A P P E N D I X

APPENDIX

A-1

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11938

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DEION SHAWN HESTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cr-20333-RNS-1

Before WILLIAM PRYOR, Chief Judge, and WILSON and LUCK, Circuit Judges.

PER CURIAM:

Deion Hester appeals his conviction for possession of a firearm and ammunition. 18 U.S.C. § 922(g)(1). He argues that section 922(g)(1) violates the Second Amendment facially and violates the Commerce Clause, both facially and as applied to him. The government moves for summary affirmance. We grant that motion and affirm.

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). We review the constitutionality of a statute *de novo*. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). But challenges raised for the first time on appeal are reviewed for plain error. *Id*.

The prior-precedent rule requires us to follow a precedent unless it is overruled by this Court *en banc* or by the Supreme Court. *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016). "To constitute an overruling for the purposes of this prior panel precedent rule, the Supreme Court decision must be clearly on point[,]" 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." *United States v. Dubois*, 94 F.4th 1284, 1292 (11th Cir. 2023) (quotation omitted).

Because Hester did not raise his Commerce Clause challenge in the district court, we review his argument for plain error. *See Wright*, 607 F.3d at 715. As Hester concedes, our precedent holds that section 922(g)(1) is constitutional under the Commerce Clause. *United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996); *United States v. Scott*, 263 F.3d 1270, 1273-74 (11th Cir. 2001). We have rejected as-applied challenges to section 922(g)(1) when the government proved a "minimal nexus" to interstate commerce by establishing—as provided in Hester's plea agreement—that the firearms were manufactured outside of the state where the offense occurred and necessarily traveled in interstate commerce. *Wright*, 607 F.3d at 715-16. Because our precedent forecloses Hester's argument, he cannot establish plain error. *See id.* at 715.

Our binding precedents also foreclose Hester's argument that section 922(g)(1) violates the Second Amendment. In *United States v. Dubois*, we reaffirmed our precedents holding that, under *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), section 922(g)(1) does not violate the Second Amendment. 94 F.4th at 1291-93 (citing *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010)). We rejected the argument that *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), abrogated *Rozier* because *Bruen* "repeatedly stated that its decision was faithful to *Heller*." *Id.* at 1293. And the recent decision in *United States v. Rahimi*, does not

change our analysis. 144 S. Ct. 1889 (2024). *Rahimi* did not "demolish" or "eviscerate" the "fundamental props" of *Rozier* or *Dubois*. *Dubois*, 94 F.4th at 1292. *Rahimi* did not discuss section 922(g)(1) or undermine our interpretation of *Heller*. To the contrary, *Rahimi* reiterated that prohibitions on the "possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Rahimi*, 144 S. Ct. at 1902 (quoting *Heller*, 554 U.S. at 626, 627 n.26).

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

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 06, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11938-JJ
Case Style: USA v. Deion Hester
District Court Docket No: 1:22-cr-20333-RNS-1

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

A-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DEION SHAWN HESTER

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **1:22-CR-20333-RNS(1)**
§ USM Number: **19377-510**
§
§ Counsel for Defendant: Andrew Scott Jacobs
§ Counsel for United States: Kevin Gerarde

THE DEFENDANT:

☒	pleaded guilty to count 1 of the indictment.	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 U.S.C. § 922(g)(1) - Possession of a firearm and ammunition by a convicted felon.	05/26/2022	1

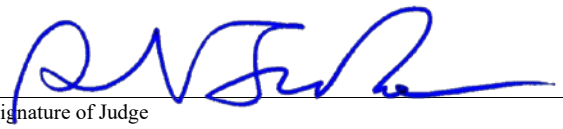
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

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

May 31, 2023
Date of Imposition of Judgment


Signature of Judge

ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

May 31, 2023
Date

DEFENDANT: DEION SHAWN HESTER
CASE NUMBER: 1:22-CR-20333-RNS(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **37 months** as to count 1. The Court recommends this sentence run concurrently with any yet to be imposed sentences in Docket Nos. F20-910, F20-838, F20-5852, F22-9721, Eleventh Judicial Circuit of Florida, Miami-Dade County, Florida, and M-22-12861, County Court, Miami-Dade County.

☒ The court makes the following recommendations to the Bureau of Prisons:
1) Defendant be designated to a facility as close to South Florida as possible.
2) Defendant receive substance abuse treatment and mental health treatment.

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEION SHAWN HESTER
CASE NUMBER: 1:22-CR-20333-RNS(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: DEION SHAWN HESTER
CASE NUMBER: 1:22-CR-20333-RNS(1)

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: DEION SHAWN HESTER
CASE NUMBER: 1:22-CR-20333-RNS(1)

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment: The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

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.

Substance Abuse Treatment: The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

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: DEION SHAWN HESTER
CASE NUMBER: 1:22-CR-20333-RNS(1)

CRIMINAL MONETARY PENALTIES

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

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

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

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

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DEION SHAWN HESTER
CASE NUMBER: 1:22-CR-20333-RNS(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 payment of $100.00 due immediately.

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

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

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

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

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

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

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

A-3

United States District Court
for the
Southern District of Florida

United States of America, Plaintiff	)	
v.	)	Criminal Case No. 22-20333-CR-Scola
Deion Shawn Hester, Defendant.	)	

Order Denying Motion to Dismiss

In the sole count of the indictment in this case, the Government charges the Defendant, Deion Shawn Hester, with possessing a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) (possession of firearms and ammunition after conviction for "a crime punishable by imprisonment for a term exceeding one year"). (ECF No. 1.) Hester has filed a motion to dismiss the indictment, based on the United States Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), arguing that § 922(g)(1) violates his Second Amendment rights. (Def.'s Mot., ECF No. 16.) The Government has responded (Gov't's Resp., ECF No. 26), to which Hester has replied (Def.'s Reply, ECF No. 27). The Court also held oral argument on Hester's motion on January 19, 2023, (ECF No. 31), after which Hester submitted a notice of supplemental authority (Def.'s Not., ECF No. 33). After careful review of the briefing, the parties' presentation at oral argument, the record, and the relevant legal authorities, the Court **denies** Hester's motion (**ECF No. 16**).

The Court finds United States Magistrate Judge Jacqueline Becerra's recent report and recommendation, in *United States v. Pierre*, thoughtful, analytically sound, and persuasive. Case No. 22-CR-20321-Martinez/Becerra, DE 53 (S.D. Fla. Nov. 28, 2022). The Court agrees with Judge Becerra—and Hester—that *Bruen* requires the Court to apply the text-and-history framework in analyzing Hester's constitutional challenge to § 922(g)(1). *Id.* at 13–16. In addressing the first part of that analysis, the Court finds itself compelled, under *Bruen*, to conclude that Hester, as a felon, is part "of the people" protected by the plain language of the Second Amendment, for the same reasons set forth by Judge Becerra (and as argued by Hester). Case No. 22-CR-20321-Martinez/Becerra at 16–20. Finally, the Court also concurs, as Judge Becerra concluded, that prohibiting felons from possessing firearms is consistent with

the historical tradition of the nation's firearm regulations. *Id.* at 21–30.[1]

In sum, *Bruen* compels the Court to conclude that felons, like Hester, are included in the Second Amendment's "of the people." But, prohibiting felons from possessing firearms, through § 922(g)(1), is nonetheless consistent with the historical tradition of our nation's firearm regulations. As such, the Court disagrees with Hester that § 922(g)(1) is unconstitutional and therefore **denies** his motion to dismiss the indictment (**ECF No. 16**).

Done and Ordered in Chambers at Miami, Florida, on January 25, 2023.

Robert N. Scola, Jr.
United States District Judge

[1] The Court recognizes that *Range v. Attorney Gen. United States*, which Judge Becerra looked to, in part, in support of her historical analysis, and upon which the Government relies, in large part in its response, has been vacated upon a petition for rehearing en banc. 53 F.4th 262, 268 (3d Cir. 2022), *reh'g en banc granted, opinion vacated sub nom. Range v. Attorney Gen. United States of Am.*, 56 F.4th 992 (3d Cir. 2023). The Court nonetheless agrees with Judge Becerra's separate analysis, that *Bruen* provides that reasoning by analogy, in the historical-framework part of the evaluation, only requires a court to review whether the historical context is "relevantly similar" as opposed to "distinctly similar." *Pierre*, Case No. 22-CR-20321-Martinez/Becerra at 21–23.

A-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-20333-CR-Scola/Goodman

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEION SHAWN HESTER,

Defendant.
_____/

MOTION TO DISMISS THE INDICTMENT
UNDER THE SECOND AMENDMENT

The Defendant, Deion Shawn Hester, through undersigned counsel, respectfully moves pursuant to Fed. R. Crim. P. 12(b) to dismiss the Indictment under the Second Amendment based upon the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In support thereof, he states:

BACKGROUND

In the sole count of the Indictment, the government charges Mr. Hester with possessing a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) (possession of firearms and ammunition after conviction for "a crime punishable by imprisonment for a term exceeding one year"). (DE 1.) Section § 922(g)(1) permanently deprives any person previously convicted of "a crime punishable by imprisonment for a term exceeding one year" from ever again exercising his core, fundamental right to possess a firearm.

The Constitution does not permit this result.

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. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that based on the text of the Second Amendment and history, the amendment "protects an individual right" "to possess and carry weapons in case of confrontation." *Id.* at 576, 582, 594. And notably, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court described that right as "fundamental to our scheme of ordered liberty," and held that it applies through the Due Process Clause of the Fourteenth Amendment to the states. *Id.* at 767, 791.[1]

But in neither *Heller* nor *McDonald* did the Supreme Court go any further than resolving the specific Second Amendment claims raised in those cases. *See Bruen*, 142 S.Ct. at 2130, n.6 ("The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies"). In neither case did the Court definitively establish a test for evaluating *other* Second Amendment claims, define the broader contours of the fundamental Second Amendment right, or delimit the outer bounds of that right. *See United States v. Jimenez-Shilon*, 34 F.4th 1042, 1050 (11th Cir. 2022) (Newsom, J., concurring) (recognizing that *Heller* and *McDonald* left the lower courts "in an analytical vacuum;" citing *Silvester v. Becerra*, 138 S.Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari) ("acknowledging that the Supreme Court 'has not definitively resolved the

[1] Unless otherwise indicated, case quotations in this motion omit citations, brackets, internal quotation marks, and other characters that do not affect the meaning of the cited language.

standard for evaluating Second Amendment claims'")).

It was only this past term, in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), that the Supreme Court set forth a clear, two-part "text and history" test for deciding the constitutionality of all firearm regulations. Specifically, the Court held in *Bruen*, conduct falling within the Second Amendment's plain text is presumptively protected, and regulating such conduct is unconstitutional unless the government can "justify its regulation by demonstrating that it 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." *Id.* at 2137.

In so holding, *Bruen* marked a dramatic shift in Second Amendment law. Before *Bruen*, most courts of appeals—possibly misled by *Heller*'s comment that keeping a firearm in the home for self-defense would "fail constitutional muster" "under any of the standards of scrutiny," 554 U.S. at 628-29—had chosen to decide Second Amendment challenges by balancing the strength of the government's interest in firearm regulation against the degree of infringement on the challenger's right to keep and bear arms. Notably, though, at the first step of this improvised post-*Heller* inquiry, the courts of appeals allowed the government to justify its regulation by "establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood." *Bruen*, 142 S.Ct. at 2127 (citing, *e.g., Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)[2]). And the Eleventh Circuit was no different in this respect.

[2] Then-judge, now Justice Amy Coney Barrett dissented in *Kanter*, explaining *inter alia* that the court of appeals' "'scope of the right' approach is at odds with *Heller* itself," since the Court in *Heller* had "interpreted 'people' as referring to 'all Americans.'" *Kanter*, 919 F.3d at 451-453 (Barrett, J., dissenting) (citing *Heller*, 554 U.S. at 580-81).

Indeed, in the aftermath of *Heller*, the Eleventh Circuit likewise engaged in this same "scope of the right" analysis at the first step of the inquiry, and applied a freewheeling "means-end" interest-balancing at the second step—both steps untethered to either text or history—in order to uphold a plethora of federal firearm regulations from constitutional attack. *See, e.g.*, *United States v. Rozier*, 598 F.3d 768, 770-71 (11th Cir. 2010) (§ 922(g)(1)); *Georgia Carry.Org, Inc. v. U.S. Army Corps. Of Engineers*, 788 F.3d 1318, 1320-21 (11th Cir. 2015) (36 C.F.R. § 327.13); *United States v. Focia*, 869 F.3d 1269, 1285-86 (11th Cir. 2017) (18 U.S.C. § 922(a)(1)(5)).

In *Bruen*, however, the Supreme Court squarely rejected such "judge-empowering" tests—instructing the courts firmly to respect the "balance … struck by the traditions of the American people" as embodied in the text and "unqualified command" of the Second Amendment. *Id.* at 2130-31. The Court was emphatic that going forward, courts consider only "constitutional text and history," 142 S. Ct. at 2128-29 & n. 5, which are now the *only* relevant steps in the analysis. At the first step, *Bruen* clarified, if "the Second Amendment's plain text covers an individual's conduct," then "the Constitution presumptively protects that conduct." *Id.* at 2129-30. To rebut the presumption, at the second step the government must show that a challenged law "is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30.

Notably, in setting forth this two-step standard for all Second Amendment claims going forward, the Supreme Court did *not* caution lower courts to read its decision in *Bruen*, or its prior decisions in *Heller* and *McDonald*, as opining specifically on a question not presented in those cases: the constitutionality of felon-disarmament

laws. And indeed, § 922(g)(1) cannot survive *Bruen*'s exacting Second Amendment analysis since the right to "keep and bear arms" indisputably includes the right to possess a handgun—the precise conduct Mr. Hester is charged with engaging in here. Because possession of a handgun comes squarely within the Second Amendment's "plain text," and that text makes no distinction between felons and non-felons, Mr. Hester's conduct is "presumptively protect[ed]" —which requires the government to "affirmatively prove" that § 922(g)(1) "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127, 2129-30. Finally, as detailed in Part I.B.2 *infra*, the government cannot meet its heavy burden because felon-disarmament laws, which did not appear in the United States until the 20th century, were unknown to the generation that ratified the Second Amendment. For these reasons, the Court should declare § 922(g)(1) unconstitutional and dismiss the Indictment.

ARGUMENT

SECTION 922(g)(1) VIOLATES THE SECOND AMENDMENT

As noted above, after *Bruen*, a court evaluating the constitutionality of firearm regulations under the Second Amendment must strictly apply a two-step "test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. At step one, the Court asks only whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2126. If it does, "the Constitution presumptively protects that conduct," *id.*, at which point the Court turns to the second step, where the burden falls on the government to "justify its regulation by demonstrating that it 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." *Id.* at 2137. If, as in *Bruen*, the government fails to carry that burden, the challenged regulation is unconstitutional. *Id.* at 2156.

Section 922(g)(1) fails both steps of the *Bruen* analysis. That section forever deprives a person previously convicted of "a crime punishable by imprisonment for a term exceeding one year" from ever again exercising his core, fundamental right to possess a firearm. 18 U.S.C. § 922(g)(1). Any person who violates this permanent firearm ban commits a federal felony previously punishable by up to 10 years imprisonment—and if committed after June 2022, punishable by up to fifteen years' imprisonment. *Id.* §§ 924(a)(8)(2022); 924(a)(2)(2021).[3] And indeed, *Bruen*'s test for historical "consistency" is demanding: a firearm regulation is consistent with American tradition only if distinctly similar regulations were widespread and commonly accepted in the founding era when the Second Amendment was adopted. And they were not.

For these reasons further detailed below, § 922(g)(1) is facially unconstitutional. The Court should dismiss the Indictment for failure to state an offense.

A. *BRUEN* STEP ONE: THE SECOND AMENDMENT'S PLAIN TEXT COVERS MR. HESTER'S ACT OF POSSESSING A HANDGUN

At step one of the *Bruen* analysis, the Court asks whether "the Second Amendment's plain text covers [the defendant's] conduct." *Bruen*, 142 S.Ct. at 2129-30. That text contains three elements, guaranteeing the right (1) "of the people," (2) "to

[3] The Bipartisan Safer Communities Act (BSCA) signed into law on June 25, 2022, raised the penalty for a § 922(g) violation from 10 years under prior 18 U.S.C. § 924(a)(2), to 15 years under new § 924(a)(8). Because Mr. Hester's alleged conduct occurred before the enactment of the BSCA, he is subject to the 10 year maximum penalty.

keep and bear," (3) "arms." *Heller*, 554 U.S. at 579–95. As explained below, Mr. Hester and his conduct fall squarely within each element.

1. Mr. Hester is Among "The People" Protected Under the Second Amendment

"The first salient feature of the [Second Amendment's] operative clause is that it codifies a 'right of the people.'" *Heller, id.* at 579. "The 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." *Id.* The Court has interpreted the term "the people" as having a consistent meaning across all three provisions, "refer[ring] 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 term 'the 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, defined as "[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). Consistent with these principles, the Court held in *Heller* 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. at 579–81 (emphasis added).

Here, Mr. Hester is a U.S. citizen and lifelong member of the national community. Thus, the Second Amendment's use of the phrase "the people" unambiguously refers to him. *See id.* at 579. Just as that 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 does not draw a felon/non-felon distinction. Indeed, as the Eleventh Circuit and other circuits have rightly recognized, there is *no* felon/non-felon distinction within the term "people" in the Second Amendment. *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.'").

2. The Right to "Keep" and "Bear" Arms Includes the Right to Possess a Handgun both Inside and Outside the Home.

The next textual element is easily satisfied. The Second Amendment protects the right to "keep" and "bear" arms. As the Court recognized in *Heller*, the word "keep" means "[t]o have in custody" or to "retain in one's power of possession." 554 U.S. at 582. And the word "bear" means "to 'carry.'" *Id.* at 584. Moreover, the Court held in *Bruen*, the meaning of "bear" even includes carrying 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, the Court has made clear, the text of the Second Amendment protects the right to possess a firearm both inside and outside the home.

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 it has specifically held the term protects the right to possess "handguns," *id.* at 629, which *were* in "common use" at the founding. *Id.* at 627. Here, Mr. Hester is charged with possessing a firearm, and the government has advised through discovery that the firearm possessed was a handgun. Handguns are unquestionably considered "arms" under the Second Amendment. *See id.*; *see also Bruen*, 142 S. Ct. at 2132, 2143.

And ammunition is likewise part of the "arms" protected by the Second Amendment to the same extent as a handgun—the theory being that "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").

As the foregoing demonstrates, the Second Amendment's plain text covers—and thus "presumptively protects" —the conduct of publicly carrying a handgun loaded

with ammunition as well as separately possessing ammunition in the home. Mr. Hester has thus satisfied step one of the *Bruen* analysis. The burden now rests with the government to justify § 922(g)(1) "by demonstrating that [§ 922(g)(1)] is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, *id.* at 2126. As the following section makes clear, the government cannot carry that burden. Dismissal is required.

B. *BRUEN* STEP TWO: SECTION 922(g)(1) IS NOT CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION.

At step two of the *Bruen* analysis, the government must show that § 922(g)(1) "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." *Id.* at 15, 29. And here, the government cannot meet this burden. We start by describing the analysis at step two, then turn to the relevant history.

1. *Bruen*'s "Historical Tradition" Inquiry

The *Bruen* analysis at step two requires a historical inquiry, but prescribes two different ways to conduct it depending on whether the "general societal problem" addressed by the statute is longstanding or new. If a statute is directed at a problem that "has persisted since the 18th century," *Bruen* holds, then the lack of "distinctly similar" historical regulations means that the statute is unconstitutional. This is the type of "straightforward" historical inquiry that the Supreme Court conducted in *Bruen* for public carry of handguns. 142 S.Ct. at 2131. In "other cases," where a statute is aimed 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.

In our case, the problem addressed by 18 U.S.C. § 922(g)(1) is unquestionably longstanding, just as the problem addressed by the New York statute in *Bruen*. It was in no sense "unimaginable" at the founding, because many felons lived in America at the time of the founding. In fact, prior to the revolution, many of the colonies were heavily populated with convicts exported there by 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 December 19, 2022) (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).

Indisputably, therefore, since guns were plentiful in America since colonial times, the problem of ex-felons with access to guns is one "that has persisted since the 18th century." *Bruen,* 142 S.Ct. at 2131. If there was a concern about the societal danger posed by felons possessing guns in 1791 or even later, there was nothing prohibiting either the new federal or state governments at that time from doing so. As such, the historical tradition analysis here is "straightforward," just as in *Bruen*.

In conducting it, important rules apply:

i. Burden

Bruen made clear that the burden of proof at step two of the historical tradition inquiry rests *entirely* with the government. The government alone must "establish the relevant tradition of regulation." *Id.* at 2135, 2149 n.25. Courts "are not obliged to sift the historical materials for evidence to sustain the [challenged] statute." *Id.* at 2150. Rather, consistent with ordinary "principle[s] of party presentation," courts must "decide a case based on the historical record compiled by the parties," *id.* at 2130 n.6. If that record yields "uncertainties," courts should rely on *Bruen*'s "default rules" —the presumption of unconstitutionality at step one and the government's burden at step two—"to resolve [those] uncertainties" in favor of the view "more consistent with the Second Amendment's command." *Id.*. In other words, and consistent with the rule of lenity, any possible tie here goes to the defendant.

ii. Distinctly Similar

Where, as here, "a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing the problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131. Stated differently, § 922(g)(1) is unconstitutional unless the government shows a tradition of "distinctly similar historical regulation" as of 1791 when the Second Amendment was ratified. *Id.* at 2126.

iii. Prevalence

The government's burden at step two of the *Bruen* analysis does not stop at

identifying a distinctly similar historical regulation. Rather, the government must show that the challenged regulation "is consistent with the Nation's historical tradition of firearm regulation." *Id.* And a "tradition" of regulation requires more than one or two isolated examples. It requires a robust, "widespread" historical practice "broadly prohibiting" the conduct in question. *Id.* at 2137-38. Although *Bruen* did not establish any clear threshold for determining when a historical practice rises to the level of a "tradition," it did hold that "a single law in a single State" is not enough, and even expressed doubt that regulations of three of the thirteen colonies "could suffice." *Id.* at 2142-45 (noting that, in any event, the three colonial regulations identified by the government were not analogous to the challenged New York public carry restriction).

iv. Time Frame

Finally, in weighing historical evidence, courts must take careful account of the relevant time frame. As *Bruen* notes, "when it comes to interpreting the Constitution, not all history is created equal." *Id.* at 2136. "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.* As a general rule, the longer a historical regulation pre- or post-dates this period, the less relevance it carries. *Id.* at 2136-37. While historical practices "from the early days of the Republic" may be relevant in interpreting an "ambiguous constitutional provision" if the practice was "open, widespread, and unchallenged," *id.* at 2137, the relevance of such practices quickly fades and ultimately vanishes as one approaches the mid- to late-19th century. *Id.* at 2137. In *Heller*, the Court found that post-Civil War discussions of the right to

keep and bear arms "took place 75 years after the ratification of the Second Amendment," and therefore did not provide "much insight into its original meaning as earlier sources." 554 U.S. at 614. Simply put, "[t]he belated innovations of the mid- to late-19th century … come too late to provide insight into the meaning of the Constitution in [1791]." *Sprint Communications Co, L.P. v. APCC Services, Inc.*, 554 U.S. 269, 312 (2008) (Roberts, J., dissenting). At most, practices from the mid-late 19th century can provide "secondary" evidence to bolster or provide "confirmation" of a historical tradition that "had already been established." *Bruen*, 142 S. Ct. at 2137. But indisputably, by the time one gets to the 20th century, the relevance of historical evidence is all but nonexistent, so much so that the Court in *Bruen* declined to "address *any* of the 20th century historical evidence brought to bear by [the government] or their *amici*." *Id.* at 2154 n.28 (emphasis added).

In short, to meet the *Bruen* Step Two inquiry, the historical tradition must be "longstanding," *id.* at 2139, which means dating from 1791. And indisputably, that is *not* the case with felon dispossession laws here.

2. The government cannot meet its Step Two *Bruen* burden because there is NO precedent in the nation's historical tradition of firearm regulation for permanently depriving a felon from possessing a firearm.

Applying these principles here yields one clear and unavoidable conclusion: § 922(g)(1) is unconstitutional on its face. Scholars and legal historians who have studied the issue have long noted the *complete lack of felon disarmament laws* at the time of the Nation's founding. Simply put, "*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) (emphasis added); *see also id.* at 1376 (because all felon disarmament laws significantly postdate the Second Amendment, an "originalist argument" for the current ban "would be quite difficult to make"); *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.").

And scholars are not alone. Judges too have noted the lack of relevant historical

precedent for felon disarmament statutes, like § 922(g)(1), including:

- Judge (now Justice) Barrett of the Seventh Circuit, *see Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) (canvassing the historical record of founding-era firearm regulations, 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 Hardiman of the Third Circuit, *see Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 368 (3d Cir. 2016) (Hardiman, J., concurring) ("[D]ispossessory regulations … were few and far between in the first century of our Republic.… [T]he Founding generation had no laws denying the right to keep and bear arms to people convicted of crimes.");
- Judge Bibas of the Third Circuit, *see United States v. Folajtar*, 980 F.3d 897, 914–15 (3d Cir. 2020) (Bibas, J., dissenting) ("Little evidence from the founding supports a near-blanket ban for all felons. I cannot find, and the majority does not cite, any case or statute from that era that imposed or authorized such bans."); *id.* at 924 ("[T]he colonists recognized no permanent underclass of ex-cons. They did not brand felons as forever 'unvirtuous,' but forgave. We must keep that history in mind when we read the Second Amendment. It does not exclude felons as an untouchable caste."); and
- 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").

What is today § 922(g)(1) traces its origins to 1938, when Congress passed a statute, the Federal Firearms Act, prohibiting certain felons from "receiving" firearms. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (citing

c. 850, § 2(f), 52 Stat. 1250, 1251 (1938)). At that time, the statute "covered only a few violent offenses," *id.*, prohibiting firearm "receipt" by those convicted of crimes such as murder, rape, and kidnapping. *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011). It was not until 1961 that Congress amended that statute to prohibit "receipt" "by all felons." *Skoien*, 614 F.3d at 640 (emphasis in original) (citing Pub. L. 87-342, 75 Stat. 757) (noting that under the statute, "possession" was evidence of "receipt"). And it was not until 1968, that Congress formally "changed the 'receipt' element of the 1938 law to 'possession,' giving 18 U.S.C. § 922(g)(1) its current form." *Id.*

Thus, the first firearm regulation in America broadly prohibiting *all felons* from possessing firearms was not enacted until *almost two centuries after the Nation's founding*, when the modern version of § 922(g)(1) became law. *See Kanter*, 919 F.3d at 464 n.12 (Barrett, J., dissenting) ("[T]he first general prohibition on felon gun possession was not enacted until 1961…."); *id.* at 462 ("[S]cholars have not identified eighteenth or nineteenth century laws depriving felons of the right to bear arms…."); Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms,* 39 Fordham Urb. L.J. 1449, 1502 n.23 (2012) ("[T]he first time a ban on all "felons" possessing firearms arose only in 1961, when Congress amended the Federal Firearms Act of 1938." (citing Marshall, *supra*, at 698)).

Section 922(g)(1) is the *first law* in our Nation's history to broadly prohibit *all felons* from possessing a firearm. *Id.* There was nothing before the twentieth century,

even in individual colonies or states. *See* Larson, 60 Hastings L.J. at 1376 ("state laws prohibiting felons from possessing firearms or denying firearm licenses to felons date from the early part of the twentieth century"). As *Bruen* makes clear, such "belated innovations … come too late to provide insight into the meaning of the Constitution in [1791]." 142 S. Ct. at 2137 (citing with approval the Chief Justice's pre-*Heller* dissent in *Sprint Communications*); *see also id.*at 2154 n.28 (declining to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*").

In sum, there was no "historical tradition," circa 1791, of gun regulations "distinctly similar" to § 922(g)(1). *Id.* at 2130-31. The "Founders themselves could have adopted laws like § 922(g)(1) to "confront" the "perceived societal problem" of violence posed by felons possessing firearms. *Id.* at 2131. But they declined to do so, and that inaction indicates § 922(g)(1) "[i]s unconstitutional." *Id.*

To reiterate, under *Bruen*, the defense has no burden at Step Two to prove a negative: the absence of distinctly similar regulation. Section 922(g)(1) criminalizes conduct falling within the Second Amendment's "plain text" and thus is "presumptively unconstitutional" unless the government can identify a "distinctly similar" tradition of regulation in the Nation's laws justifying the statute. Here, the government cannot meet this burden.[4] For these reasons, the Court should declare §

[4] Although *Bruen* is clear that "analogical" reasoning is not appropriate here because the potential danger posed by felons' access to firearms would not have been "unimaginable" to the Founders, even if analogical reasoning were appropriate in this case, that would not aid the government because there are no founding-era statutes that are "relevantly similar" to § 922(g)(1).

922(g)(1) unconstitutional on its face and dismiss the Indictment for failure to state an offense.

CONCLUSION

Section 922(g)(1) violates the Second Amendment as it was understood at the time of its adoption. As such, the Indictment should be dismissed.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
BY: ***s/ Andrew S. Jacobs***
Andrew S. Jacobs
Assistant Federal Public Defender
Florida Special Bar No. A5502687
150 W. Flagler St., Ste. 1700
Miami, FL 33130
305-533-4201
Andrew_Jacobs@fd.org

CERTIFICATE OF SERVICE

I HEREBY certify that on December 20, 2022, I electronically filed the foregoing document with the Clerk of 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/ Andrew S. Jacobs
Andrew S. Jacobs