it never mentioned this sentence from *Heller* at all." *Meyer*, No. 22-CR-10012-RKA, 2023 WL 3318492, at *2. Indeed, *Bruen's* majority opinion never once addresses whether felons are protected by the Second Amendment, and the closest *Bruen* came to addressing the issue was Justice Kavanaugh's concurring opinion, joined by Chief Justice Roberts, reiterating *Heller's* and *McDonald's* rejection of the idea that the Second Amendment protected the rights of felons to bear arms. *See Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) (citing *Heller*, 554 U.S. at 636, and *McDonald*, 561 U.S. at 786); *see also id.* at 2157 (Alito, J., concurring) ("Nor have we disturbed

anything that we said in *Heller* or *McDonald* … , about restrictions that may be imposed on the possession or carrying of guns."); *id.* at 2189 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting) ("I understand the Court's opinion today to cast no doubt on that aspect of Heller's holding" permitting felons to be prohibited from possessing firearms). In total, six Justices took pains to emphasize that *Bruen* did not upset *Heller's* and *McDonald's* reassurances regarding prohibitions on felon possession.

And while the pre-*Bruen* first-step analysis remained intact, *Bruen*'s change to the second step did nothing to affect *Rozier* either, as would be required for the case to unsettle established circuit law. Rather, *Bruen* only clarified that *Heller*'s analytical framework should not have allowed courts to "invoke any means-end test such as strict or intermediate scrutiny" for regulating protected conduct, *id.* at 2129, when "*Rozier* did not utilize the means-end analysis that has been rejected by the Supreme Court," *Palmore*, No. 7:23-CR-3 (WLS-TQL-1), 2023 WL 4055698, at *3. In other words, *Bruen* corrected other circuits' error on that point, but it did not disturb *Rozier's* reasoning at all—a result of the fact that *Rozier* stopped its analysis after holding that felons' firearm possession was not protected and thus never applied a means-end analysis. *See Rozier*, 598 F.3d at 771.[1]

As a result, *Rozier* and *Jimnez-Shilon* are still binding law, and the Defendant has not given the Court any reason to decline to follow them. Indeed, the Defendant's Motion does not cite to, much less

[1] Previously, in *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012), the Eleventh Circuit had stated that in fitting circumstances, "*if necessary*, [this Court] would apply the appropriate level of scrutiny," referring to the means-ends analysis. *Id.* at 1260 n.34 (emphasis added). But Judge Newsom later recognized after *Rozier* that "even after *GeorgiaCarry.Org*, we have never applied means-ends scrutiny in a published decision analyzing a Second Amendment challenge." *Jimenez-Shilon*, 34 F.4th at 1052 (Newsom, J., concurring). It never was necessary, because "we have always—and only—assumed that we would do so if we determined, in some unidentified future case, that a law 'restricted activity' that is 'protected by the Second Amendment in the first place.'" *Id.* at 1052-53 (Newsom, J., concurring) (quoting *GeorgiaCarry.Org*, 687 F.3d at 1260 n.34).

discuss, *Rozier*, so it is not clear whether he is arguing that *Bruen* expressly overruled *Rozier* or that it "undermined [*Rozier*] to the point of abrogation," *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015), as required for *Rozier* to not control this case, *see id*. Neither is the case, and that is why no court in this District—or even this Circuit—has dismissed a § 922(g)(1) prosecution on Second Amendment grounds. *Accord United States v. Morgan*, No. 8:23-CR-72-TPB-CPT, 2023 WL 4562850, at *1 (M.D. Fla. July 17, 2023); *United States v. Alvin*, No. 22-CR-20244-DPG (S.D. Fla. June 13, 2023), ECF No. 111; *United States v. Meyer*, No. 22-CR-10012-RKA, 2023 WL 3318492 (S.D. Fla. May 9, 2023); *Leonard v. United States*, No. 22-CV-22670-RAR (S.D. Fla. March 10, 2023), ECF No. 15; *United States v. Pierre*, No. 22-CR-20321-JEM (S.D. Fla. Feb. 23, 2023), ECF No. 74; *United States v. Johnson*, No. 22-CR-20370-DPG, 2023 WL 2308792 (S.D. Fla. Feb. 20, 2023) (magistrate judge report adopted by the district court, No. 22-CR-20370-DPG, ECF No. 49); *United States v. Hester*, No. 22-CR-20333-RNS (S.D. Fla. Jan. 27, 2023), ECF No. 39; *Olson*, No. 22-CR-20525, ECF No. 33; *United States v. Gray*, No. 22-CR-20258-BB (S.D. Fla. Oct. 26, 2022), ECF No. 46 at 50. The issue is currently pending before the Eleventh Circuit in several cases.

And more to the point, the district courts in this Circuit that have addressed *Rozier* have all ruled that it remains binding Eleventh Circuit law, including thorough analyses in cases like *United States v. Palmore*, No.: 7:23-CR-3 (WLS-TQL-1), 2023 WL 4055698, at *2-3 (M.D. Ga. July 16, 2023), *United States v. Kirby*, No. 3:22-CR-26-TJC-LLL, 2023 WL 1781685, at *2-3 (M.D. Fla. Feb. 6, 2023), and *United States v. Isaac*, No. 22-CR-117-LCB-HNJ-1, 2023 WL 1415597, at *2-5 (N.D. Ala. Jan. 31, 2023). And those holdings make sense because "*Bruen* did not disturb *Heller* but took great lengths to clarify it, and nothing in *Bruen* conflicts with the Eleventh Circuit's construction of *Heller* regarding § 922(g)(1)'s harmony with the Second Amendment." *Isaac*, No.

22-CR-117-LCB-HNJ-1, at *5. *See also Morgan*, No. 8:23-CR-72-TPB-CPT, 2023 WL 4562850, at *1; *United States v. Mashburn*, No. CR 22-00190-KD-MU, 2023 WL 4375615, at *1 (S.D. Ala. July 6, 2023); *Meyer*, No. 22-CR-10012-RKA, 2023 WL 3318492, at *2; *Johnson*, No. 22-CR-20370-DPG, 2023 WL 2308792, at *4; *Olson*, 22-CR-20525-CMA, ECF No. 33 at 1; *United States v. Williams*, No. 1:21-cr-00362-LMM-LTW-1, 2022 WL 17852517, at *2 (N.D. Ga. Dec. 22, 2022); *United States v. Hunter*, No. 1:22-CR-84-RDP-NAD-1, 2022 WL 17640254, at *1 (N.D. Ala. Dec. 13, 2022); *United States v. Mitchell*, No. CR 1:22-00111-KD-MU, 2022 WL 17492259, at *1 (S.D. Ala. Nov. 17, 2022). As the *Mitchell* court explained, "by reaffirming and adhering to its reasoning in *D.C. v. Heller*, [*Bruen*] did not change the regulatory framework that prohibits felons from possessing firearms." 2022 WL 17492259, at *1.[2]

So with all the ink spilled in this Circuit discussing *Bruen*'s potential effect on § 922(g)(1) and *Rozier*, the answer has always been the same: that § 922(g)(1) remains constitutional and *Rozier* controlling law. And that same result has come time and again for a simple reason: it's correct. As the court recently explained in *Leonard*, "[t]he Supreme Court has repeatedly confirmed that the Second Amendment allows the government to prohibit convicted felons from possessing firearms." *Leonard*, No. 22-cv-22670-RAR, ECF No. 15 at 19. And as the court explained in *Meyer*, "*Bruen* didn't overrule" *Heller's* preservation of the "longstanding prohibitions on the possession of firearms by felons," relied

[2] And Magistrate Judge Becerra's report and recommendation in *United States v. Pierre*, which was cited by the Defendant, Mot. at 5, and which opined that *Rozier* did not control the question of whether felons were among the people whose possession rights were protected in the first instance, was rejected by the district court in that case. *See United States v. Pierre*, No. 22-CR-20321-JEM (S.D. Fla. Feb. 23, 2023), ECF No. 104 at 2. After the government objected to the magistrate judge's analysis, the district court concluded: "In United States versus Rozier, the Eleventh Circuit upheld the constitutionality of Section 922(g)(1) and concluded that convicted felons are not protected by the right to keep and bear arms. Rozier squarely forecloses the Defendant's constitutional challenge here." *Id.*

on in *Rozier*, 598 F.3d at 771. *Meyer*, No. 22-CR-10012-RKA, 2023 WL 3318492, at *2. Rather, "far from overruling or abrogating any part of *Heller*, the majority opinion in *Bruen* expressly—and without exception—declared that it was simply 'making the constitutional standard endorsed in *Heller* more explicit.'" *Meyer*, No. 22-CR-10012-RKA, 2023 WL 3318492, at *2 (quoting *Bruen*, 142 S.Ct. at 2134).[3] Because *Rozier* held that felons as a class were not people with a pre-existing right to bear arms, *Rozier*, 598 F.3d at 771, and because, as Justice Alito emphasized, *Bruen* "decide[d] nothing" altering the first step inquiry "about who may lawfully possess a firearm," pre-*Bruen* precedent—like this Circuit's—remains binding on that first step question. *See Sitladeen*, 64 F.4th at 985 (quoting *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring)).[4] As a result, *Rozier* remains controlling law.

[3] And while the Defendant devotes first-page real estate in his Motion to citing *Range v. Att'y Gen.*, 69 F.4th 96, 99, 106 (3d Cir. 2023) (en banc), he fails to mention that the en banc Third Circuit struck § 922(g)(1) "only as applied" to that specific defendant, Bryan Range, who had been "convicted of a nonviolent, non-dangerous misdemeanor," not resulting in incarceration, but that was nevertheless treated as a felony-equivalent for § 922(g)(1) purposes. *Range*, 69 F.4th at 99, 106. In contrast, the Eighth Circuit confirmed that "*Bruen* … reaffirmed that the [Second Amendment] right is 'subject to certain reasonable, well-defined restrictions,' [and] did not disturb [*Heller's* recognition of the longstanding prohibitions on felon possession] or cast doubt on the prohibitions." *United States v. Jackson*, 69 F.4th 495, 501-02 (8th Cir. 2023) (citing *Bruen*, 142 S. Ct. at 2156).

[4] The Eighth Circuit has similarly reaffirmed its pre-*Bruen* precedent that unlawfully-present foreign nationals were not protected by the Second Amendment, because, like *Rozier*, its pre-*Bruen* precedent had relied on the undisturbed first step and not "by engaging in means-end scrutiny or some other interest-balancing exercise" that *Bruen* had rejected. *Sitladeen*, 64 F.4th at 985. Just as *Rozier* had held that felons as a class were not included in the text's reference to "the people" with a pre-existing right to bear arms, the Eighth Circuit explained that it had "determined that … unlawfully present aliens are not within the class of persons to which the [Second Amendment's] phrase 'the people' refers." *Sitladeen*, 64 F.4th at 985. "Nothing in *Bruen* casts doubt on our interpretation of this phrase." *Id.*

B. Even If Felon Possession is Presumptively Protected Under the First Step, Section 922(g)(1)'s Regulation Is Consistent With Historically-Allowed Firearm Restrictions.

But even if this Court were to proceed to the second-step historical inquiry of the Supreme Court's firearm restriction analysis, § 922(g)(1) passes muster in any event because the historical record shows that felons may be restricted from possessing firearms.

1. Historical Analysis Standard.

Before examining the historical record, this Court must consider how the *Bruen* Court explained its use of historical analysis. The Defendant misstates *Bruen*'s burden of proof in arguing that it boils down to the proposition that "if there is no historical tradition of 'distinctly similar' regulation, the regulation at issue is unconstitutional." Mot. at 7 (quoting *Bruen*, 142 S. Ct. at 2131). Rather, the *Bruen* Court described how its approach could be applied in various circumstances, noting only that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is *relevant evidence* that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131 (emphasis added).

To that end, the proper use of "*Heller's* methodology," as opposed to the rejected means-end test, "relied on the historical understanding of the [Second] Amendment to demark the limits on the exercise of that right." *Id.* at 2128-29. To draw those lines, the Court "assessed the lawfulness of" the regulation at issue "by scrutinizing whether it comported with history and tradition." *Id.* at 2128. The Supreme Court summed up its approach by saying, "The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id*. at 2131.

Yet regardless of which word or phrase one pulls from *Bruen*—whether one looks for historical precedent that is comparable, analogous, consistent with, relevantly similar, or distinctly similar—"[l]egislatures historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed." *Jackson*, 69 F.4th at 504. That history supports § 922(g)(1) ban on firearm possession by convicted felons. Here, the government relies on the following primary historical evidence, noting its acceptance in both legal literature and by various courts.

2. Felon Possession Has a Long History of Prohibition.

For centuries, the gun rights of certain groups have been categorically limited to promote lawful society. Some classes of people were "almost universally excluded" from exercising certain civic rights, including "the felon, on obvious grounds." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 29 (1st ed. 1868) (cited in *Heller*, 554 U.S. at 616, as a leading authority on the subject). The Second Amendment incorporates "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible" and "'does not preclude laws disarming the unvirtuous (i.e. criminals).'" *United States v. Bena*, 664 F.3d 1180, 1183-84 (8th Cir. 2011) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (Winter 1986)).

"'Perhaps the most accurate way to describe the dominant understanding of the right to bear arms in the Founding era is as a civic right . . . limited to those members of the polity who were deemed capable of exercising it in a virtuous manner." *United States v. Rene E.*, 583 F.3d 8, 15-16 (1st Cir. 2009) (quoting Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 679 (2002)).

As the Ninth Circuit has observed, most scholars of the Second Amendment agree "that the right to bear arms was 'inextricably . . . tied to' the concept of a 'virtuous citizen[ry]' that would protect society through 'defensive use of arms against criminals, oppressive officials, and foreign enemies alike,' and that 'the right to bear arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals).'" *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010) (quoting Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. at 146, and Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995)).[5] "Felons 'were excluded from the right to arms' because they were deemed unvirtuous." *United States v. Carpio-Leon*, 701 F.3d 974, 979-80 (4th Cir. 2012) (quoting Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. at 480). District courts in the Ninth Circuit continue to apply *Vongxay* and its reasoning post-*Bruen*. *See, e.g.*, *United States v. Moore*, No. 20-cr-00474, 2023 WL 154588, at *2 (D. Or. Jan. 11, 2023) (finding *Bruen* to be consistent with *Vongxay* and *Heller*).

"*Heller* identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (quoting *Heller*, 554 U.S. at 604). That report, cited again recently in *Jackson*, 69 F.4th at 503, recognized the permissibility of imposing a firearms restriction on convicted criminals and did not distinguish between types of criminals, stating that "citizens have a personal right to bear arms '*unless for crimes committed*, or real danger of public injury.'" *Id.* (quoting 2 Bernard Schwartz, The Bill of Rights: A Documentary

[5] *Vongxay* acknowledged that scholars disagree on whether common law supports bans on felon gun possession. 594 F.3d at 1118 (citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 714–28 (2009)). However, as demonstrated below, the historical evidence establishes that felons, nonviolent or otherwise, have always been subject to limitations and prohibitions on their right to possess firearms.

History 662, 665 (1971)) (emphasis added). Whether the report's recommendations passed Pennsylvania's convention is irrelevant. *Heller* recognized its influence on the Second Amendment, and it shows how contemporary legislators understood the scope of permissible limitations on the pre-existing right to bear arms.

During the Revolutionary War, Connecticut passed a law providing that any person who "shall libel or defame" any acts or resolves of the Continental Congress or the Connecticut General Assembly "made for the defence or security of the rights and privileges" of the colonies "shall be disarmed and not allowed to have or keep any arms." Public Records of the Colony of Connecticut 193 (1890) (1775 law). And, at the recommendation of the Continental Congress, *see* 4 Journals of the Continental Congress 205 (1906) (resolution of March 14, 1776), at least six states disarmed those who refused to take an oath of allegiance to those states, *see, e.g.*, 5 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 479 (1886) (1776 law); 7 Records of the Colony of Rhode Island and Providence Plantations, in New England 567 (1776 law); 1 The Public Acts of the General Assembly of North Carolina 231 (1804) (1777 law); 9 Statutes at Large; Being A Collection of All the Laws of Virginia 282 (1821) (1777 law); Rutgers, New Jersey Session Laws Online, Acts of the General Assembly of the State of New Jersey 90 (1777 law); 9 Statutes at Large of Pennsylvania 348 (1779 law). The Eighth Circuit cited these laws in support of § 922(g)(1). *See Jackson*, 69 F.4th at 503. However many states chose to pass such laws, this record shows the contemporary understanding of the Continental Congress, no less, that disarmament laws were permissible.

"Many of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime." *Skoien*, 614 F.3d at 640. Pennsylvania, North Carolina, and Massachusetts each passed disarmament laws just after adopting right-to-bear-arms provisions in their

state constitutions. *See* The Complete Bill of Rights: The Drafts, Debates, Sources, And Origins 277-78 (Neil Cogan ed., Oxford University Press 2d ed., 2014). The Seventh Circuit did not recede from *Skoien* in *Atkins*; in fact, in *Holden* it reaffirmed the government's power to "keep firearms out of the hands of dangerous people who are apt to misuse them." *Holden*, 70 F.4th at 1017. Meanwhile, district courts within that circuit have continued to apply its conclusions post-*Bruen*. *See, e.g.*, *United States v. Price*, -- F. Supp. 3d --, 2023 WL 1970251, at *3 (N.D. Ill. Feb. 13, 2023) (citing *Skoien* as "the controlling law of this circuit" and applying its historical analysis).

"Early legislatures also ordered forfeiture of firearms by persons who committed non-violent hunting offenses … and they authorized punishments that subsumed disarmament—death or forfeiture of a perpetrator's entire estate—for non-violent offenses involving deceit and wrongful taking of property." *Jackson*, 69 F.4th at 503 (citing primary historical sources). *See also Folajtar*, 980 F.3d at 904; *United States v. Lindsey*, --F. Supp. 3d--, 2023 WL 2597592, at *3 (S.D. Iowa Mar. 10, 2023) (considering such laws post-*Bruen*). "[I]t is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Medina v. Whitaker*, 913 F.3d 152, 158 (D.C. Cir. 2019); *see also Jackson*, 69 F.4th at 503 (citing *Medina*).

Even Colonial and Founding-era firearm deprivations that could be reversed, laws allowing firearm rights to be restored if the offender swore proper allegiance, or prohibitions that lapsed demonstrated the understanding of the legislatures' power "to disarm groups that it considered to be threats to the peace." *United States v. Goins*, -- F. Supp. 3d --, 2022 WL 17836677, at *11 (E.D. Ky. Dec. 21, 2022). A prohibition that can later be lifted if the individual complies with the law still imposes a complete deprivation of that individual's right to bear arms while he is outside the law. *See Bruen*,

142 S. Ct. at 2128 (comparing the burdens imposed by proffered historical precedents). Of course, § 922(g)(1) imposes no "burden [on] a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133.

In this respect, the right to bear arms is analogous to other civic rights that have historically been subject to forfeiture by individuals convicted of crimes, including: the right to vote, *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974); the right to serve on a jury, 28 U.S.C. § 1865(b)(5); and the right to hold public office, *Spencer v. Kemna*, 523 U.S. 1, 8-9 (1998). Just as Congress and the States have required persons convicted of felonies to forfeit other civic rights, § 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler v. Hillsdale Cty. Sherriff's Dep't*, 837 F.3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in judgment).

The Defendant's point that federal legislation disarming felons was enacted in the 20th Century is of no moment. It does not matter that this particular felon-in-possession law is "of mid-20th century vintage." *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosive*s, 700 F.3d 185, 196 (5th Cir. 2012), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. *Heller's* point in endorsing felon-in-possession laws was not that they had existed in their modern form since the nation's founding, but that they were sufficiently similar to historical regulations to be deemed "longstanding." *See Heller*, 544 U.S. at 626-27. As *Bruen* explained, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Bruen*, 142 S. Ct. at 2133.

Bruen acknowledged that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders," and "[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond

those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132.

As the Eighth Circuit has recognized, "Congress enacted an analogous prohibition in § 922(g)(1) to address modern conditions." *Jackson*, 69 F.4th at 504. Appreciating the dangers from the "widespread traffic in firearms" and the easy availability of firearms to those involved in "lawlessness and violent crime," Congress sought to prohibit possession of such weapons in a manner "contrary to the public interest." *Id.* (quoting Pub. L. No. 90-351, § 901(a)(1), (2), 82 Stat. 225, 225). "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Id.* at 505 (citation omitted).

The Eighth Circuit quoted then-circuit judge Kavanaugh's dissenting opinion on remand from the Supreme Court's *Heller* decision: "[H]istory and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*." *Heller v. D.C.*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (quoted in *Jackson*, 69 F.4th at 505).

Which is all to say, Section 922(g)(1)'s prohibition on felons possessing firearms is firmly rooted in this nation's history and consistent with traditional understanding of the virtuous citizenry's right to bear arms.

3. Almost All Courts Have Rejected Historical Challenges to Section 922(g)(1).

That compelling history relating to felon-in-possession laws has led the overwhelming majority of courts around the country to reject historical challenges to § 922(g)(1), even when first determining that felon possession is protected under the first step. The Eighth Circuit has recognized that "history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society." *Jackson*, 69 F.4th at 504 (reaffirming § 922(g)(1)). The Seventh Circuit has likewise acknowledged the government's power to "keep firearms out of the hands of

dangerous people who are apt to misuse them," *United States v. Holden*, 70 F.4th 1015, 1017 (7th Cir. 2023), with another Seventh Circuit case where the court ultimately remanded the issue "to allow the district court to undertake the *Bruen* [historical] analysis in the first instance" that included a dissenting judge who noted that "since the founding, governments have been understood to have the power to single out categories of persons who will face total disarmament based on the danger they pose to the political community if armed," *Atkinson v. Garland*, 70 F.4th 1018, 1020, 1035 (7th Cir. 2023) (Wood, J., dissenting). As a Middle District of Florida judge recently ruled, "[e]ven if the Court was not bound by *Rozier*, … § 922(g)(1) is part of the historical tradition of the Second Amendment." *Morgan*, No. 8:23-CR-72-TPB-CPT, 2023 WL 4562850, at *1 (cleaned up); *see also United States v. Carrero*, 2022 WL 9348792, at *2-3 (D. Utah Oct. 14, 2022) (ruling that even if possession by a felon "is presumptively covered by the Second Amendment," still "prohibition of firearm possession by felons is consistent with the Nation's historical tradition of firearm regulation"); *United States v. Coombes*, 2022 WL 4367056, at *4, *8 (N.D. Okla. Sept. 21, 2022) ("declin[ing] to carve out felons" from Second Amendment protection, but concluding that "§ 922(g)(1) is 'consistent with the Nation's historical tradition of firearm regulation' and the statute is not unconstitutional"). Other courts, like *United States v. Price*, 2022 WL 6968457 (S.D.W. Va. Oct. 12, 2022), have considered felon possession to be "covered by the plain text of the Second Amendment," but denied dismissal because "the Supreme Court left generally undisturbed the regulatory framework that keeps firearms out of the hands of dangerous felons through its decision in *Bruen* by reaffirming and adhering to its reasoning in *Heller* and *McDonald*." *Id.* at *7-8. Other courts have found both that felon possession is not protected and that, even if it were, restrictions on felon possession are consistent with historical tradition. *See United States v. Melendrez-Machado*, -- F. Supp. 3d --, 2022 WL 17684319, at *3-6 (W.D. Tex. Oct. 18, 2022);

United States v. Young, -- F. Supp. 3d --, 2022 WL 16829260 (W.D. Penn. Nov. 7, 2022). A ruling on any of these grounds is sufficient to deny the Defendant's motion to dismiss his indictment.

Only two courts have ruled against § 922(g)(1) on the historical inquiry. The en banc Third Circuit held there was no "longstanding history and tradition of depriving people like Range of their firearms," a person "convicted of a nonviolent, non-dangerous misdemeanor," not resulting in incarceration, but nevertheless treated as a felon-equivalent for § 922(g)(1) purposes. *Range*, 69 F.4th at 99, 106. And in *United States v. Bullock*, which the Defendant also cites on the first page of his Motion, Mot. at 1, a Mississippi district judge first scoffed at the idea that courts should "play historian in the name of constitutional adjudication," and then noted that "an overwhelming majority of historians reject the Supreme Court's most fundamental Second Amendment holding—its 2008 conclusion that the Amendment protects an individual right to bear arms." No. 3:18-CR-165-CWR-FKB, 2023 WL 4232309, at *4-5 (S.D. Miss. June 28, 2023) (cleaned up). Ultimately faced with *Bruen's* required methodology, however, the court ruled that the government had failed to meet its historical burden and chided it for relying on second-hand historical arguments. *Id.* at *31. So the bottom line remains, as with all other aspects of this *Bruen* challenge, that the law and history cut against the Defendant's attempt to invalidate § 922(g)(1) with *Bruen*. The Court should therefore decline to dismiss the Indictment on that basis.

II. Controlling—and Correctly Reasoned—Eleventh Circuit Law Similarly Forecloses the Defendant's Commerce Clause Challenge to Section 922(g)(1).

The Defendant begins his second claim for dismissal—that § 922(g)(1) violates the Commerce Clause—by acknowledging that controlling Eleventh Circuit law forecloses his argument. *See* Mot. at 4 (citing *McAllister*, 77 F.3d 387; *Scott*, 263 F.3d 1270); *see also United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010) (same); *United States v. Nichols*, 124 F.3d 1265, 1266 (11th Cir. 1997) (same).

That line of binding cases is grounded in the longstanding understanding from *Scarborough v. United States*, 431 U.S. 563, 571 (1977), that "the phrase 'in or affecting commerce' indicates a Congressional intent to assert its full Commerce Clause power," *Nichols*, 124 F.3d at 1266; *see also Wright*, 607 F.3d at 715, which the *Scarborough* Court distinguished from statutes that only apply to conduct that is "in commerce," which limits a statute's scope. *Scarborough*, 431 U.S. at 571. This Court should follow that binding precedent and deny the Defendant's Commerce Clause challenge as a result.

CONCLUSION

For the foregoing reasons, the Court should rule that controlling law compels the denial of the Defendant's motion to dismiss the Indictment, and the United States further submits that no hearing is necessary for the Court to reach this conclusion.

Respectfully submitted,

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Date: July 26, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document and the referenced discovery is being served this day on counsel of record.

/s/ Zachary A. Keller
ZACHARY A. KELLER
Assistant United States Attorney

A-9

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI

CASE NO. 23-20149-CR-ALTONAGA

UNITED STATES OF AMERICA,
Plaintiff,
v.

MARCUS ALBERT RAMBO,
Defendant.
_____/

MR. RAMBO'S REPLY TO THE GOVERNMENT'S RESPONSE IN OPPOSITION TO HIS MOTION TO DISMISS INDICTMENT

In its response (DE 33) in opposition to Mr. Rambo's motion to dismiss (DE 29), the Government agrees, as it must, that *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022), set forth a two-step test for determining "the constitutionality of a firearm restriction." DE 33, at 3. However, the Government's arguments fail at both steps. At Step One, the Government relies on *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010) to argue that convicted felons are not covered by the Second Amendment's plain text, but fails to acknowledge the primary problem: *Rozier* never in fact considered whether felons are part of "the people," per the Second Amendment's plain text. And at Step Two, the Government has not shown—and indeed could not show—that there is a longstanding historical tradition of permanently disarming a person like Mr. Rambo based, primarily, on prior nonviolent instances of improper possession. Absent such a showing, this Court should find 18 U.S.C. § 922(g)(1) unconstitutional as applied here, and dismiss the

indictment. *See United States v. Bullock*, Case No. 3:18-CR-166-CWR-FKB, 2023 WL 4232309 (S.D. Miss. June 28, 2023) (Reeves, J.) ([T]he standard announced by the Supreme Court in *Bruen* is the law of the land. It must be enforced. Under that standard, the government has failed to meet its burden.")

Mr. Rambo also maintains that § 922(g)(1) violates the Second Amendment on its face, and violates the Commerce Clause, for the reasons set forth in his motion.

ARGUMENT

I. STEP ONE: The Second Amendment's "plain text" covers Mr. Rambo's conduct; the Government's contrary position based on *Rozier*—which it claims remains binding and forecloses *Bruen*'s newly-dictated "plain text" analysis—is unfounded.

The parties agree that Step One of the analysis mandated by *Bruen* is for courts "to decide whether the restricted conduct is covered by 'the Second Amendment's plain text,' with that type of conduct 'presumptively protect[ed].'" DE 33, at 2 (citing *Bruen*, 142 S.Ct. at 2127). As is described in Mr. Rambo's motion, the Second Amendment's plain text grants the right (1) "of the people," (2) "to keep and bear," (3) "arms." DE 29, at 3. The Government apparently does not dispute items (2) or (3). There is thus no question that the *conduct* at issue in this case falls squarely within the Second Amendment's plain text. The Government does argue that Mr. Rambo—a convicted felon—is not part of "the people," but this is not correct.

First, the Government does not cite anything in the Second Amendment's text, or surrounding constitutional text, to support its contention that those with felony convictions are not "the people" under *Bruen* Step One.

Second, the Government is mistaken in its argument that "the Eleventh Circuit has already ruled on the first step" in *Rozier*, and that therefore, "felon in possession is not covered by the Second Amendment's plain text." DE 33, at 2. In fact, it is indisputable that *Bruen*'s Step One calls for analysis of the Second Amendment's "plain text," and equally indisputable that *Rozier* never considered that "plain text" at all. *See* 598 F.3d at 770-71. Relying on dicta from the Supreme Court's then-recent decision in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), the Eleventh Circuit's relatively brief *per curiam* opinion in *Rozier* found that a convicted felon's "Second Amendment right to bear arms is not weighed in the same manner as that of a law-abiding citizen," and that "[w]hile felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded." *Id.*

But notably absent in this analysis was any reference to the Second Amendment's text, and the right it guarantees to "the people." *Rozier* ignored *Heller*'s finding that the Second Amendment's reference to "the people" "unambiguously refers" to "all Americans," and that any other interpretation of that text would be inconsistent with the Court's interpretation of the same phrase—"the people"—in the First, Fourth, Ninth and Tenth Amendments. 128 S.Ct. 2790-91. In failing to consider the text of the Second Amendment, *Rozier* thus ***misapplied*** *Heller*, and is ***inconsistent*** with *Bruen*. The Eleventh Circuit itself has since issued opinions that do engage with the Second Amendment's text, and specifically, the meaning of the

phrase "the people." In *United States v. Jimenez-Shilon*, the Eleventh Circuit made clear that even "dangerous felons" are indisputably "part of 'the people.'" 34 F.4th 1042 (11th Cir. 2022). Thus, this Court should find that the question in Step One has been decisively answered.

Under well-settled Eleventh Circuit precedent, dicta—even Supreme Court dicta, if it is "devoid-of-analysis" (such as the *Heller* dicta that was quoted in *Rozier*)—is "not binding on anyone for any purpose." *Edwards v. Prime, Inc.*, 602 f.3d 1276, 1298 (11th Cir. 2010); *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006); *cf. Reynolds v. Behrman Capital IV L.P.*, 988 F.3d 1314, 1322 (11th Cir. 2021). And Eleventh Circuit precedent is also clear that where—as in *Bruen*—the Supreme Court sets forth a new "mode of analysis," it abrogates prior circuit precedent analyzing the same or even related legal questions under a different "mode of analysis." *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008); *see also Babb v. Sec'y, Dep't of Veterans Affairs*, 992 F.3d 1193, 1196 (11th Cir. 2021); *Dawson v. Scott*, 50 F.3d 884, 892 n. 20 (11th Cir. 1995); *United States v. Howard*, 742 F.3d 1334, 1343-45 (11th Cir. 2014); *Santiago-Lugo v. Warden*, 785 F.3d 467, 474 n. 4 (11th Cir. 2015); *United States v. Lopez*, 562 F.3d 1309, 1312 (11th Cir. 2009). These precedents confirm that *Rozier* has *not* survived *Bruen*, and thus cannot "foreclose" this Court from considering—under *Bruen*'s newly-articulated two step analysis—the "plain text," history, and tradition questions *Rozier* itself failed to consider.

Third, to be clear, Mr. Rambo has never argued that *Bruen* abrogated *Heller*.

To the contrary, he has argued only—and rightly—that *Bruen* abrogated *Rozier*, which did not heed *Heller*'s dictates and was inconsistent with *Bruen*'s newly-articulated, two-step methodology. *Bruen* was the Supreme Court's effort to bring all the courts of appeals back into conformity with *Heller*—because they had ignored *Heller*'s holding, and mistakenly followed its dicta. *See Bruen*, 142 S.Ct at 2134 (noting that the opinion had "made the constitutional standard endorsed in *Heller* more explicit.") Although *Bruen* did not change *Heller*, it did clarify and elaborate upon *Heller*'s "text, history, and tradition" approach by: (1) newly separating the consideration of text and history dictated by *Heller*, into discrete steps of analysis; (2) newly delineating the burdens at each step (the Government bears the burden of showing a consistent historical tradition of firearm regulation if the defendant shows that the conduct criminalized was covered by the "plain text" of the Second Amendment); and (3) clarifying that to meet its burden of showing a true "tradition" of regulation dating to the Founding, the Government must show more than a few outlier regulations.

Fourth, contrary to the Government's assertion, judges in this district (including District Judge Robert N. Scola), have agreed post-*Bruen* that felons are part of "the people," and that regulations on their right to possess handguns are thus presumptively protected under the Step One analysis. *See Hester*, Case No. 22-CR-20333-Scola, DE 39 (adopting Magistrate Judge Jacqueline Becerra's reasoning in *United States v. Pierre*, Case No. 1:22-CR-20321-JEM/Becerra, DE 53 (S.D. Fla. Nov.

28, 2022)). Judge Becerra had put it this way:

> *Bruen* definitively pronounced the standard by which any gun regulation must now be evaluated, a standard that the Supreme Court may have begun articulating in *Heller* (which was decided before *Rozier*), but that it did not finish articulating until *Bruen* (which was decided twelve years after *Rozier*). [*Rozier*] did not apply the now-required text and history approach of *Bruen*. Although it relied on *Heller*, it did not make any determination as to whether a felon was part of "the people" as set out in the plain text of the Second Amendment, nor did it undertake any analysis of the historical record at the time of the founding. Given that *Bruen* unequivocally mandates courts to apply the text and history standard, the Court is required to do so now. The Court cannot, as the Government urges it to do, simply rely on *Rozier* and ignore *Bruen*…[] *Bruen* clearly sets out the analysis that courts must now follow in reviewing gun regulations…

Pierre, Case No. 22-CR-20321-Martinez/Becerra, DE 53, at 15-16. The Government is thus mistaken in its assertion that judges in this district have not recognized an abrogation of *Rozier*. *See* DE 33, at 5.

Fifth, the same conclusion is supported by *Range v. Att'y Gen. United States of Am.*, 69 F.4th 96 (3d Cir. 2023) (*en banc*), in which every judge on the *en banc* Third Circuit either expressly or impliedly agreed that felons are part of "the people" covered by the Amendment, and as such, § 922(g)(1) is presumptively unconstitutional. In *Range*, the full Third Circuit vacated a prior decision of a panel of that court and not only held that felons are indeed among "the people" protected by the Second Amendment, but also squarely rejected the Government's atextual position that having a felony removes an American citizen from "the people" referenced in the Second Amendment. On the latter point, the majority expressly agreed with the plurality's statement in *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir.

2016) (*en banc*): "That individuals with Second Amendment rights may nonetheless be denied possession of a firearm is hardly illogical," *id.* at 344 (Ambro, J.). This "track[ed] then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), in which she persuasively explained that 'all people have the right to keep and bear arms,' through the legislature may constitutionally 'strip certain groups of that right.' *Range, Id.* at *4 (citing *Kanter, id.* at 452 (Barret, J., dissenting)). Ultimately, the majority adopted then-judge Barrett's reasoning on that point, and took care to follow *Heller*'s holdings, rather than its dicta. *Id.* Notably, the *Range* majority held specifically that references to "law-abiding citizens" in both *Heller* and *Bruen* were dicta. In addition, the majority found the phrase "law-abiding, responsible citizens" to be "as expansive as it is vague," potentially reaching an indefinite, undefined number of people, contrary to *Heller*'s reasoning that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table", and *Bruen*'s warning not to defer to legislatures. *Id.* at 102.

That these arguments are not only extremely persuasive, but essentially unrebuttable, is evidenced by the fact that neither the concurrences nor dissents in *Range* disagreed with any of them. *See id.* at 106. Indeed, not one judge on the *en banc* Third Circuit (including the original *Range* panel members) agreed with the Government's atextual position here that felons are simply "out" at *Bruen* Step One because they are not part of "the people." Nor has any other circuit court embraced that unfounded position in resolving a Second Amendment challenge to § 922(g)(1).

Sixth, and finally, the Government points to this Court's January 5, 2023, Order denying a defendant's facial (not as-applied) challenge to § 922(g)(1), and asks for the same ruling here. *United States v. Joseph Olson*, 22-CR-20525-CMA, DE 33. However, it bears emphasis that at that point, the Court cited only one post-*Bruen* challenge to § 922(g)(1), which was the original panel decision in *Range v. Att'y Gen. United States*. 53 F.4th 262, 266 (3d Cir. 2022). As described above, that decision has since been vacated, and the *en banc* Third Circuit has ruled that § 922(g)(1) was unconstitutional as applied in that case. 56 F.4th 992 (3d Cir. 2023).

II. STEP TWO: The Government has not met its burden to show a longstanding tradition of prohibiting a person like Mr. Rambo from possessing a firearm, nor could it, since no such tradition exists.

For the following reasons, the Government has not, and could not, meet its burden to show that there is a longstanding historical tradition in this country that would support the disarmament of a person who has never been convicted of a crime of violence and whose prior convictions relate primarily to the unlawful possession of firearms—the very right at issue here.

First, in support of his as-applied constitutional challenge, Mr. Rambo made repeated reference to two significant, recent opinions—in *Range* and in *Bullock*—each of which had found, under *Bruen*, that § 922(g)(1) violated the Second Amendment as applied to the individuals whose rights were at issue in those cases. *See, generally* DE 29. The Government does not address these cases until the last page of its *Bruen* argument, where it asks this Court not to follow the lengthy, well-

reasoned opinions in those cases, or to even to ask the same questions that those Courts had asked about whether the constitutionally-required longstanding tradition exists. DE 29, at 16. The learning from *Range* and *Bullock* is that if the Court undertakes a detailed review of the precedent and secondary sources cited by the Government—as the *en banc* Third Circuit and the Chair of the U.S. Sentencing Commission had in those cases—the result would be a finding that there is in fact no longstanding tradition of regulation sufficient to pass constitutional muster.

Range, as the Government points out, involved an individual who had been "convicted of a nonviolent, non-dangerous, misdemeanor" that, because of the maximum punishment it carried, served as a § 922(g)(1) predicate. DE 33, at 7 n. 3. But as the dissenting Judges pointed out in that case, the reasoning—meaning the finding that there is no appropriate historical tradition of regulation—would apply to a broader range of defendants, certainly to include individuals like Mr. Rambo who have no violent prior convictions. *See Range,* 69 F.4th at 116 (Schwartz, J., dissenting). In *Bullock*, the defendant in question had in fact been convicted of aggravated assault and manslaughter, offenses that are plainly more serious than any offense of which Mr. Rambo has ever been convicted. The Government's response does not distinguish Mr. Rambo's case from *Range* or *Bullock* in a meaningful way.

Second, the Government cites *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023), in which the Eighth Circuit rejected the defendant's as-applied challenge to § 922(g)(1) at *Bruen* Step Two. *See* DE 33, at 7 n. 3. *See id.* at 502 (finding § 922(g)(1)

as applied to *Jackson* and other convicted felons constitutional because it "is consistent with the Nation's historical tradition of firearm regulation"). Firstly, it is worth noting that even there, the Eighth Circuit did not uphold the statute based on the Step One analysis, but instead reached Step Two. Secondly, in its Step Two reasoning in that case, the *Jackson* panel followed the then-vacated *Range* panel decisions, whose reasoning has now been rejected by the *en banc* Third Circuit.

Third, the Government takes issue with Mr. Rambo's emphasis on the earliest federal felon-in-possession laws, including that the very earliest law (applying only to those with violent prior convictions) was passed in 1938 and that the earliest version of the modern law was passed in 1961. *See* DE 29, at 10. The Government does not appear to disagree that *Bruen* calls for a history that is older than the 20th century, but claims the vintage of the federal felon-in-possession laws in particular do not matter. DE 33, at 13.

The trouble for the Government is, there were not analogous laws at the time of the founding, and to the contrary, laws from that time specifically contemplated that felons could in fact be armed. Indeed, just one year after the Second Amendment was ratified, Congress enacted the first Militia Act, in which it made clear that "each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years . . . *shall* severally and respectively be enrolled in the militia." *Act of May 8, 1792, § 1, 1 Stat. 271* (emphasis added). The Act of 1792 further stipulated that "every

citizen so enrolled . . . *shall*, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt," and various other firearm accoutrements, including ammunition. *Id.* (emphasis added). Although the Act "exempted" certain classes of people from these requirements (*e.g.,* "all custom-house officers," "all ferrymen employed at any ferry on the post road"), felons notably were not among those exempted. Id. § 2, § 1 Stat. 272. And in fact, at least eight state militia statutes, passed shortly before or after 1791, contained similar requirements, and none of those statutes exempted felons from their requirements to become armed either. These federal and state militia statutes are crucial historical evidence that cannot be ignored under *Bruen*. Indeed, they show that in the Founding era, felons were not only permitted to possess firearms, but were legally required to do so.

III. The Eleventh Circuit has recently vacated a panel decision on a post-*Bruen* challenge to a gun regulation and granted rehearing *en banc*.

It is worth noting that in *Nat'l Rifle Ass'n v. Bondi*, which involved a post-*Bruen* challenge to a gun regulation in this circuit, a panel of the Eleventh Circuit initially upheld a Florida State law rendering it unlawful for those under the age of 21 to purchase firearms, but as recently as July 14, 2023 (after Mr. Rambo filed his motion to dismiss the indictment), the Eleventh Circuit, just like the Third Circuit had in *Range*, vacated its opinion and granted rehearing *en banc*. 61 F.4th 1317 (11th Cir. 2023) (applying the two-step *Bruen* analysis described above and initially upholding the statute); ____ F 4th ____, 2023 WL 4542153 (11th Cir. 2023) (vacating the opinion and granting rehearing *en banc*). This case remains pending.

REQUEST FOR A HEARING

Mr. Rambo respectfully submits that a hearing would assist in resolving the important and evolving constitutional issues raised in this as-applied challenge. Accordingly, he requests a hearing on this motion.

CONCLUSION

For the reasons stated above, § 922(g)(1), as applied to Mr. Rambo, violates the Second Amendment, and this Court therefore should dismiss the indictment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY certify that on **August 2, 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/ *Srilekha Jayanthi*

A-10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-20149-CR-CMA

UNITED STATES OF AMERICA

v.

MARCUS ALBERT RAMBO,

Defendant.
_____/

UNITED STATES' SUR-REPLY TO
THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

After a Motion that ignored *Rozier* entirely, the Defendant's Reply does all it can to minimize its import, primarily by arguing that the Eleventh Circuit *Rozier* court was variously confused by *Heller*, lazy in its analysis, and flat-out wrong—and that its resulting opinion cannot be reconciled with *Bruen*. Yet after 32 pages of briefing by the Defendant and exceeding the page limit in its Reply, the same thing remains inescapably true: that *Rozier* controls the Defendant's requested relief and compels this Court to deny the Defendant's Motion. Because the Reply's shotgun approach resulted in 10 sub-headed arguments made over the course of as many pages, the following Sur-Reply proceeds point-by-point in response:[1]

Point 1: *Rozier*'s Second Amendment Analysis. The Reply begins by incorrectly claiming that "the Government does not cite anything in the Second Amendment's text … to support its contention that those with felony convictions are not 'the people' under *Bruen* Step One." Rep. at 2. The Government refers the Court to pages 2-4 of the Response, where the Government explained that

[1] Because the Defendant's Reply was limited to the *Bruen* aspect of its Motion, the Government rests on its initial Response as to the Defendant's Commerce Clause challenge.

binding Eleventh Circuit law has held "that felons categorically were a 'certain class of people' whose firearm possession was not protected by the Second Amendment," Resp. at 2-3 (quoting *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010)), and "that 'the Second Amendment's text shows that it codified what the *Heller* Court called a "pre-existing right" … and that right's particular history demonstrates that it extended (and thus extends) to some categories of individuals, but not others," Resp. at 3 (quoting *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1044 (11th Cir. 2022) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 592, 603 (2008)). The Government did not spend more than two pages on that proposition because it did not need to: as the Response points out, the Supreme Court and Eleventh Circuit have already spent ample time doing so themselves, and the Court can rely on the law as it already exists in finding that felons are not covered by the Second Amendment.

Point 2: *Rozier*'s Use of *Heller*. The Reply then quibbles with *Rozier* for not directly quoting the Second Amendment text and relying on Supreme Court dicta, *see* Rep. at 3, but both criticisms fall flat. As to *Rozier*'s discussion of the Second Amendment, the Reply boils down to faulting the *Rozier* court for failing to reinvent the wheel when the *Heller* Court had already provided a design. Like the Government here, the *Rozier* court did not need to engage in its own lengthy discourse on the nature of the Second Amendment's history and felons' status within "the people" because *Heller* already did just that in a famously comprehensive opinion replete with historical analysis.

So while the Reply refers to *Rozier* as "the Eleventh Circuit's relatively brief *per curiam* opinion" as though that means *Rozier* was the product of insufficient thought, Rep. at 3, the fact is that *Rozier* gave its defendant's challenge to § 922(g)(1)'s constitutionality exactly the short shrift it deserved, truncating its analysis because the Supreme Court had already done the heavy lifting. In that respect, *Rozier*'s brevity is a feature, not a bug—a consequence of the pages of Supreme Court real

estate that had already been devoted to comprehensively addressing the history of the Second Amendment and its relevance to felon possession before the case came before the Eleventh Circuit in *Rozier*, rather than a lack of analytical depth as the Reply would have it.[2]

Moreover, the Defendant's argument that *Rozier* should not be followed because it failed to examine the Second Amendment's use of the word "people" misinterprets both *Rozier* and the Second Amendment. The Defendant wrongly suggests that the legal question here is whether felons are "people," Rep. at 3, when the grammatical subject of the Second Amendment is not "the people." Rather, the subject of the amendment is "*the right* of the people" to keep and bear arms. U.S. Const. amend. II (emphasis added). While that may seem to be a pedantic, semantic point, this is the realm the Motion has brought us to by discussing what the Second Amendment protects. This will be the third time the Government has quoted *Jimenez-Shilon* between its two briefings, but it apparently bears emphasis: the Eleventh Circuit explained there that the Second Amendment is about a *right*, which is important because it demands understanding what that right was intended to protect: "[T]he Second Amendment's text shows that it codified what the *Heller* Court called a 'pre-existing right' … and that right's particular history demonstrates that it extended (and thus extends) to some categories of individuals, but not others." *Id.* (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 592, 603 (2008)).

The Reply then moves to Supreme Court dicta, where it flat-out misstates Eleventh Circuit law after claiming that the Eleventh Circuit "ignored *Heller*'s holding, and mistakenly followed its dicta." Rep. at 5. To get there, the Reply advises this Court that Supreme Court dicta is like any other—that "dicta[,] even Supreme Court dicta, if it is 'devoid-of-analysis' … [,] is 'not binding on anyone for

[2] And of course had the *Rozier* court engaged in a lengthy and unnecessary historical analysis, then the Reply would have done what it did in response to the Government's Response here: simply argued that the analysis was not lengthy enough or focused on the wrong history.

any purpose,'" citing *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006), and *Edwards v. Prime, Inc.*, 602 F.3d 1276 (11th Cir. 2010), in support. But *Edwards* had nothing to do with Supreme Court dicta, and *Schwab* contrasted Supreme Court dicta with the very "devoid-of-analysis" dicta that the Reply describes here. In fact, *Schwab* stands for the opposite proposition that the Defendant cites it to support, going on to quote earlier Eleventh Circuit published opinions in holding that "there is dicta, and then there is Supreme Court dicta," 451 F.3d at 1325, and that "dicta from the Supreme Court is not something to be lightly cast aside," *id*. (collecting cases). *Schwab*'s approach to Supreme Court dicta follows a long and ongoing line of Eleventh Circuit precedent holding that the circuit court "appl[ies Supreme Court dicta] as much as the text of the statute allows," *United States v. F.E.B. Corp*., 52 F.4th 916, 928-29 (11th Cir. 2022), which is precisely the line *Rozier* takes incorporating *Heller* into its analysis. As a result, the *Rozier* court was on all fours in considering *Heller*'s dicta about felon possession.

Point Three: *Bruen*'s Impact on *Heller*. While acknowledging that "*Bruen* did not change *Heller*," Rep. at 5, the Reply then attempts to muddy clear waters by listing out three ways that *Bruen* clarified *Rozier* when the bottom line is that the *Bruen* Court's framework expressly preserved *Heller*'s first step. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (recognizing that this first step is "[i]n keeping with" *Heller*); *see* Resp. at 2-3. That matters because *Rozier* properly answered *Heller's* step one inquiry, which was preserved in *Bruen*, as to whether felons were historically included among that portion of the people with a pre-existing right to bear arms. *Rozier* held they were not. *See Rozier*, 598 F.3d at 771. Simply put, felons were not "qualified to possess a firearm." *Id.* And as was true at the time of the government's original response to Defendant's motion to dismiss, and as still true now, no district court within this circuit that has

addressed *Rozier* has considered it abrogated by *Bruen*. Most recently, the Southern District of Alabama has reaffirmed that "*Rozier* remains binding precedent in this circuit." *United States v. Gilbert*, No. CR 21-00110-KD-N, 2023 WL 4708005, at *1 (S.D. Ala. July 24, 2023).

Point Four: Judge Scola's *Hester* Opinion. Judge Scola did not address *Rozier* in his order in *United States v. Hester*, Case No. 22-CR-20333-Scola, DE 39 (S.D. Fla. Jan. 27, 2023), cited by the Defendant in support of his step-one argument, Rep. at 5. Rather, he merely adopted Magistrate Judge Becerra's step-one analysis that felons were part of "the people" in *United States v. Pierre*, No. 1:22-CR-20321-JEM/Becerra, DE 53 (S.D. Fla. Nov. 28, 2022), but without any discussion of *Rozier* or *Jimenez-Shilon*'s explanation that being part of "the people" was not sufficient if one was not among that part of the people with a pre-existing right to bear arms. 34 F.4th at 1044. In addition, it bears noting again that that Magistrate Judge Becerra's analysis was rejected by the district court in its actual case, *Pierre*, No. 22-CR-20321-JEM, DE 104 at 2 (S.D. Fla. Feb. 23, 2023), with Judge Jose E. Martinez "overrul[ing] the R&R and declin[ing] to adopt it," *id.* He ruled instead, as the government argued there and here, that "*Rozier* squarely forecloses the Defendant's constitutional challenge." *Id.*

Point Five: The Third Circuit's *Range* Opinion. While *Rozier's* binding effect in this circuit forecloses Defendant's argument for adopting the Third Circuit's *Range* decision, even that decision was strictly limited "only as applied" to Bryan Range, who had been "convicted of a nonviolent, non-dangerous misdemeanor," not resulting in incarceration, but nevertheless treated as a felony-equivalent for § 922(g)(1) purposes. *Range v. Att'y Gen.*, 69 F.4th 96, 99, 106 (3d Cir. 2023) (en banc). In contrast, the Defendant was serving federal supervised release after serving a 27-month prison sentence for a prior § 922(g)(1) conviction when he committed the instant offense—a far cry from Bryan Range's misdemeanor conviction. Indeed, that prior § 922(g)(1) conviction came after the

Defendant was convicted of felony battery on a law enforcement officer—a conviction that the Defendant attached to his Motion while bizarrely arguing that he has "no violent prior convictions," Rep. at 9, apparently leaning hard into the hyper-technical categorical approach for violent crime predicates under the Sentencing Guidelines or Armed Career Criminal Act as though they were relevant here. Suffice to say, the Defendant is squarely within the category of "felon" that the Eleventh Circuit has held the Second Amendment to not protect and does not fall within the scope of *Range*'s reasoning in any event.

Point Six: This Court's *Olson* Order. The Reply then confronts the elephant in the room: this Court's prior rejection of his argument in *Olson* by pointing to *Rozier* and *Range* that it failed to address in the Motion. As in his Motion, he attempts to minimize *Rozier* by making no mention of it when describing this Court's order, instead only deigning to mention *Range*. And here, the Defendant points out that the *Range* opinion cited by this Court in *Olson* has been vacated, as though the new *Range* opinion were anything more than an out-of-circuit case that by its own terms applies to a defendant who had been convicted of a misdemeanor offense—again, a far cry from the Defendant's situation here.

Point Seven: *Bollock and Range* (Again). The Government already addressed *Range* above and both *Range* and *Bullock* in its Response, *see* Resp. at 16, and incorporates that response here. The Reply appears to take issue with the Government giving these cases short shrift in that Response, *see* Rep. at 8 ("The Government does not address these cases until the last page of its *Bruen* argument"), but the Response gave the cases precisely the small amount of attention they deserve. *Bullock* is an unpublished district court opinion where the judge scoffed at the notion that it needed to conduct the analysis that it needed to perform and merely found that the Government in that case did not carry its

burden as to historical analysis, rather than rendering a clear judgment about the history itself. That posture renders the case irrelevant to this one, where the Government provided ample historical analysis in its response. *See* Resp. at 9-14. The Reply then asks this Court to consider *Range*'s dissenting opinion about the history of gun regulation, but the Government thoroughly explained why that history points the other way, like the actual *Range* opinion held.

Point Eight: The Eighth Circuit *Jackson* Opinion. The Defendant is also wrong to claim that the Eighth Circuit has not ruled in the Government's favor on the first-step inquiry. Rather, the Eighth Circuit reaffirmed its pre-*Bruen* precedent specifically on the grounds that, like *Rozier*, it had relied on the undisturbed first step and not "by engaging in means-end scrutiny or some other interest-balancing exercise" that *Bruen* had rejected. *United States v. Sitladeen*, 64 F.4th 978, 985 (8th Cir. 2023). Its precedent remained valid because *Bruen* "decide[d] nothing" altering the first step inquiry "about who may lawfully possess a firearm." *Id.* (quoting *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring)). When it then reaffirmed § 922(g)(1)'s validity, the Eighth Circuit added that *Bruen* "did not disturb [*Heller's* recognition of the longstanding prohibitions on felon possession] or cast doubt on the prohibitions." *United States v. Jackson*, 69 F.4th 495, 501-02 (8th Cir. 2023) (citing *Bruen*, 142 S. Ct. at 2156). And while the Defendant provides that the *Jackson* panel "followed" the *Range* panel, the *Jackson* court was not bound to do so; rather, it rendered its own independent judgment and agreed with *Range* as to its second-step analysis.

Point Nine: Historical Analysis. If the Court follows *Rozier* and concludes that felons were not included in the pre-existing right to bear arms protected by the Second Amendment, it need go no further. But if it nevertheless proceeds to *Bruen's* step two inquiry, the Defendant is also wrong that the Government has not established historical analogs reflecting contemporaneous Founding-era

understanding that even non-violent law-breakers could be disarmed. The government has cited contemporaneous laws disarming those who refused to swear allegiance to the newly independent States, who libeled or defamed acts of the Continental Congress, or who committed non-violent hunting offenses. *See* Resp. at 11-12. That the Defendant can point to other laws that did not disarm felons is of no moment; rather, a "list of the laws that happened to exist in the founding era is … not the same thing as an exhaustive account of what laws would have been theoretically believed to be permissible by an individual sharing the original public understanding of the Constitution." *United States v. Kelly*, No. 3:22-CR-37, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022). Founding-era legislatures cannot be presumed to have legislated to the full limits of their constitutional authority. Laws *not* disarming felons are not proof that the Founding-era legislatures believed they could not pass any.

Point Ten: The Eleventh Circuit's Pending *Bondi* Case. Finally, the Eleventh Circuit's vacatur of *National Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir. 2023), has no bearing on the issues here. *Bondi* addressed the validity of a Florida law imposing age restrictions on firearm purchases. *Id.* at 1320. It has nothing to do with felon rights, *Rozier*, § 922(g)(1), or any historical basis for restricting felon possession.

So while the Defendant throws 10 arguments at the wall in as many pages, none stick. That result is the simple consequence of the issue before the Court—Section 922(g)(1)'s constitutionality—having been decided already in binding Eleventh Circuit precedent. While much ink has been spilled since this Court rendered its opinion in *Olson*, the legal landscape today remains substantively unchanged, with *Rozier* the same controlling law that this Court found it to be in January of this year. For that reason, the Government respectfully submits that no hearing is necessary here.

CONCLUSION

For the foregoing reasons, the Court should rule that controlling law compels the denial of the Defendant's motion to dismiss the Indictment, and the United States further submits that no hearing is necessary for the Court to reach this conclusion.

Respectfully submitted,

MARKENZY LAPOINTE
UNITED STATES ATTORNEY

Date: August 8, 2023

By: */s/ Zachary A. Keller*
ZACHARY A. KELLER
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U.S. Attorney's Office – SDFL
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 8, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document and the referenced discovery is being served this day on counsel of record.

/s/ Zachary A. Keller
ZACHARY A. KELLER
Assistant United States Attorney

A-11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-20149-CR-ALTONAGA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCUS ALBERT RAMBO,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on Defendant's Motion to Dismiss Indictment [ECF No. 29], seeking dismissal based on *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *Range v. Attorney General United States of America*, 69 F.4th 96 (3d Cir. 2023) (en banc); and *United States v. Bullock*, No. 3:18-cr-165, 2023 WL 4232309 (S.D. Miss. June 28, 2023). Upon careful review of the parties' briefing and applicable authorities, the Court is not persuaded to dismiss this 18 U.S.C. section 922(g)(1) prosecution on Second Amendment grounds. (*See generally* Resp. in Opp'n [ECF No. 33]; Sur-Reply [ECF No. 37]); *see also United States v. Rozier*, 598 F.3d 768, 770–71 (11th Cir. 2010); *Leonard v. United States*, No. 22-cv-22670 (S.D. Fla. March 10, 2023) [ECF No. 15] 19 ("*Bruen* may ultimately impact dozens of firearms regulations around the country, but [section] 922(g)(1) is not one of them. The Supreme Court has repeatedly confirmed that the Second Amendment allows the government to prohibit convicted felons from possessing firearms." (alteration added; citations omitted)); *United States v. Gilbert*, No. 21-cr-00110, 2023 WL 4708005, at *1 (S.D. Ala. July 24, 2023) (citing *United States v. Hunter*, No. 22-cr-84, 2022 WL 17640254, at *1 (N.D. Ala. Dec. 13, 2022) ("Because *Rozier* has not been clearly overruled or undermined to the point of abrogation, this court is bound by that

decision's holding that [section] 922(g)(1) does not violate the Second Amendment." (alteration added))).

Being fully advised, it is

ORDERED AND ADJUDGED that the Motion to Dismiss Indictment **[ECF No. 29]** is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 10th day of August, 2023.

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record

A-12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

MARCUS ALBERT RAMBO

JUDGMENT IN A CRIMINAL CASE

Case Number: **1:23-CR-20149-CMA(1)**
USM Number: **18064-104**

Counsel for Defendant: **Srilekha Jayanthi**
Counsel for United States: **Jacob Koffsky** for **Zachary A. Keller**

The defendant pled guilty to Count 1 of the Indictment.
The defendant is adjudicated guilty of the following offense:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) / Possession of a Firearm and Ammunition by a Convicted Felon	08/12/2022	1

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

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.

November 2, 2023
Date of Imposition of Judgment

Cecilia M. Altonaga
Signature of Judge

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

November 2, 2023
Date

DEFENDANT: MARCUS ALBERT RAMBO
CASE NUMBER: 1:23-CR-20149-CMA(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **30 months**.

☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends that the defendant be designated to a facility located in or near South Florida.

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

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: MARCUS ALBERT RAMBO
CASE NUMBER: 1:23-CR-20149-CMA(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: MARCUS ALBERT RAMBO
CASE NUMBER: 1:23-CR-20149-CMA(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, 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 40 hours per week) at a lawful type of employment, unless the Court excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the Court 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: MARCUS ALBERT RAMBO
CASE NUMBER: 1:23-CR-20149-CMA(1)

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction: The defendant is prohibited from associating with Michelson Valsaint and Christopher Vilena while on supervised release.

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.

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: MARCUS ALBERT RAMBO
CASE NUMBER: 1:23-CR-20149-CMA(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	$1,000.00				

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.

* 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: MARCUS ALBERT RAMBO
CASE NUMBER: 1:23-CR-20149-CMA(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. The fine is payable over the period of supervision.

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.

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.