No. _____

In the

Supreme Court of the United States

DIONTAI MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2021, intruders tried to break into the house where Diontai Moore was living with his fiancée and her three children. Terrified, his fiancée took her handgun out of the safe and gave it to Moore while she fled with the children. Fortunately, Moore was able to use the handgun to ward off the intruders. Moore was on supervised release at the time as part of his sentence for a violation of 18 U.S.C. §922(g)(1)'s prohibition on possession of a firearm by a felon. Moore promptly informed his probation officer of the incident—and then was charged with another §922(g)(1) violation for using his fiancée's firearm to fend off the invaders. The indictment identified Moore's disqualifying offenses as three drug-related charges and his earlier §922(g) conviction. Moore pled guilty on the condition that he could challenge his §922(g)(1) conviction under the Second Amendment on appeal. Yet when he tried to challenge §922(g)(1) as applied to the convictions identified in the indictment, the Third Circuit declined to analyze whether those offenses could justify a permanent deprivation of Second Amendment rights. Instead, it held that Moore could be disarmed consistent with historical tradition because he was on supervised release—which is not the basis for his §922(g)(1) conviction or the 84-month sentence he has been ordered to serve.

The question presented is:

Whether courts should analyze as-applied Second Amendment challenges to 18 U.S.C. §922(g)(1) by examining whether historical tradition supports permanently disarming someone for the predicate offense(s) underlying the defendant's conviction.

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 14.1(b)(i), petitioner submits that there are no parties to the proceeding other than those named in the caption of the case.

Petitioner Diontai Moore was the defendant in the district court and appellant below.

Respondent United States of America was the plaintiff in the district court and appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings in the U.S. District Court for the Western District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit:

United States v. Diontai Moore, No. 2:14-cr-00110-RJC-1 (W.D. Pa.) (Apr. 20, 2023);

United States v. Diontai Moore, No. 2:21-cr-00121-RJC-1 (W.D. Pa.) (Apr. 20, 2023);

United States v. Diontai Moore, No. 23-1843 (3d Cir.) (Aug. 2, 2024).

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PETITION FOR WRIT OF CERTIORARI

It is a bedrock rule of our judicial system that the government may not convict someone of violating an unconstitutional law. So if the government secures a conviction under a law that the defendant maintains is unconstitutional, whether on its face or as applied to him, the government must defend the conviction by demonstrating that the law is consistent with the Constitution. That unremarkable principle applies with full force in the Second Amendment context. As this Court has explained at length, if the government chooses to regulate arms-bearing conduct, then it bears the burden of proving that its regulation is "consistent with this Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). Accordingly, when courts are faced with criminal defendants who argue that they were convicted under a law that violates the Second Amendment, courts must determine whether that law (or the application of it at hand) is consistent with historical tradition.

The Third Circuit failed to follow that bedrock rule here. Diontai Moore was convicted under 18 U.S.C. §922(g)(1) of possessing a firearm after having been convicted of certain felonies that the government specified in securing his conviction. He challenged his §922(g)(1) conviction under the Second Amendment, arguing that the government cannot identify any historical tradition that would support permanently disarming individuals for the conduct at issue in his predicate crimes. Yet rather than resolve that question, the Third Circuit decided to address a different question entirely: whether the government

may disarm individuals while they are serving a term of supervised release.

That would make eminent sense if Moore were challenging a conviction for possession of a firearm while on supervised release. But while Moore faced additional loss of liberty for violating the terms of his supervised release, he did not challenge that judgment on appeal. At the Third Circuit, Moore challenged only his conviction (and accompanying 84-month sentence) under §922(g)(1) for possessing a firearm after having committed a felony. So whether the government may deprive people of firearms while they are on supervised release was entirely beside the point. There is not some harmless-error doctrine under which the government may avoid defending the constitutionality of the law under which it chose to proceed by showing that a hypothetical prosecution under a different statute would not violate the Constitution. To the contrary, such sleights of hand have long been rejected by both this Court and others.

Even without *Bruen* and *Rahimi*, it should be obvious that the government cannot defend a criminal conviction by arguing that it would have been constitutional to deprive someone of their constitutional rights for an entirely different reason. The government wants to send Moore to prison for seven years because he possessed a firearm after committing a felony. To do so, the government must show why *that* criminal prohibition—not some other hypothetical criminal provision—is constitutional. The Third Circuit's decision affirming Moore's permanent disarmament without resolving that question is gravely erroneous.

Unfortunately, this case is no isolated incident, but rather is emblematic of the profound confusion and division among the lower courts about how to analyze as-applied challenges to §922(g)(1). The Third Circuit is not alone in holding that §922(g)(1) may constitutionally be applied to individuals who are on supervised release even though that fact played no role in their §922(g)(1) charge. The Fifth and Sixth Circuits have embraced that approach too. Indeed, the Fifth Circuit has done so even as it has (correctly) concluded in *other* contexts that §922(g)(1) challenges must be resolved by examining whether historical tradition supports disarming someone *for the predicate offense(s) that justified the §922(g)(1) charge*. Still other circuits have rejected as-applied challenges to §922(g)(1) entirely, on the theory that having been convicted of a felony is itself sufficient justification to permanently deprive someone of Second Amendment rights, no matter what the prior felony was.

That intractable conflict necessitates this Court's resolution. Indeed, lower courts have recognized that "there is significant disagreement about" how to resolve §922(g) challenges "that the Supreme Court should resolve." *United States v. Morton*, 123 F.4th 492, 498 n.2 (6th Cir. 2024). The Court should grant certiorari and hold that, when addressing as-applied challenges to §922(g)(1), courts must ask whether historical tradition supports disarming people based on the felony offense(s) underlying the §922(g)(1) charge. But at the very least, the Court should grant, vacate, and remand with instructions for the Third Circuit to decide whether Moore can constitutionally be convicted of the crime with which he was actually charged.

OPINIONS BELOW

The Third Circuit's opinion is reported at 111 F.4th 266 and reproduced at App.1-15. The district court's decision denying Moore's motion to dismiss the indictment is reported at 2022 WL 17490023 and reproduced at App.18-31. The district court's opinion denying Moore's motion for reconsideration of his motion to dismiss is reported at 2022 WL 17490021 and reproduced at App.32-34.

JURISDICTION

The Third Circuit issued its opinion on August 2, 2024, and denied a timely rehearing petition on October 9, 2024. Justice Alito extended the deadline to file a petition for writ of certiorari to March 8, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution and 18 U.S.C. §922(g) are reproduced at App.35-36.

STATEMENT OF THE CASE

A. Legal Background

In its seminal decision in *District of Columbia v. Heller*, this Court held that there is "no doubt … that the Second Amendment confer[s] an individual right to keep and bear arms." 554 U.S. 570, 595 (2008). While the Court acknowledged that the right is not "unlimited," it looked to historical restrictions on firearm possession to inform its analysis of the constitutionality of the law at hand. *Id.* at 626-27, 631-34. But the Court left a full-throated exposition of that historical analysis for another day.

Over the next decade, lower courts "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Bruen*, 597 U.S. at 17. But this Court ultimately rejected that approach in *Bruen*, explaining that a "judge-empowering 'interest-balancing inquiry'" would not sufficiently safeguard individuals' constitutional rights. *Id.* at 22. After all, as *Heller* made clear, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 23 (quoting *Heller*, 554 U.S. at 634). So the Court laid out a more robust constitutional framework steeped in "the Nation's historical tradition of firearm regulation." *Id.* at 24. Under that approach, if the regulated conduct is covered by the text of the Second Amendment, then it is presumptively protected, and the burden shifts to the government to justify its regulation. *Id.* To do so, the government must identify historical firearm restrictions that are analogous to the modern challenged regulation in their "how and why"—i.e., the "modern and historical regulations" must "impose a comparable burden on the right of armed self-defense" that "is comparably justified." *Id.* at 29.

Last year, this Court provided additional guidance on how to implement *Bruen*'s methodology in *United States v. Rahimi*, 602 U.S. 680 (2024). *Rahimi* reiterated that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition" as evidenced by the government's proffered historical analogues. *Id.* at 692. This Court clarified that those analogues "need

not be a 'dead ringer' or a 'historical twin'" for the challenged regulation. *Id.* But it reiterated that "[w]hy and how the [challenged] regulation burdens the right are central" to the Second Amendment inquiry. *Id.* In other words, the focus remains on whether the challenged regulation "impos[es] similar restrictions for similar reasons." *Id.* Applying that framework, this Court held that §922(g)(8)(C)(i) is constitutionally sound, as it is grounded in a historical tradition of temporarily disarming individuals who have been found to pose "a credible threat to the physical safety of another." *Id.* at 702.

In short, as exemplified in *Rahimi*, *Bruen* tasks courts with conducting a categorical comparison of the mechanics of the challenged provision and the government's historical analogues to assess whether the challenged law passes constitutional muster.

B. Factual Background

1. In 2008, Diontai Moore was arrested and charged with having distributed less than five grams of cocaine base in violation of 21 U.S.C. §841(a)(1) and (b)(1)(C). App.2. He pled guilty and was sentenced to 72 months in prison, followed by a three-year term of supervised release. App.2.

In 2013, after Moore had served the prison sentence on his drug conviction, police again arrested him after they observed a bulge under his shirt and discovered that he possessed a handgun. App.2. Because of his prior felony drug conviction, Moore was charged with—and eventually pled guilty to—violating 18 U.S.C. §922(g)(1). App.2. For this first §922(g)(1) conviction, Moore was sentenced to 60 months' imprisonment, followed by a three-year term

of supervised release. App.2. Moore was released from prison in July 2019 and began serving his term of supervised release. App.2.

Moore eventually moved into the townhouse of his fiancée, Gwendolyn Pullie, where they lived with her three children. App.2-3. Early one morning, Moore and Pullie heard their dog barking wildly in the kitchen. App.3. This commotion "terrified" Pullie, as she believed that she and her children might be "in harm's way." App.3. Her fear that "someone was at [her] back door" was confirmed when she and Moore went downstairs and observed "shadowy figures near the back of the house." App.3. Surveillance footage reveals that two individuals had broken into Pullie's car behind her townhouse. App.3.

Fearing for her safety and the safety of her children, Pullie removed her handgun from the safe she kept in the bedroom and gave the loaded firearm to Moore. App.3. Pullie woke up her children and fled with them, while Moore went out to face the intruders. App.3. Fearing the trespassers were going to break into the residence, Moore fired three shots, injuring one of them in the thigh. App.3. Fortunately, the intruders fled. App.3.

2. Shortly after the incident, Moore and Pullie reached out to law enforcement to inform them of the crime that had been perpetrated against them and the shooting that had ensued. App.3-4. Moore called his probation officer to explain what had happened; Pullie also spoke with a local detective and, upon request, turned over her firearm. App.3-4. For his troubles, Moore was charged with another violation of §922(g)(1) for having possessed Pullie's firearm as a

convicted felon. App.4. The indictment was predicated on two 15-year-old state drug-trafficking convictions, Moore's federal cocaine distribution conviction, and his first §922(g) conviction. App.4; D.Dkt.3. Soon after the grand jury indicted him on this new §922(g)(1) charge, the government filed a petition to revoke his term of supervised release. W.D.Pa.No.14-00110.D.Dkt.102.

Moore twice attempted to dismiss the new §922(g)(1) charge. Each time, he argued that he could not constitutionally be convicted of a crime for his momentary use of Pullie's handgun in self-defense because §922(g)(1) is unconstitutional as applied to individuals who committed only non-violent prior felonies. App.18-22; D.Dkt.67. His initial motion raised these arguments in the context of the then-applicable means-end scrutiny analysis that *Buren* ultimately rejected. App.20-21. Applying that framework, the district court denied the motion, concluding that the government could deprive Moore of his Second Amendment rights based on its assessment that his prior non-violent felonies were "serious" in nature. App.22.

This Court decided *Bruen* shortly thereafter, and Moore moved for reconsideration, raising both a facial and an as-applied challenge to the constitutionality of §922(g)(1) under *Bruen*'s newly minted framework. D.Dkt.67. Moore argued that because he is among "the people" whose rights are protected by the Second Amendment, his possession and use of Pullie's firearm in self-defense was presumptively protected conduct. *Id.* at 5-7. And he argued that §922(g)(1) is facially unconstitutional under *Bruen*'s second step because

felon-disarmament laws are not rooted in the Nation's history and tradition of firearms regulation. *Id.* at 7-9. Moore also argued in the alternative that §922(g)(1) is unconstitutional as applied to him because his prior felonies were non-violent. *Id.* at 9-10.

The government resisted these arguments, trying to justify the application of §922(g)(1) across the board by invoking a purported tradition of disarming "unvirtuous" citizens. D.Dkt.72 at 4, 7-9. The district court denied reconsideration, relying on other district court decisions that rejected similar facial and as-applied challenges to §922(g)(1) after *Bruen,* and again resting on its earlier determination that Moore's prior drug-related offenses were "serious" crimes. App.32-34.

At that point, Moore agreed to plead guilty to the §922(g)(1) charge on the condition that he could challenge the constitutionality of his conviction facially and as applied under *Bruen*. D.Dkt.103-1 at 2-3. Under the plea agreement, Moore also admitted that he had violated the condition of his supervised release barring him from possessing a firearm. *Id.* at 2. And he did not seek or secure any right to contest the revocation of his supervised release. *Id.* at 2-3. The district court sentenced Moore for both his §922(g)(1) conviction and the violation of the terms of his supervised release. For the §922(g)(1) conviction, the court sentenced him to 84 months' imprisonment and three years of supervised release. D.Dkt.107. As for the supervised-release violation, the court sentenced him to 12 months' imprisonment, to run consecutively. W.D.Pa.No.14-00110.Dkt.147.

3. As permitted by his conditional plea agreement, Moore appealed the judgment entered on his §922(g)(1) conviction. D.Dkt.111. The Third Circuit affirmed—but only by answering a question that had nothing to do with the constitutional challenge Moore pressed. App.1. Seizing on an argument the government raised for the first time on appeal, *see* Gov't.CA3.Opp.21-23, the Third Circuit posited that whether the government could constitutionally convict Moore for possessing a firearm after having committed non-violent felonies turns on whether "a convict completing his sentence on supervised release ha[s] a constitutional right to possess a firearm." App.1.

The Third Circuit's analysis started on firm footing. The court had little difficulty concluding that Moore "is one of the 'people' whom the Second Amendment presumptively protects" and that "the charge at issue punishes Moore for quintessential Second Amendment conduct: possessing a handgun." App.4-5. And it correctly explained that, under *Bruen* and *Rahimi*, the government "bears the burden of justifying [the] regulation" it seeks to enforce. App.5 & n.2. The panel also reiterated that, "[a]s compared to its historical analogue, [the] modern regulation [at issue] must 'impose a comparable burden on the right of armed self-defense, and … that burden [must be] comparably justified.'" App.5-6 (quoting *Bruen*, 597 U.S. at 29) (final brackets in original).

But despite clearly and correctly identifying its doctrinal responsibility under *Bruen* and *Rahimi*, the Third Circuit proceeded to depart from that task. Rather than address whether depriving someone of the right to possess a firearm *based on Moore's past*

felony convictions "impose[s] a comparable burden" to the government's historical analogues that is "comparably justified," the court assessed whether historical analogues support dispossessing a criminal defendant who is serving a term of supervised release. App.6.

Moore had pointed out that his supervised-release status "c[ould not] support his felon-in-possession conviction" because that is not one of "the predicate offenses that made him a felon." App.13. But the Third Circuit disagreed. In its view, it was not confined to asking whether the law *at hand* is constitutional as applied to Moore, but rather could consider any "fact[s] that [it] deem[ed] constitutionally relevant"—i.e., whether there is *any* basis that might justify disarming Moore, whether tied to the law of conviction at issue or not. App.13. And, according to the court, "the tradition of forfeiture laws, which temporarily disarmed convicts while they completed their sentences," sufficed "[t]o justify disarming Moore while he was on supervised release." App.6; *see* App.6-11 (discussing Founding-era forfeiture laws). Thus, in the Third Circuit's view, the actual "predicate offenses alleged in the indictment"—and whether the government had established a historical tradition of disarming individuals based on similar offenses—were beside the point; the only "fact … constitutionally relevant" was that "Moore was on supervised release when he possessed the firearm." App.13.

For similar reasons, the court rejected Moore's argument that §922(g)(1) could not constitutionally be applied to him at home while acting in self-defense. App.13-14. The court again focused not on whether

any historical tradition supports permanently disarming non-violent felons, but on the fact that Moore was not permitted to possess a firearm while on supervised release. App.13-14. And having found that Moore's irrelevant supervised-release status defeated his as-applied challenge to his §922(g)(1) conviction, the Third Circuit summarily rejected his facial challenge as well. App.14 n.5.[1]

REASONS FOR GRANTING THE PETITION

The decision below is patently wrong. There is no other context in which the government may defend a conviction under a law that criminalizes constitutionally protected behavior by arguing that it could validly deprive the defendant of his constitutional rights for some other reason entirely. And certainly nothing in *Heller*, *Bruen*, or *Rahimi* suggests that, when a defendant argues that his conviction violates the Second Amendment, the inquiry turns on whether there is *any* reason that someone in similar shoes could be punished for possessing a firearm consistent with historical tradition. To the contrary, both this Court's cases and bedrock principles make plain that the government must defend the challenged law itself. Yet the Third Circuit failed to hold the government to that burden here.

Unfortunately, this case is no isolated incident. Multiple courts of appeals have made the category mistake of letting the government avoid defending §922(g)(1) convictions on their own terms by pointing

[1] Moore sought rehearing en banc, which the Third Circuit denied. App.16-17.

to the fact that the defendant was on supervised release at the time of the unlawful possession. Indeed, even one circuit that typically *does* require the government to justify a §922(g)(1) conviction by focusing on the prior convictions underlying it has inexplicably abandoned that approach when it comes to defendants who were on supervised release when they unlawfully possessed a firearm. And other circuits have rejected as-applied challenges to §922(g)(1) altogether, on the theory that historical tradition supports disarming individuals who have shown a disregard for the law, no matter what law they violated.

In short, although most circuits have squarely addressed as-applied challenges to §922(g)(1), they have hopelessly splintered on the basic question of how to analyze them. That disarray readily warrants this Court's attention. Indeed, lower courts have implored this Court for further guidance even after *Rahimi*. And this is a particularly good vehicle to answer the methodological question, as the Court would have the option of answering *only* that question here should it prefer to do so. The Court could simply resolve the analytical dispute over how to evaluate as-applied Second Amendment challenges that has fractured the lower courts and then remand for the Third Circuit to consider Moore's appeal under the proper framework. But in all events, whether through plenary review or summary reversal, the Court should not let the decision below stand, as Moore is, at the very least, entitled to a resolution of the constitutional question he actually raised—namely, whether the government can send him to prison for seven years because he briefly used a firearm to defend himself,

his loved ones, and his property after having committed non-violent felonies.

I. The Decision Below Defies This Court's Precedents And Deepens A Circuit Split.

A. The Decision Below Is Egregiously Wrong.

1. There is no basis in law or logic to permit the government to defend the constitutionality of a conviction by speculating that it could have reached the same result via an entirely different statute (real or imagined). Indeed, that much should have been clear even without *Heller*, *Bruen*, or *Rahimi*. After all, this Court expressly rejected that sleight of hand more than half a century ago in *Williams v. Illinois*, 399 U.S. 235 (1970). There, a defendant challenged a state statutory regime that forced indigent criminal defendants who failed to pay the fines imposed as part of their sentences to serve a prison sentence longer than the applicable one-year statutory maximum. *Id.* at 238. Although the state argued that the statute was "not constitutionally infirm simply because the legislature could have achieved the same result by some other means," this Court had no difficulty rejecting that argument, as the state's authority to pass alternative means to achieve the same goal "does not resolve the [constitutional] issue" actually presented by the law it sought to enforce. *Id.* at 238-39. For that reason, the Court granted relief to the defendant after finding that the law the state actually enacted and enforced violated his equal protection rights—even though it acknowledged that the state could "have appropriately fixed the penalty, in the first instance," and incarcerated the defendant for

greater than one year for the same conduct. *Id.* at 240-41; *accord Tate v. Short*, 401 U.S. 395, 399-401 (1971).

After *Williams*, there is no room for the government to argue that its ability to implement an *alternative*, supposedly constitutionally valid regime enables the *provision it actually enforced* to survive (or evade) constitutional review. As one court aptly put it, "[a]n unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." *People v. Burns*, 79 N.E.3d 159, 165-66 (Ill. 2015). That is why this Court invalidated a law categorically banning the display of signs outside its building under the First Amendment in *United States v. Grace*, 461 U.S. 171 (1983), even though the same behavior may have been regulated through "reasonable time, place and manner restrictions." *Id.* at 183-84. It also explains why this Court concluded in *United States v. Eichman*, 496 U.S. 310 (1990), that the government could not criminally punish a defendant for burning a Post Office flag under a law specifically outlawing flag burning, even though he could still be subject to prosecution for the destruction of federal property for the exact same conduct. *Id.* at 313 n.1, 316 n.5.

This understanding of as-applied challenges is ubiquitous precisely because it follows from bedrock constitutional principles. Indeed, any other approach would render the "as-applied challenge" label a misnomer. As this Court has long observed, a court is "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *United States v. Raines*, 362 U.S. 17, 21 (1960). If courts were

instead authorized to sustain statutory enactments on the grounds that the government might have chosen another valid means to achieve the same result, they would stray from the case presented and answer constitutional questions that are not implicated. *Id.* Courts thus routinely reject government efforts to employ such sleights of hand. *See, e.g.*, *United States v. Price*, 111 F.4th 392, 402 n.4 (4th Cir. 2024) (en banc) (rejecting an attempt to invoke defendant's felon status to defeat his constitutional challenge to §922(k)'s ban on possessing firearms with obliterated serial numbers because regulating felon firearm possession was "not the law Congress enacted via §922(k)").

That principle does not change just because the court is tasked with addressing a Second Amendment challenge under *Bruen* and *Rahimi*. Indeed, there is absolutely nothing in the methodology laid out in either case that would justify a deviation from this bedrock rule. Both made clear that the focus of the analysis turns on the mechanics and contours of the challenged regulation itself. *See Rahimi*, 602 U.S. at 692 ("Why and how the [challenged] regulation burdens the right are central to this inquiry."); *Bruen*, 597 U.S. at 29 (requiring courts to evaluate "how and why the [challenged] regulations burden" the Second Amendment right). And neither announced any rule giving judges or the government a roving license to investigate whether there is any conceivable reason that the party asserting his Second Amendment rights could be disarmed. It is little wonder why not: Such a rule not only would treat the Second Amendment "as a second-class right," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality), but would run

afoul of the constitutional principles requiring strict adherence to examining the application of the challenged law to the facts at hand, *cf. City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (explaining that the Court "considered only applications of the statute in which it actually authorizes or prohibits conduct" when assessing its constitutionality).

Take *Rahimi*. This Court focused exclusively on whether historical going-armed and surety laws were comparable to §922(g)(8), even though the defendant there had not only threatened his domestic partner (prompting the domestic restraining order) but also threatened a woman with a firearm (prompting an aggravated assault charge) and was connected to five other shootings. *See* 602 U.S. at 687. Because the government charged Rahimi only with violating §922(g)(8), the Court asked only whether §922(g)(8) could pass constitutional muster, not whether the government could have constitutionally disarmed him on another basis. *See id.* at 690, 700-02; *see also id.* at 777 (Thomas, J., dissenting) ("This case is not about whether States can disarm people who threaten others.… Instead, the question is whether the Government can strip the Second Amendment right of anyone subject to a protective order[.]"). Just as with other constitutional questions, then, whether there may be other reasons the government could disarm someone is not a valid consideration in the proper constitutional analysis. *Cf. TikTok v. Garland*, 145 S.Ct. 57, 68 (2025) ("[W]e look [only] to the provisions of the Act that give rise to the effective TikTok ban that petitioners argue burdens their First Amendment rights" to address their as-applied challenge.).

2. Rather than follow these well-settled principles, the Third Circuit answered a question not properly presented for its review—effectively affirming a double deprivation of liberty (sending a man to prison and allowing him to be stripped of his right to keep and bear arms) without ever deciding whether the actual statute of conviction could constitutionally be applied to the defendant.

Moore appealed his judgment of conviction under §922(g)(1) to challenge the criminal penalties the government sought to impose for violating *that* statute. D.Dkt.111. The government was therefore obligated to defend the appealed conviction by demonstrating that applying §922(g)(1) to someone based on the felonies Moore committed is consistent with our Nation's historical tradition. *See Bruen*, 597 U.S. at 29. Nothing about that inquiry turns on an independent assessment of whether there may be *other* reasons why Moore could constitutionally be disarmed. Whether §922(g)(1)'s permanent prohibition on firearm possession imposes a burden on the Second Amendment right consonant with our Nation's tradition requires the court to review how the law actually regulates *that* behavior. Yet that is not what the Third Circuit "deem[ed] constitutionally relevant." App.13. According to the court of appeals, all that mattered was that "Moore was on supervised release when he possessed the firearm," and (in its view) historical tradition "yield[s] the principle that a convict may be disarmed while he completes his sentence and reintegrates into society." App.13.

To explain that (il)logic is to refute it. The existence of a parallel punishment that the

government could—or even did—impose simply does not permit the court to probe all aspects of a defendant's life for potential ways that the government might lawfully dispossess him of his Second Amendment (or any other fundamental) rights. That would entail standing in the stead of a legislature "to make a new law, not to enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875).

The Third Circuit's error is particularly acute given that the government successfully petitioned the district court to revoke Moore's supervised release under 18 U.S.C. §3583(e), which resulted in a *separate*, consecutive 12-month prison term. W.D.Pa.No.14-00110.Dkt.147; *see also* 18 U.S.C. §3583(g)(2). In other words, Moore was in fact already punished and sentenced for possessing a firearm while serving a term of supervised release in a separate action. Asking whether the government can constitutionally deprive someone who is serving a term of supervised release of Second Amendment rights would make sense in the context of a challenge to *that* judgment of conviction. But Moore did not appeal that judgment or sentence. He appealed only the separate 84-month sentence that he received under §922(g)(1). To allow the validity of the unappealed judgment to justify additional deprivations of fundamental rights not only deviates from settled judicial procedures, *see Greenlaw v. United States*, 554 U.S. 237, 252-53 (2008), but turns the Second Amendment into a uniquely second-class right.

What is more, the Third Circuit's confusion about Second Amendment challenges led it to ignore its

basic obligation to address Moore's actual challenge that his conviction could not stand under §922(g)(1)—a statute that dispossessed him of his Second Amendment rights solely because he had previously been convicted of felonies. Moore's supervised-release status is not constitutionally relevant to "why" and "how" §922(g)(1) impinges on his Second Amendment rights.

The Third Circuit's approach also runs headlong into the exact problem *Bruen* sought to solve—avoiding an "interest-balancing inquiry" that requires a "case-by-case basis whether the right is *really worth* insisting upon." 597 U.S. at 22-23. *Bruen* adopted its historical-tradition approach to prevent judges from engaging in a subjective assessment of a defendant's worthiness of Second Amendment rights—"a value-laden and political task that is usually reserved for the political branches." *Rahimi*, 602 U.S. at 732-33 (Kavanaugh, J., concurring). Yet under the Third Circuit's approach, courts must address extra-offense characteristics and assess a wide range of potentially disqualifying factors unmoored from the justification the government has asserted for taking away Second Amendment rights. *See, e.g.*, *Pitsilides v. Barr*, 128 F.4th 203, 210-13 (3d Cir. 2025). Once a court steps away from the firearm regulation at hand and abandons the value-neutral analysis of how its particular features measure up against the features of historical regulations, it is left with only "value-laden" questions about who is deserving enough to exercise Second Amendment rights. That does not comport with what this Court has instructed courts to do when adjudicating Second Amendment challenges—namely, "apply faithfully the balance struck by the

founding generation to modern circumstances." *Bruen*, 597 U.S. at 29 n.7.

In short, the government has sought to imprison Moore for seven years because he possessed a firearm after having been convicted of certain specified felonies—not because of any other action he took or any other personal detail about his background. After all, §922(g)(1) regulates possession of a firearm by an individual who has been convicted of a felony, not possession of a firearm by an individual on supervised release (which is separately regulated by a statute that applies to misdemeanants and felons alike, *see* 18 U.S.C. §3583(b)(1)). It is *that* decision to attach liberty-restricting consequences to felons' firearm possession that ought to have been analyzed on appeal. The Third Circuit grievously erred in choosing to analyze an entirely different (and unappealed) question.

B. The Courts of Appeals Have Hopelessly Fractured Over How to Address As-Applied Challenges to §922(g)(1).

The Third Circuit's marked departure from the proper course warrants this Court's intervention. At the very least, the Court should vacate and remand with instructions for the court to address the challenge Moore actually pressed: whether §922(g)(1) is constitutional, either on its face or as applied to him. Notably, this Court recently granted the petitions of two criminal defendants raising the as-applied-review question, vacated the judgments in those cases, and remanded for "further consideration in light of *United States v. Rahimi*." *See Whitaker v. United States*, 2025

WL 581590 (U.S. Feb. 24, 2025); *Rambo v. United States*, 2025 WL 581574 (U.S. Feb. 24, 2025).

The decision below is considerably more egregious than either of those Eleventh Circuit decisions. The Third Circuit held that Moore may be deprived of two fundamental liberties without ever deciding that the statute the government charged him with violating could constitutionally be applied to him. That result, which turns the whole notion of an "as-applied challenge" upside-down, cannot stand, and justifies the strong medicine of summary reversal.

That said, the lower courts would be better served by plenary review, as the Third Circuit's approach is emblematic of the profound confusion that pervades when it comes to §922(g)(1) challenges. The Sixth and Seventh Circuits have embraced an approach similar to the Third Circuit's, sanctioning a free-floating inquiry into whether there is *any* reason an individual could constitutionally be deprived of Second Amendment rights, rather than focusing on the predicate convictions the government invoked. The Fifth Circuit has taken the opposite (i.e., correct) approach as a general matter, focusing on the actual felonies underlying the §922(g)(1) charge. But even that court has lost the plot vis-à-vis defendants on supervised release: The Fifth Circuit recently joined the Third and Sixth Circuits in holding that as-applied challenges to §922(g)(1) necessarily fail if the defendant was on supervised release, parole, or probation when he unlawfully possessed a firearm, even though that fact played no role in securing the §922(g)(1) conviction. And other circuits have held that §922(g)(1) is not susceptible to as-applied

challenges at all. In short, the caselaw in the lower courts is a mess, and this Court's guidance is desperately needed.

1. The decision below is no anomaly—either in the Third Circuit or otherwise. The Third Circuit has already extended the same reasoning "to defendants who are on state supervised release—including a sentence of parole or probation." *United States v. Quailes*, 126 F.4th 215, 217 (3d Cir. 2025); *see also Pitsilides*, 128 F.4th at 213 (instructing district court to analyze all of the plaintiff's "post-conviction conduct indicative of dangerousness" to determine whether he "poses a special danger of misusing firearms").[2] And two other circuits likewise have held that §922(g)(1) is constitutional as applied to individuals who were on supervised release (or the state equivalent) when they possessed a firearm, even though that had nothing to do with the government's §922(g)(1) charge.

The Sixth Circuit reached the same conclusion in *United States v. Goins*, 118 F.4th 794 (6th Cir. 2024). In 2021, Goins convinced "an associate … to purchase [an] AR pistol[] for him" because "he had multiple convictions for crimes punishable by imprisonment for more than one year," and so was prohibited from possessing a firearm under §922(g)(1). *Id.* at 796. After he was charged with violating §922(g)(1), Goins challenged the constitutionality of the statute as

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[2] Although *Pitsilides* involved an affirmative challenge, that the court drew exclusively on defendants' as-applied challenges to their convictions to reach its holding, *see* 128 F.4th at 212-13, underscores that courts in the Third Circuit must now consider all potentially disqualifying characteristics, even if (as here) the defendant raised an as-applied challenge defensively.

applied to him. Yet rather than address the felonies underlying his §922(g)(1) conviction, the Sixth Circuit relied on the Third Circuit's decision in this case to hold that "Congress could … disarm Goins" simply because he was on probation "at the time." *Id.* at 797; *see also id.* at 801-02 ("[O]ur nation's historical tradition of forfeiture laws, which temporarily disarmed convicts while they completed their sentences, also supports disarming those on parole, probation, or supervised release.").

Even outside the supervised-release context, moreover, the Sixth Circuit does not analyze §922(g)(1) challenges by focusing on whether the government has proven that historical tradition supports depriving people of their Second Amendment rights based on the predicate offenses underlying the defendant's conviction. The court has instead concluded that, because some historical regulations allowed "individuals [to] demonstrate that their particular possession of a weapon posed no danger to peace," a defendant challenging §922(g)(1) as applied must make an individualized showing "that he is not dangerous." *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024). According to the court, because "officials of old" made individualized assessments of dangerousness, courts today must "focus on each individual's *specific characteristics*," including not only his "entire criminal record" but any "information beyond [his] criminal convictions" as well. *Id.* at 657-58, 658 n.12.

The Fifth Circuit, for its part, has *sometimes* gotten the inquiry right. In *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024), for example, the court

confronted an as-applied challenge raised by a criminal defendant who had previously been convicted of car theft, evading arrest, and possessing a firearm as a felon. *Id.* at 467. Although the parties' briefing had discussed the defendant's "various drug offenses," none of which was punishable by imprisonment for more than one year, the court limited its focus to only his "predicate offenses under §922(g)(1)." *Id.* Indeed, the court expressly declined to address a contemporaneous drug charge filed in the same indictment because §922(g)(1) "rel[ies] on previous history." *Id.* As the court explained, the relevant question is whether there is "a longstanding tradition of disarming someone with a [felony] history analogous to [the defendant's]." *Id.*; *accord United States v. Bullock*, 123 F.4th 183, 185 (5th Cir. 2024).[3]

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[3] The Ninth Circuit's now-vacated opinion in *United States v. Duarte*, 101 F.4th 657 (9th Cir. 2024), employed the same mode of analysis. The court first held that the defendant constituted one of "the people" protected by the Second Amendment and then turned to whether his §922(g)(1) conviction had a proper historical analogue. *Id.* at 676-77. After reviewing the historical record and comparing those historical regulations to the defendant's prior felony convictions, the panel majority determined that none of those "predicate offenses were, by Founding era standards, of a nature serious enough to justify permanently depriving him of his fundamental Second Amendment rights," and so concluded that his §922(g)(1) conviction was unconstitutional. *Id.* at 691. And although *Duarte* has since been vacated, *see* 108 F.4th 786 (9th Cir. 2024), it is illustrative of the right approach—and is not the only Ninth Circuit decision to employ the correct methodology (albeit outside the context of a §922(g)(1) conviction). *See United States v. Perez-Garcia*, 96 F.4th 1166, 1182-84 (9th Cir. 2024).

Yet the Fifth Circuit has inexplicably departed from that approach when it comes to defendants who were on supervised release when they possessed a firearm in violation of §922(g)(1). *See United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025). In *Giglio*, following the Third Circuit's lead, the Fifth Circuit affirmed a §922(g)(1) conviction based solely on the fact that the defendant was on supervised release when he was charged. In the eyes of the *Giglio* court, so long as "the government *may* disarm those who continue to serve sentences for felony convictions," it does not matter if that is what the government actually did. *Id.* at 1044 (emphasis added); *see also id.* at 1045-46.

That now makes three circuits that have squarely held that §922(g)(1) is constitutional as applied to individuals who were on supervised release, probation, or parole when they possessed a firearm, even though that had nothing to do with their §922(g)(1) convictions. And while the Seventh Circuit has not yet addressed an as-applied challenge to §922(g)(1) after *Rahimi*, its analysis in *United States v. Gay* suggests that it too would adopt the approach of having district courts review the record to identify any characteristics that would permit the government to disarm the defendant. 98 F.4th 843, 847 (7th Cir. 2024) (highlighting that the defendant was on parole and fled from the police before being arrested and charged under §922(g)(1)).

2. The Fourth, Eighth, Tenth, and Eleventh Circuits have taken yet another approach. In those circuits, courts do not analyze whether historical tradition supports disarming a defendant for the

predicate felony conviction(s), or ask whether the defendant was on supervised release or probation. These circuits instead eschew as-applied challenges entirely, having deemed §922(g)(1) to be constitutional in *all* its applications.

Take, for instance, *United States v. Hunt*, 123 F.4th 697 (4th Cir. 2024). After reviewing historical examples of disarmament, the Fourth Circuit purported to derive from them a tradition of "disarm[ing] categories of people based on a legislative determination that such people 'deviated from legal norms.'" *Id.* at 707. Applying this guiding principle, the court saw no constitutional problem with *any* application of §922(g)(1), deeming it a permissible exercise of the legislature's discretion over which individuals may be disarmed for violating the law. *Id.*

The Eighth Circuit likewise adopted a categorical rule barring as-applied challenges after observing, at a high level of generality, that "legislatures traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms." *United States v. Jackson* (*Jackson I*), 110 F.4th 1120, 1127 (8th Cir. 2024). The court never directly addressed whether the "how" and "why" of the historical examples of firearm regulations it purported to analyze matched the "how" and "why" of §922(g)(1) or the defendant's predicate conviction. Indeed, four judges highlighted that deficiency in a dissent from the denial of rehearing en banc, noting that the court "ma[de] no attempt to explain how the burden imposed by the felon-in-possession statute, which lasts for a lifetime, is comparable to any of the

Founding-era laws it discusses." *United States v. Jackson* (*Jackson II*), 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissenting from the denial of rehearing en banc).

The Tenth and Eleventh Circuits have similarly foreclosed as-applied challenges to §922(g)(1)—without even addressing the historical record. In *Vincent v. Bondi*, 127 F.4th 1263 (10th Cir. 2025), the court continued to rely on pre-*Rahimi* precedent that had resolved the matter by invoking dicta from *Heller* observing that the prohibition on felon firearm possession is "presumptively lawful." *See id.* at 1265. The Eleventh Circuit has taken the same tack in a line of unpublished decisions, repeatedly observing that "*Rahimi* d[id] not displace" prior circuit precedent upholding §922(g)(1) based on the same "presumptively lawful" dicta. *E.g.*, *United States v. Morrissette*, 2024 WL 4709935, at *2 (11th Cir. Nov. 7, 2024).

* * *

In sum, not only have multiple courts embraced the flawed logic the Third Circuit employed here, but courts more generally have hopelessly fractured on how to properly apply *Bruen*'s historical-tradition framework to as-applied Second Amendment challenges to §922(g)(1). This clear confusion "about [key aspects] of the analysis" calls out for this Court to intervene and resolve the recurring methodological issues that have caused the circuits to splinter. *Morton*, 123 F.4th at 498 n.2.

II. The Question Presented Is Exceptionally Important, And This Case Is An Effective Vehicle For This Court To Address It.

How to resolve §922(g)(1) challenges is an exceptionally important question given the frequency with which the federal government seeks to dispossess citizens of firearms under §922(g)(1). In fiscal year 2023 alone, 88.5% of all §922(g) convictions were convictions under §922(g)(1). U.S. Sent. Comm'n, *Quick Facts: 18 U.S.C. §922(g) Firearms Offenses* (June 2024), https://tinyurl.com/nheeuyuz. And with the increasing volume of constitutional challenges to these convictions, it is critical that courts have a shared (and correct) understanding of how to resolve them. Indeed, the government itself has made precisely this point in seeking review of decisions unfavorable to its maximalist position regarding the constitutionality of §922(g)(1). *See, e.g.*, Pet. for Rhg. En Banc 19, *United States v. Duarte*, No. 22-50048 (9th Cir. May 14, 2024), Dkt.72-1; Pet. for Cert. 24-25, *Garland v. Range*, No. 23-374 (U.S. Oct. 5, 2023).

Moreover, millions of Americans are estimated to have felony records (a non-trivial proportion of the citizenry). *See* Sarah K.S. Shannon, et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 Demography 1795, 1806 (2018), available at https://tinyurl.com/mz36x3uh. And given the increasing scope of supervised release (and its state equivalents), many individuals charged with violating §922(g)(1) do so while on supervised release (or probation or parole). Not only does §922(g)(1) disqualify all of them from exercising their

fundamental rights; decisions like the one below effectively deprive them of potential as-applied challenges, amplifying the importance of ensuring that courts apply the correct framework in these cases.

There is no need to await further percolation in the lower courts, as most of them have already spoken, and there are no signs that they will all be able to independently reconcile their various disagreements about even the most fundamental aspects of the Second Amendment analysis. To the contrary, the intractable confusion and conflict has already prompted some to implore this Court for guidance. As the Sixth Circuit recently remarked, "there is significant disagreement about much of the [Second Amendment] analysis [as applied to felons] that the Supreme Court should resolve," *Morton*, 123 F.4th at 498 n.2—especially since "[t]he constitutionality of the felon-in-possession statute is as 'exceptionally important' as ever," *Jackson II*, 121 F.4th at 660 (Stras, J., dissenting from the denial of rehearing en banc). And this case presents a particularly effective vehicle for providing guidance as to the proper mode of analysis, as the Court could choose not to delve into the ultimate question of whether historical tradition supports punishing Moore for possessing a firearm based on the prior convictions that served as the predicates for his §922(g)(1) charge. Because the Third Circuit chose to sustain Moore's §922(g)(1) conviction based on an entirely irrelevant characteristic of his background (his supervised-release status), this Court would have the option of simply resolving the cross-cutting question of how courts should approach these challenges, then letting

the Third Circuit apply the proper framework in the first instance.

At a bare minimum, though, this Court should grant, vacate, and remand with instructions for the Third Circuit to consider Moore's challenge to his §922(g)(1) conviction itself, without any free-floating inquiry into whether the government might have some independent basis for stripping Moore of his Second Amendment rights. Whatever room for debate there may be about whether §922(g)(1) is susceptible to as-applied challenges, there should be no debate that the government must defend §922(g)(1) charges by grounding *§922(g)(1)* in historical tradition. By failing to follow that bedrock rule, the Third Circuit not only risked sanctioning a violation of the Second Amendment, but deprived Moore of his right to a full and fair adjudication of the Second Amendment challenge he raised. The Court should not let that egregious mistake stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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March 7, 2025

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1843

UNITED STATES OF AMERICA,
Appellee,
v.
DIONTAI MOORE,
Appellant.

Argued: Apr. 16, 2024
Filed: Aug. 2, 2024

Before: Hardiman, Smith, and Fisher,
Circuit Judges.

OPINION

HARDIMAN, *Circuit Judge*.

This appeal arises under the Second Amendment to the United States Constitution and presents a question of first impression in this Court. Does a convict completing his sentence on supervised release have a constitutional right to possess a firearm? The answer is no.

I

A

In 2008, federal agents collaborated with Pennsylvania State Police to investigate Appellant Diontai Moore for drug crimes. As part of this investigation, a confidential informant bought nearly a gram of cocaine from Moore. The police arrested Moore and searched his home, where they found more than three grams of cocaine base. Moore was charged with distribution of less than five grams of cocaine base. *See* 21 U.S.C. § 841(b)(1)(C). He pleaded guilty and was sentenced to 72 months' imprisonment followed by 3 years' supervised release.

In 2013, while Moore was on supervised release for that cocaine conviction, Pittsburgh Police noticed an unusual bulge under Moore's shirt. After a struggle, the officers arrested Moore and recovered a handgun from him. Moore was then charged with possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). In 2015, Moore pleaded guilty. He was sentenced to 60 months' imprisonment followed by 3 years' supervised release. As a condition of his supervised release, Moore was not allowed to "possess a firearm, ammunition, destructive device, or any other dangerous weapon." Supp. App. 3.

B

Moore was released from prison and began his three-year term of supervised release in July 2019. Less than two years later, on a Friday night in March 2021, Moore went out drinking with friends to celebrate his birthday. Moore returned that night to the Pittsburgh townhome of his fiancée Gwendolyn

Pullie, where he had been living with Pullie and her three minor children for about a year.

Around 4:00 a.m., Moore and Pullie were upstairs talking about "how [Moore] went to the club," when they heard the dog barking downstairs in the kitchen. App. 279. Moore later described the dog as "going f***ing crazy." *Id.* As surveillance video footage shows, two figures entered the parking lot behind the townhome and broke into Pullie's car, which was parked in a spot next to the townhome's back door. Pullie later testified she felt "terrified" that she was "in harm's way." App. 181. She also "felt like someone was at [her] back door." App. 184. So she and Moore went downstairs, where they saw shadowy figures near the back of the house.

Pullie then went upstairs to grab a handgun that she kept in a safe under her bed. She woke up her children, returned downstairs, and handed Moore the loaded weapon. Pullie left through the front door, taking her children with her. She and the children headed for the family's other car, which was parked on the street in front of the townhome.

While Pullie left with the children, Moore took the gun and went out the back door of the townhome to confront the trespassers. The two intruders, who had broken into Pullie's car, ran away at the sight of Moore. While they were fleeing, Moore fired three shots. Moore hit one of the intruders in the back of the thigh. Shortly after hearing the gunshots, Pullie drove her children to her cousin's house, where she dropped them off.

Later that weekend, Pullie met with a local detective, turned in her gun, and spoke about the

incident. On Monday, Moore called his federal probation officer. He admitted his involvement in the shooting and said that "he fired at individuals he thought were breaking into his residence." Supp. App. 7.

C

Within weeks, Moore was charged as a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The indictment listed Moore's previous federal convictions for distributing cocaine base and being a felon in possession of a firearm, as well as previous state drug trafficking convictions.

Moore pleaded guilty to violating § 922(g)(1). In doing so, he reserved the right to argue on appeal that § 922(g)(1) is unconstitutional. The District Court entered judgment against Moore, sentencing him to 84 months' imprisonment followed by 3 years' supervised release. Moore timely appealed the judgment of conviction.[1]

II

A

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As an adult citizen, Moore is one of the "people" whom the Second Amendment presumptively protects. *See Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 127 (3d Cir.

[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291. We review the District Court's legal conclusions de novo and its factual findings for clear error. *See United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011).

2024). And the charge at issue punishes Moore for quintessential Second Amendment conduct: possessing a handgun. *See District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). So the Government bears the burden of justifying its regulation. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022); *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024).[2]

B

The Government can satisfy its burden only "by demonstrating that [its regulation] is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. To do so, it must "identify a well-established and representative historical analogue," which need not be "a historical twin" or a "dead ringer." *Id.* at 30 (emphasis omitted).

In analyzing the Government's proposed historical analogues, we "must ascertain whether the [challenged] law is 'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29). "*Why* and *how* the regulation burdens the right are central to this inquiry." *Id.* (emphasis added). As compared to its

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[2] That Moore was on supervised release does not relieve the Government of its burden to justify its regulation of Moore's arms-bearing conduct. To hold otherwise would relegate the Second Amendment to "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (cleaned up). The First and Fourth Amendments apply to convicts on parole, probation, and supervised release. *See Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 125 (1977) (First Amendment); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (Fourth Amendment). So too for the Second Amendment.

historical analogue, a modern regulation must "impose a comparable burden on the right of armed self-defense, and . . . that burden [must be] comparably justified." *Bruen*, 597 U.S. at 29. In other words, a modern firearms regulation passes constitutional muster only if it is "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898.

To justify disarming Moore while he was on supervised release, the Government cites the tradition of forfeiture laws, which temporarily disarmed convicts while they completed their sentences. For example, a 1790 Pennsylvania statute provided that "every person convicted of robbery, burglary, sodomy or buggery . . . shall forfeit to the commonwealth all . . . goods and chattels whereof he or she was . . . possessed at the time the crime was committed . . . and be sentenced to undergo a servitude of any term . . . not exceeding ten years." Act of Apr. 5, 1790, 13 *Statutes at Large of Pennsylvania*, at 511, 511-12 (James T. Mitchell & Henry Flanders eds., 1896).

That 1790 Pennsylvania law is analogous to disarming convicts on supervised release because it burdened arms-bearing conduct in the same way and for the same purpose. The law seized all of the convict's possessions, including his weapons, as part of his "servitude" or sentence. *Id.* So it was like disarming a convict on supervised release—which is a "part of the same sentence" as a term of imprisonment. *Mont v. United States*, 587 U.S. 514, 524 (2019). And the Pennsylvania law burdened the right to bear arms for the same reasons that we now burden the rights of

convicts on supervised release: to deter criminal conduct, protect the public, and facilitate the convict's rehabilitation. *Compare* 18 U.S.C. § 3583(c) (instructing courts to consider these factors in imposing supervised release), *with* Act of Apr. 5, 1790, 13 *Statutes at Large of Pennsylvania*, at 511 (intending "to reform" and "to deter").

To be sure, the 1790 Pennsylvania law is not a dead ringer for § 922(g)(1). The old law deprived convicts of all their goods—including their weapons—while § 922(g)(1) deprives them of firearms and ammunition alone. But the founding-era law and the modern statute need not be "identical." *Rahimi*, 144 S. Ct. at 1901. The old law took the convict's possessions, including his weapons, and then imprisoned him, preventing reacquisition until the sentence was complete. Because it disarmed the convict while he served his criminal sentence, the 1790 Pennsylvania law is sufficiently analogous to § 922(g)(1) as applied to convicts on supervised release.

The relevance of the 1790 law is buttressed by the fact that the Pennsylvania Constitution included a precursor to the federal Constitution's Second Amendment. *Cf. Roth v. United States*, 354 U.S. 476, 482 (1957) (state analogues to First Amendment). The Pennsylvania Constitution of 1776 provided: "the people have a right to bear arms for the defence of themselves and the state." Pa. Const. of 1776, ch. I, art. XIII. And as revised in 1790, it stated: "the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned." Pa. Const. of 1790, art. IX, § XXI.

At the same time that it provided these guarantees, Pennsylvania enacted multiple forfeiture provisions in addition to the 1790 law. For example, the legislature stipulated that counterfeiters were subject to imprisonment "and moreover [were required to] forfeit all [their] . . . goods and chattels." Act of Nov. 26, 1779, § 2, 10 *Statutes at Large of Pennsylvania*, at 12, 15-16 (James T. Mitchell & Henry Flanders eds., 1904). Likewise, Pennsylvania regulations intended to protect the Philadelphia market from competition required a repeat offender to "forfeit all his goods, and [be] imprisoned at the discretion of the court." Act of Apr. 5, 1779, 9 *Statutes at Large of Pennsylvania*, at 387, 388-89 (James T. Mitchell & Henry Flanders eds., 1896).

The Pennsylvania forfeiture laws just mentioned were not outliers; they were sufficiently well-established and representative in the late 18th century to serve as historical analogues. *See Bruen*, 597 U.S. at 30. For example, Massachusetts provided:

> [A]ll persons who, for the space of one hour after [an anti-riot] proclamation [is] made . . . shall unlawfully, routously, riotously and tumultuously continue together, or shall wilfully . . . hinder any such officer . . . from making the said proclamation, shall forfeit all their . . . goods and chattels to this Commonwealth, or such part thereof as shall be adjudged by the Justices, before whom such offence shall be tried . . . and suffer imprisonment for a term not exceeding twelve months, nor less than six months.

Act of Oct. 28, 1786, 1 *Laws of the Commonwealth of Massachusetts*, at 346, 347 (J.T. Buckingham ed., 1807); *see also* Mass. Const. of 1780, pt. I, art. XVII (recognizing the "right to keep and to bear arms"). Virginia had a similar penalty for counterfeiting:

> [I]f any person within this commonwealth shall forge or counterfeit, alter or erase, any certificate of money . . . , every person so offending, and being lawfully convicted, shall forfeit his whole estate, real and personal, . . . and shall be obliged to serve on board some armed vessel . . . without wages, not exceeding seven years.

Act of May 5, 1777, ch. 5, § 4, 9 *Virginia Statutes at Large*, at 286, 287 (William Waller Hening ed., 1821). Unlike the outlier territorial laws that the Supreme Court has rejected, *see Bruen*, 597 U.S. at 67-68, these forfeiture laws came from populous States that sent the most representatives to the First Congress, *see* U.S. Const. art. I, § 2.

Disarming convicts as part of their sentences continued into the 19th century. For example, Kentucky criminalized "go[ing] with force and arms before courts." Act of Dec. 19, 1801, § 33, *Collection of All the Public and Permanent Acts of the General Assembly of Kentucky*, at 360, 371 (Harry Toulmin ed., 1802) (capitalization altered). Those who violated that law were required "to forfeit their arms to the commonwealth," and were "fined and imprisoned at the discretion of a jury." *Id.* That disarmament was compelled even though the Kentucky Constitution stated that "the rights of the citizens to bear arms in defence of themselves and the State shall not be

questioned." Ky. Const. of 1799, art. X, § 23. Unlike more general forfeiture laws, which required forfeiture of *all goods*, this law specifically required forfeiture of *arms* as part of a criminal sentence.

Similarly, a founding-era Massachusetts law specifically disarmed offenders as part of their rehabilitation and reintegration into the community. In the wake of Shays' Rebellion, "the Massachusetts legislature made rebels who had taken up arms against the state swear allegiance and give up their arms for three years before they could be pardoned." *Folajtar v. Att'y Gen.*, 980 F.3d 897, 914 (3d Cir. 2020) (Bibas, J., dissenting) (cleaned up). To qualify for pardon, the rebels were required to "deliver up their arms to, and take and subscribe the oath of allegiance, before some Justice of the Peace." Act of Feb. 16, 1787, ch. VI, 1787 Mass. Acts 555. If the rebels satisfied certain conditions for three years, those arms would be "returned to the . . . persons who delivered the same, at the expiration of the said term of three years." *Id.* at 556. The temporary disarmament imposed by that law is also akin to disarmament during a criminal sentence.

The bottom line is this: during the founding era, forfeiture laws temporarily disarmed citizens who had committed a wide range of crimes.[3] Convicts could be

[3] The crimes referenced from the early days of the Republic differ from Moore's felon-in-possession crime. But they all stand for the proposition that convicts could be disarmed while serving their sentences. So those founding-era laws serve as relevant analogues to § 922(g)(1), as it applies to convicts on supervised release. The context is critical because a law which constitutes an

required to forfeit their weapons and were prevented from reacquiring arms until they had finished serving their sentences. This historical practice of disarming a convict during his sentence—or as part of the process of qualifying for pardon—is like temporarily disarming a convict on supervised release. After all, "[t]he defendant receives a term of supervised release thanks to his initial offense, and . . . it constitutes a part of the final sentence for his crime." *United States v. Haymond*, 588 U.S. 634, 648 (2019) (plurality opinion); *see also United States v. Island*, 916 F.3d 249, 252 (3d Cir. 2019) ("The supervised release term constitutes part of the original sentence.") (cleaned up). Consistent with our Nation's history and tradition of firearms regulation, we hold that convicts may be disarmed while serving their sentences on supervised release.

Moore tries to distinguish supervised release from founding-era forfeiture laws. He argues that supervised release differs materially from forfeiture because supervised release occurs after the term of imprisonment. We disagree primarily because "analogical reasoning under the Second Amendment is n[ot] a regulatory straightjacket." *Bruen*, 597 U.S. at 30. In addition, Moore's argument misconstrues the historical record. The forfeiture of property and limitation on rights occurred while the convict was serving out his sentence, not only while he was physically in prison. For example, Virginia convicts served out their sentences by doing forced labor on a ship, not in prison. *See* Act of May 5, 1777, 9 *Virginia*

"an appropriate analogue" in one context may "not [be] a proper historical analogue" in another. *Rahimi*, 144 S. Ct. at 1902.

Statutes at Large, at 287. And convicts sentenced to prison could serve part of their sentences outside of prison. *See* Act of Dec. 22, 1787, ch. 11, 1 *Public Acts of the General Assembly of North Carolina*, at 434 (James Iredell and Francois-Xavier Martin, eds. 1804).

Moore also suggests that supervised release cannot be subject to historical analogues because it "is a modern innovation . . . created by the federal government in 1984." Reply Br. 23 (citing *Haymond*, 588 U.S. at 651-52). This argument is a nonstarter because requiring "regulations identical to ones that could be found in 1791" is just "as mistaken as applying the protections of the [Second Amendment] only to muskets and sabers." *Rahimi*, 144 S. Ct. at 1898. Although criminal justice worked differently in the founding era than it does today, it is also true that a convict could be temporarily disarmed as part of his sentence. So the "prohibition on the possession of firearms" by a convict subject to a criminal sentence "fits neatly within the tradition" embodied by forfeiture laws. *Rahimi*, 144 S. Ct. at 1901.

Our conclusion is bolstered by the Supreme Court's recent decision in *Rahimi*. As the Court explained, early American surety and affray laws establish the principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Rahimi*, 144 S. Ct. at 1901. The Court applied that principle to uphold the federal law prohibiting an individual subject to a domestic violence restraining order from possessing firearms. *See id.* (citing 18 U.S.C. § 922(g)(8)). Taken together, the early American

forfeiture laws—which required forfeiting property in general and arms in particular—likewise yield the principle that a convict may be disarmed while he completes his sentence and reintegrates into society. And this principle justifies applying § 922(g)(1) to Moore, a convict on supervised release.

C

Moore's other counterarguments are unpersuasive. First, Moore argues that his status as a supervised releasee cannot support his felon-in-possession conviction. According to Moore, we may consider only the facts alleged in the indictment—such as the predicate offenses that made him a felon. But Moore cites no authority to support this proposition. That is unsurprising because an as-applied challenge requires us to ask whether a statute's "application to a particular person under particular circumstances deprived that person of a constitutional right." *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) (cleaned up). "In order to mount a successful as-applied challenge, [Moore] must show that under these particular circumstances he was deprived of a constitutional right." *Id.* at 406 (cleaned up). And "these particular circumstances" include facts beyond the predicate offenses alleged in the indictment. So the circumstances of a criminal offense can justify rejecting an as-applied challenge to a conviction regardless of whether they were charged. This is especially so where, as here, no party questions the fact that we deem constitutionally relevant: Moore was on supervised release when he possessed the firearm. *See* Moore Br. 5 (conceding this fact).

Moore also argues that § 922(g)(1) violates the Second Amendment as applied to his possession of a firearm for protection at home. He notes that self-defense is the "*central component*" of the right, and "the home" is where the need for self-defense is "most acute." Moore Br. 44 (quoting *Heller*, 554 U.S. at 599, 628). Those truisms about the core of the Second Amendment do not dictate the outcome here. A prisoner's cell is his temporary home—and a prisoner may feel the need to defend himself against other prisoners—but that does not entitle him to keep a firearm in prison. "Persons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned." *State v. Buzzard*, 4 Ark. 18, 21 (Ark. 1842) (opinion of Ringo, C.J.). A prisoner on house arrest does not necessarily have a right to keep a weapon at home for self-defense, even though typical citizens do. The same is true for a prisoner on supervised release.[4]

Because history and tradition support disarming convicts who are completing their sentences, we reject Moore's as-applied challenge to his conviction for violating § 922(g)(1).[5]

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[4] Of course, the doctrine of necessity or justification "is a valid defense to a felon-in-possession charge." *United States v. Alston*, 526 F.3d 91, 94 (3d Cir. 2008). But Moore failed to preserve the argument that this defense applies.

[5] Since we reject Moore's as-applied challenge to § 922(g)(1), his facial challenge also fails: he cannot "establish that no set of circumstances exists under which the Act would be valid." *Rahimi*, 144 S. Ct. at 1898 (cleaned up).

A convict completing his sentence on supervised release does not have a Second Amendment right to possess a firearm. So 18 U.S.C. § 922(g)(1) is constitutional as applied to Moore, and we will affirm his judgment of conviction.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1843

UNITED STATES OF AMERICA,
Appellee,
v.
DIONTAI MOORE,
Appellant.

Filed: Oct. 9, 2024

Before: Chagares, *Chief Judge*, Jordan, Hardiman, Shwartz, Krause, Restrepo, Bibas, Porter, Matey, Phipps, Freeman, Montgomery-Reeves, Smith, and Fisher,* *Circuit Judges.*

ORDER

The petition for rehearing in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

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* The votes of Judge Smith and Fisher are limited to panel rehearing.

decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman
Circuit Judge

Appendix C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 21-121

UNITED STATES OF AMERICA,

v.

DIONTAI MOORE,

Defendant.

Filed: June 1, 2022

MEMORANDUM OPINION

Before the Court are a Motion for Discovery (ECF No. 40) and a Motion to Dismiss Indictment (ECF No. 42) filed by Defendant Diontai Moore. The Motions have been fully briefed and are ripe for disposition. For the reasons that follow, the Court will deny the Motion to Dismiss Indictment, and will deny the remaining relief requested by way of the Motion for Discovery.

I. Motion to Dismiss Indictment

Defendant avers that, in *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc), a majority of the United States Court of Appeals for the Third Circuit agreed that it would violate the Second Amendment to apply § 922(g)(1) to individuals convicted of certain nonviolent state law misdemeanors. Mot. to Dismiss

3, ECF No. 42. Defendant argues that, accordingly, his past convictions, which Defendant asserts do not involve violent conduct, cannot serve as a basis to deny him—permanently and totally—of his Second Amendment rights, and that Section 922(g)(1) is unconstitutional as applied to him, under the circumstances of this case, and that the Indictment must be dismissed. *Id*. Of course, Defendant's past convictions are not state law misdemeanor convictions, but rather are state and federal felony convictions, including: January 2006 and February 2006 Pennsylvania convictions for possession with intent to deliver heroin, an October 2009 federal conviction for distribution of cocaine base, and a May 2015 federal conviction for being a felon in possession of a firearm and/or ammunition, i.e. the same offense with which he is charged in this matter. *Id.* at 7. Defendant does not dispute that these prior convictions meet the traditional definition of a felony for purposes of Section 922(g). *Id*. The Government has further provided:

> This case is the third federal felony case in which [Defendant] has been charged. The first two led to convictions for which he was sentenced to 72 months (distribution of cocaine base at Cr. No. 07-33) and 60 months (possession of a firearm and/or ammunition by a convicted felon at Cr. No. 14-110), respectively. Notably, the second federal conviction served as the basis for a supervised release violation at the first federal case number. Moreover, the first federal case served as the basis for a violation of the parole he was serving in a state felony drug

> conviction from 2006 for possessing with the intent to distribute heroin.

Omnibus Resp. 12, ECF No. 46.

In *Binderup*, the Third Circuit explained as follows:

> [T]he following is the law of our Circuit: (1) the two-step [*United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)] framework controls all Second Amendment challenges, including as-applied challenges to § 922(g)(1); (2) a challenger will satisfy the first step of that framework only if he proves that the law or regulation at issue burdens conduct protected by the Second Amendment; (3) to satisfy step one in the context of an as-applied challenge to § 922(g)(1), a challenger must prove that he was not previously convicted of a serious crime; (4) evidence of a challenger's rehabilitation or his likelihood of recidivism is not relevant to the step-one analysis; (5) as the narrowest ground supporting the Court's judgments for Binderup and Suarez, the considerations discussed above will determine whether crimes are serious (i.e., disqualifying) at step one; and (6) if a challenger makes the necessary step-one showing, the burden shifts to the Government at step two to prove that the regulation at issue survives intermediate scrutiny.

Binderup, 836 F.3d at 356; *see also Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 901-02 (3d Cir. 2020), *cert. denied sub nom. Folajtar v. Garland*, 141 S. Ct. 2511, 209 L. Ed. 2d 546 (2021) ("As noted, we

typically would proceed under the first step of *Marzzarella* to determine: (1) whether persons with felony convictions fall within the historical class of those barred from Second Amendment protection; and (2) whether Folajtar, as one convicted of a federal tax fraud felony, can distinguish herself from that class. As we explain below, our precedents instruct we can collapse these two questions into one: Has the plaintiff overcome the generally conclusive rule that a felony conviction is serious, so that it falls outside the historical class of offenses that render felons excluded from Second Amendment protections?").

In arguing that Section 922(g)(1) is unconstitutional as applied, Defendant relies on argument that his past convictions were for non-violent offenses. Mot. to Dismiss 7, ECF No. 42. However, the relevant standard under *Binderup* is whether the crimes are "serious," not whether they are violent. *See Folajtar*, 980 F.3d at 902 ("[W]e made clear in *Binderup* that the exclusion applies to all serious crimes, and there ten judges agreed that 'the correct test at step one for challenges to § 922(g)(1) is whether the offense is "serious," not whether the offense is violent.'" (quoting *Holloway v. Att'y Gen.*, 948 F.3d 164, 171 n.7 (3d Cir. 2020))). Further, "the legislature's designation of an offense as a felony is generally conclusive in determining whether that offense is serious." *Folajtar*, 980 F.3d at 900. In *Folajtar*, the Third Circuit found tax fraud to constitute a "serious" offense. Possession with intent to deliver heroin, cocaine base distribution, and illegal firearm possession are felonies that could not reasonably be considered non-serious offenses "so exceptional" that they "fall outside the historical bar."

Folajtar, 980 F.3d at 910. These are serious, felony offenses involving dangerous drugs and weapons for which the penalties prescribed and imposed were severe. Defendant acknowledges the seriousness of these convictions. *See* Supplemental Br. 3, ECF No. 57 ("Mr. Moore recognizes that his prior felony convictions are serious and they are 'generally conclusive' evidence that those convictions bar him from Second Amendment protection."). The Court must find that each of these four felony convictions constitutes a serious crime.

In *Binderup*, the Third Circuit also explicitly rejected any assertion that "the passage of time or evidence of rehabilitation will restore the Second Amendment rights of people who committed serious crimes." *Binderup*, 836 F.3d at 349. Defendant disagrees with that holding, but this Court will not depart from the holding in *Binderup*. In arguing that Section 922(g)(1) is unconstitutional as applied in this case, Defendant relies only on assertions of his purported rehabilitation, an avenue that the Third Circuit has explicitly stated is irrelevant at the first step of the *Marzzarella* framework, and that his felony convictions were non-violent, which the Third Circuit has held is not alone sufficient to render a conviction non-serious. In this case, the Court's inquiry ends with its determination that Defendant has been convicted of a serious offense. It is unquestionable that Defendant has been convicted of multiple serious offenses, and Section 922(g)(1) is thus constitutional as applied in this case. While Defendant invites the

Court to consider the facts of the present case,[1] his purported rehabilitation, and the fact that his felony convictions were non-violent, he presents no compelling argument whatsoever that could support a finding that his prior felony convictions, which are the focus of the first step of the *Marzzarella* framework, were not serious in nature. Accordingly, Defendant's Motion will be denied on that basis, and the Court need not, and will not, proceed to the second step of the *Marzzarella* framework.

With respect to Defendant's assertion that Section 922(g)(1) unconstitutionally exceeds the federal government's powers under the Commerce Clause, Defendant asserts that the Government's evidence is insufficient as a matter of law to establish that Defendant possessed a firearm "in or affecting commerce." Mot. to Dismiss 12, ECF No. 42. Defendant acknowledges that the Third Circuit has ruled that 18 U.S.C. § 922(g)(1) is constitutional and

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[1] In particular, Defendant relies on his assertion that he believes he will prove successful on his justification defense in the present case. *See* Supplemental Br. 3-5, ECF No. 57. With respect to his as-applied challenge to Section 922(g)(1), Defendant's citation to the facts of the present case is misplaced. *See Binderup*, 836 F.3d at 350. ("[O]nly the seriousness *of the purportedly disqualifying offense* determines the constitutional sweep of statutes like § 922(g)(1) at step one." (emphasis added)); *see also id.* at 356 ("[T]o satisfy step one in the context of an as-applied challenge to § 922(g)(1), *a challenger must prove that he was not previously convicted of a serious crime* . . . . (emphasis added)). Nothing herein prevents Defendant from presenting his justification defense at trial in the present action, but the Court looks only to the disqualifying offense, or in this case offenses, at step one in determining whether Section 922(g)(1) is constitutional as applied.

has reaffirmed that holding in *United States v. Singletary*, 268 F.3d 196 (3d Cir. 2001) following the Supreme Court's decisions in the "*Lopez* trilogy," upon which Defendant relies. Mot. to Dismiss 12-13, ECF No. 42. Defendant's argument relies on an assertion that Defendant believes that the United States Supreme Court will overrule *Scarborough v. United States*, 431 U.S. 563 (1977), and Defendant states that he "therefore raises the issue now, in order to preserve his jurisdictional claims for appellate review." *Id.* The Court acknowledges Defendant's efforts to preserve issues for appeal, but, given that Defendant acknowledges that his argument is contrary to Third Circuit precedent, the Court will deny the Motion to Dismiss to the extent that it argues that Section 922(g)(1) unconstitutionally exceeds the federal government's powers under the Commerce Clause.

Finally, Defendant asserts that the Indictment must be dismissed as a violation of the doctrine of corpus delicti. Mot. to Dismiss 18, ECF No. 42. This argument is tied in with Defendant's assertion in the Motion for Discovery that he should be provided with transcripts of the grand jury proceedings in this matter.[2] Defendant asserts that the Government may not rely only on a confession for proof of an offense, here, possession of a firearm, and further asserts that Defense Counsel is unclear what, if any, evidence establishes Defendant's possession of a firearm apart

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[2] *See* Mot. for Discovery 12, ECF No. 40 ("The exculpatory evidence in this case, that Mr. Moore acted in self-defense, should have been presented to the grand jury, and Mr. Moore asks this Court to inspect the grand jury transcripts to determine whether the government adhered to its policy.").

from Defendant's own statement to police, which resulted in a decision not to charge him in a shooting. *Id.* at 18-19.

The Government asserts that it has provided the following evidentiary disclosures in this case:

> [A]ll ShotSpotter reports regarding the March 6, 2021 incident; interview reports of both [Defendant] and Ms. Pullie; security video footage from four different angles from before, during, and after [Defendant's] firing of a gun; police reports from the responding agency, the Pittsburgh Bureau of Police; and an audio/visual recording of Defendant's confession to law enforcement in the presence of his defense attorney.

Omnibus Resp. 6, ECF No. 26. The Government further avers:

> The Indictment itself (Doc. No. 3) provides the identification of the specific firearm Moore is charged with unlawfully possessing, and as the [D]efendant knows, that firearm is now in the possession of the Government. Moreover, the disclosed Rule 16 materials make plain that days before the [D]efendant made any admissions to law enforcement, officers had already responded to UPMC Children's Hospital to interview the gunshot wound victim; viewed video footage of the [D]efendant firing the weapon at that victim who was retreating from him; reviewed ShotSpotter data; and recovered 3 spent shell casings consistent with the number of shots fired and location of the shots fired.

> [Defendant's] confession is certainly a piece of the admissible evidence against him. It is disingenuous, however, to pretend that it is the sole piece of admissible evidence against him. Contrary to his argument, the doctrine of corpus delicti bars neither the admissibility of the defendant's confessions nor the return of an Indictment against him.

Id. at 16. The Government also asserts that some of the discovery Defendant has received, including the video evidence from the night in question referenced above, was introduced at Defendant's detention hearing in a pending supervised release case before this Court at 14-cr-110. *Id.* at 14.

As such, the Government avers that it has provided Defendant with more evidence than simply Defendant's confession to police. Defendant's argument seems to be related to his assertion in the Motion for Discovery that the Government should have provided some evidence to the grand jury that Defendant acted in self-defense on the night in question. To the extent that this argument relies on an assertion that the Government did not present evidence as to Defendant's potential justification defense, Defendant himself acknowledges that he "understands that this Court cannot grant dismissal of an indictment where a prosecutor fails to introduce exculpatory evidence to the grand jury." Mot. for Discovery 12, ECF No. 40. Defendant has also argued that review of the grand jury records, at least by the Court during an in-camera inspection, is appropriate to see whether the Government followed their own policy requiring them to present evidence to the grand

jury where, as here, a prosecutor is aware of evidence that "directly negates the guilt of a subject of the investigation." *Id*.

Initially, the Court notes that it is Defendant, not the Government, that will bear the burden of proving the affirmative defense of justification at trial. *See United States v. Alston*, 526 F.3d 91, 95 (3d Cir. 2008). The Court agrees with the Government that Defendant:

> does not identify any specific direct evidence in support of this self-defense claim—such as a statement made during his confession—that "should have been presented to the grand jury." But even if he had, the government had no burden to present such evidence (if it existed) at the time of the presentment of the case to the grand jury.

Omnibus Resp. 17, ECF No. 42. To the extent that Defendant "seeks a preemptive conclusion that the [G]overnment will be unable to meet its burden to prove him guilty beyond a reasonable doubt, the Court lacks the authority to make that determination prior to trial." *United States v. Terry*, No. 2:20-CR-43-NR, 2021 WL 2261585, at *3 (W.D. Pa. June 3, 2021). Further, "for better or worse, 'investigators and prosecutors need not present exculpatory evidence to grand juries.'" *Terry*, 2021 WL 2261585, at *4 (quoting *Costino v. Anderson*, 786 Fed. App'x. 344, 348 (3d Cir. 2019)).

The justification defense will ultimately be an issue for the jury, and not the grand jury, to decide. Defendant seemingly seeks an early determination as to his justification defense, and the Court declines any

invitation to consider that issue at this juncture. To the extent the Motion to Dismiss asserts that the Indictment violates the doctrine of corpus delicti, the Motion is denied.

II. Motion for Discovery

With respect to the Motion for Discovery, the Court notes that it has already denied this Motion without prejudice in part with respect to the Motion's more general requests for reasons explained on the record during oral argument on the Motion. The parties have conferred with respect to the specific discovery requests set forth at page 2 of the Motion for Discovery, and have informed the Court that the only specific request still at issue is request no. 7, which is Defendant's request for grand jury information and transcripts. Supplemental Br. 5, ECF No. 57.

Federal Rule of Criminal Procedure 6(e)(3)(E)(i) provides that a court can grant disclosure of grand jury information "in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). "As a matter of public policy, grand jury proceedings generally must remain secret except where there is a compelling necessity." *United States v. Watson*, No. 2:20-CR-112-NR, 2020 WL 7074623, at *10 (W.D. Pa. Dec. 3, 2020) (quoting *United States v. McDowell*, 888 F.2d 285, 289 (3d Cir. 1989)). To obtain the testimony, a party must show "a particularized need for that information which outweighs the public interest in secrecy." *United States v. Minerd*, 299 F. App'x 110, 111 (3d Cir. 2008) (citations omitted).

Defendant's Motion for Discovery requests a copy of the transcript of the grand jury proceedings in this case, including the charge to the grand jury, and he

argues that the same may be necessary to develop the claims in his Motion to Dismiss and his planned defense at trial. Mot. for Discovery 11, ECF No. 40. He also requests that the Court perform an in-camera inspection of the grand jury transcripts to determine whether the Government introduced exculpatory evidence that Defendant asserts "directly negates the guilt of a subject of the investigation." *Id.* at 12. Defendant also argues that the need for disclosure in this case outweighs the need for secrecy. *Id.* at 13. The Government counters that the grand jury transcripts are protected by an "obligation of secrecy" under Federal Rule of Criminal Procedure 6(e), and that Defendant has not established a compelling necessity for disclosure of grand jury transcripts and his motion seeking the same should be denied. Omnibus Resp. 7-8, ECF No. 46.

In response to the Motion for Discovery, and as described above, the Government states that it has made extensive productions in this case consistent with Rule 16, that it intends to continue to comply with Rule 16, and that, should it become aware of any *Brady* evidence, the government will disclose it sufficiently in advance of trial to allow the Defendant to make effective use of it. The Government represented that it recognizes and intends to adhere, at the appropriate times, to its discovery obligations under Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, (Jencks) 18 U.S.C. § 3500, and *Brady/Giglio*. As noted during oral argument on Defendant's Motion, Defendant asks the Court to compel the Government to do what it is already obligated to do, that is, comply with the law, but fails to provide any true suggestion of noncompliance on

the Government's part. Defendant does not articulate a particularized need for grand jury transcripts, but rather simply asks that the Government produce all discoverable evidence. *See* Supplemental Br. 6, ECF No. 57 ("Information favorable to this affirmative defense must be disclosed under DOJ guidelines, regardless of the government attorney's personal opinion about whether Mr. Moore will ultimately succeed at trial. If any information presented to the grand jury shows Mr. Moore's lack of knowledge of Ms. Pullie's firearm or supports his belief that he and his family were under threat of death or serious injury, that is *Brady* information that must be disclosed." (footnote omitted)). Of course, the Government is already obligated to comply with the law, and the Court finds that Defendant fails to articulate a compelling necessity for disclosure of grand jury transcripts in this matter.

As noted, the Government was not required to present exculpatory evidence to the grand jury, and any failure to do so would not entitle Defendant to dismissal of the Indictment. Accordingly, the same is not a basis to compel disclosure of grand jury information or transcripts. Moreover, the Government has acknowledged its discovery obligations. The Court notes that the Government proceeds at its own peril to the extent that it withholds information subject to discovery on the basis that it believes the same is not subject to discovery. However, Defendant articulates no compelling necessity for the disclosure of grand jury information or transcripts at this time. The request for grand jury information will be denied. As noted with respect to Defendant's more general requests, the Motion for Discovery was denied without

prejudice as premature. Defendant may, after reviewing the discovery provided by the Government in this case and conferring with the Government, file a renewed motion addressing specific areas of any purported noncompliance.

III. Conclusion

For the reasons discussed above, the Court will deny Defendant's Motion to Dismiss Indictment, and will deny the Motion for Discovery with respect to its only remaining outstanding request, that is, the request for grand jury information and transcripts. An appropriate Order of Court follows.

BY THE COURT:

s/ *Robert J. Colville*

Robert J. Colville

United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 21-121

UNITED STATES OF AMERICA,

v.

DIONTAI MOORE,

Defendant.

Filed: Nov. 9, 2022

MEMORANDUM ORDER

AND NOW, this 9th day of November, 2022, upon consideration of Defendant's "Motion for Reconsideration of Motion to Dismiss Indictment Following *Bruen*" (ECF No. 67), it is hereby ORDERED that Defendant's Motion is denied. Defendant, relying on the Supreme Court's recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), argues that the Court should revisit its prior Order denying Defendant's Motion to Dismiss Indictment (ECF No. 42) on the basis that, following *Bruen*, 18 U.S.C. § 922(g)(1) is unconstitutional on its face, or, alternatively, unconstitutional as applied to Defendant. The Court joins the many district courts,

including three Judges of this District,[1] in rejecting Defendant's constitutional challenges to Section 922(g)(1).

With respect to Defendant's facial challenge, the Court agrees with the well-reasoned analyses set forth by Judge Schwab in *Young*, Judge Ranjan in *Reese*, and Judge Robert D. Mariani of the United States District Court for the Middle District of Pennsylvania in *United States v. Minter*, No. 3:22-CR-135, 2022 WL 10662252 (M.D. Pa. Oct. 18, 2022), and adopts the same reasoning in rejecting Defendant's facial challenge. Turning to Defendant's as-applied challenge, Defendant again relies on argument that his past convictions were for non-violent offenses. The Court again notes that Defendant's past convictions are serious state and federal felony convictions, including: January 2006 and February 2006 Pennsylvania convictions for possession with intent to deliver heroin, an October 2009 federal conviction for distribution of cocaine base, and a May 2015 federal conviction for being a felon in possession of a firearm and/or ammunition. In *Young*, Judge Schwab considered an as-applied challenge brought by a Defendant who had four prior felony convictions for drug trafficking. In rejecting that challenge, he explained:

> In Defendant's brief, he cites to the dissent written by then-Judge Barrett in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019). The dissent states: "History is consistent with

[1] *See United States v. Young*, No. 22-54 (W.D. Pa. Nov. 7, 2022); *United States v. Reese*, No. 19-257 (W.D. Pa. Nov. 8, 2022); *United States v. Law*, No. 20-341 (W.D. Pa. Oct. 27, 2022).

> common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*." *Id.* at 451. Then-Judge Barrett explained that "founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety," and approved of precedent permitting laws banning firearms from those who have committed violent crimes or drug offenses. *Id*. at 466. Among Defendant's prior felony convictions, according to the Indictment, are the four felony drug offenses. Accordingly, even under the most expansive reading of the Second Amendment, Section 922(g)(1) is constitutional as applied to Defendant, given his prior drug trafficking felony convictions.

Young, Docket No. 47 at 24; *see also Minter*, 2022 WL 10662252, at *4 ("This Court further notes that the *Bruen* Court broadly cited to 'law-abiding' citizens, declining to signal any deficiency in a state's failure to draw a distinction between individuals who may be considered non-law-abiding due to violent, as opposed to non-violent, crimes."). There is no basis to conclude that Section 922(g)(1) is unconstitutional as applied in this case, and Defendant's Motion for Reconsideration is hereby denied.

Appendix E

CONSTITUTIONAL AND STATUTORY PRIVISIONS

U.S. Const. amend. II

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

18 U.S.C. §922

(g) It shall be unlawful for any person--

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

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

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