IN THE SUPREME COURT OF THE UNITED STATES

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No. 24A___

PAMELA JO BONDI, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

BRYAN DAVID RANGE

_____

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Acting Solicitor General -- on behalf of applicants Pamela Jo Bondi, Attorney General, and Kashyap Patel, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives -- respectfully requests a 29-day extension of time, to and including April 22, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The opinion of the en banc court of appeals (App., infra, 1a-164a) is reported at 124 F.4th 218. A prior opinion of the en banc court of appeals (App., infra, 165a-271a) is reported at 69 F.4th 96. The opinion of the court of appeals panel (App., infra, 274a-323a) is reported at 53

F.4th 262. The memorandum of the district court (App., infra, 325a-335a) is reported at 557 F. Supp. 3d 609.

The court of appeals entered its judgment on December 23, 2024. Unless extended, the time within which to file a petition for a writ of certiorari will expire on March 24, 2025 (Monday). The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. Federal law prohibits a person from possessing a firearm in or affecting commerce if the person has been convicted of "a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. 922(g)(1). That prohibition is subject to an exception for "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." 18 U.S.C. 921(a)(20)(B).

In 1995, respondent Bryan David Range was convicted of making a false statement in order to obtain food stamps, in violation of 62 Pa. Ann. § 481(a). App., infra, 5a. State law classified that offense as a misdemeanor and made it punishable by up to five years of imprisonment. Id. at 6a. As a result, Section 922(g)(1) disqualified respondent from possessing firearms. Ibid.

Respondent sued the Attorney General and the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives in the U.S. District Court for the Eastern District of Pennsylvania. App., infra, 6a. He argued that Section 922(g)(1) violates his Second Amendment rights and sought declaratory and injunctive relief

preventing the government from enforcing the statute against him. Ibid. The district court granted the government summary judgment. Id. at 325a-335a.

2. A panel of the Third Circuit affirmed. App., infra, 274a-323a. The Third Circuit granted rehearing en banc, id. at 272a-273a, and then reversed and remanded, id. at 165a-271a. This Court granted the government's petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of United States v. Rahimi, 602 U.S. 680 (2024). See 144 S. Ct. 2706 (2024).

On remand, the en banc Third Circuit again reversed and remanded. App., infra, 1a-164a. The court first concluded that, despite respondent's conviction, he remains "one of 'the people' who have Second Amendment rights." Id. at 11a. It then determined that the government "ha[d] not carried its burden" of showing that "applying § 922(g)(1) to [respondent] * * * 'is consistent with the Nation's historical tradition of firearm regulation.'" Id. at 17a. The court stated that its decision was "narrow" and that it extended only to "people like [respondent]." Id. at 24a-25a.

Judge Matey issued a concurrence arguing that the court of appeals' decision accorded with "classical principles respecting * * * natural rights." App., infra, 26a; see id. at 26a-56a. Judge Phipps issued a concurrence arguing that there is "no historical analogue for the lifetime disarmament of an otherwise free citizen." Id. at 63a; see id. at 57a-65a.

Judge Krause, joined in part by one other judge, concurred in the judgment, arguing that Congress may categorically disarm "a class of persons that presumptively 'presents a special danger of misusing' firearms," but that it must provide "individual class members with a later opportunity to rebut that presumption and reclaim their Second Amendment rights going forward." App., infra, 71a (brackets and citation omitted); see id. at 66a-142a. Judge Roth, joined in part by two other judges, concurred in the judgment, arguing that the Second Amendment permits "categorical disarmament" but that it requires that respondent "be permitted to petition for restoration" of his rights. Id. at 144a, 153a; see id. at 143a-154a. Judge Shwartz, joined by one other judge, issued a dissent arguing that "there is a historical basis" for disarming felons. Id. at 155a; see id. at 155a-164a.

3. The Acting Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to continue consultation within the government and to assess the legal and practical impact of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

MARCH 2025

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 21-2835

_____

BRYAN DAVID RANGE,
Appellant

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA;
REGINA LOMBARDO, Acting Director, Bureau of Alcohol,
Tobacco, Firearms and Explosives

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5:20-CV-03488)
District Judge: Honorable Gene E.K. Pratter

_____

Argued before Merits Panel on September 19, 2022
Argued En Banc on February 15, 2023
Reargued En Banc on October 9, 2024 on Remand from the
Supreme Court of the United States

_____

Before: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, ROTH,[*] and AMBRO,[**]
Circuit Judges.

(Filed: December 23, 2024)

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[*] Judge Roth is participating as a member of the en banc court pursuant to 3d Cir. I.O.P. 9.6.4.

[**] Judge Ambro assumed senior status on February 6, 2023 and elected to continue participating as a member of the en banc court pursuant to 3d Cir. I.O.P. 9.6.4.

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge*, filed the Opinion of the Court with whom CHAGARES, *Chief Judge*, and JORDAN, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, *Circuit Judges*, join. MATEY, *Circuit Judge*, filed a concurring opinion. PHIPPS, *Circuit Judge*, filed a concurring opinion. KRAUSE, *Circuit Judge*, filed an opinion concurring in the judgment, with whom ROTH, *Circuit Judge*, joins in part. ROTH, *Circuit Judge*, filed an opinion concurring in the judgment, with whom KRAUSE and CHUNG, *Circuit Judges*, join in part. AMBRO, *Circuit Judge*, concurs in the judgment only. SHWARTZ, *Circuit Judge*, filed a dissenting opinion with whom RESTREPO, *Circuit Judge*, joins.

Bryan Range appeals the District Court's summary judgment rejecting his claim that the federal "felon-in-possession" law—18 U.S.C. § 922(g)(1)—violates his Second Amendment right to keep and bear arms. We agree with Range that, despite his false statement conviction, he remains among "the people" protected by the Second Amendment. And because the Government did not carry its burden of showing that the principles underlying our Nation's history and tradition of firearm regulation support disarming Range, we will reverse and remand.

I

A

The material facts are undisputed. In 1995, Range pleaded guilty in the Court of Common Pleas of Lancaster County to one count of making a false statement to obtain food stamps in violation of Pennsylvania law. *See* 62 Pa. Stat. Ann. § 481(a). In those days, Range was earning between $9.00 and $9.50 an hour as he and his wife struggled to raise three young children on $300 per week. Range's wife prepared an application for food stamps that understated Range's income, which she and Range signed. Though he did not recall reviewing the application, Range accepted full responsibility for the misrepresentation.

Range was sentenced to three years' probation, which he completed without incident. He also paid $2,458 in restitution, $288.29 in costs, and a $100 fine. Other than his 1995 conviction, Range's criminal history is limited to minor traffic and parking infractions and a summary offense for fishing without a license.

When Range pleaded guilty in 1995, his conviction was classified as a Pennsylvania misdemeanor punishable by up to five years' imprisonment. That conviction precludes Range from possessing a firearm because federal law generally makes it "unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Although state misdemeanors are excluded from that prohibition if they are "punishable by a term of imprisonment of two years or less," 18 U.S.C. § 921(a)(20)(B), that safe harbor provided no refuge for Range because he faced up to five years' imprisonment.

In 1998, Range tried to buy a firearm but was rejected by Pennsylvania's instant background check system. Range's wife, thinking the rejection a mistake, gifted him a deer-hunting rifle. Years later, Range tried to buy a firearm and was rejected again. After researching the reason for the denial, Range learned he was barred from buying a firearm because of his 1995 conviction. Range then sold his deer-hunting rifle to a firearms dealer.

B

In 2020, Range sued in the United States District Court for the Eastern District of Pennsylvania, seeking a declaration that § 922(g)(1) violates the Second Amendment as applied to him. He also requested an injunction prohibiting the law's enforcement against him. Range asserts that but for § 922(g)(1), he would "for sure" purchase another deer-hunting rifle and "maybe a shotgun" for self-defense at home. App. 197–98. Range and the Government cross-moved for summary judgment.

The District Court granted the Government's motion. *Range v. Lombardo*, 557 F. Supp. 3d 609, 611 (E.D. Pa. 2021). Faithfully applying our then-controlling precedents, the Court held that Range's crime was "serious" enough to deprive him of his Second Amendment rights. *Id.* In doing so, the Court noted the two-step framework we established in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). *Range*, 557 F. Supp. 3d at 613. The Court began—and ended—its analysis at the first step. It considered five factors to determine whether Range's conviction made him an "unvirtuous citizen" of the kind historically barred from possessing a firearm: (1) whether the conviction was classified as a misdemeanor or a felony; (2) whether the elements of the offense involved violence; (3) the sentence imposed; (4) whether there was a cross-jurisdictional consensus as to the seriousness of the crime, *Binderup v. Att'y Gen.*, 836 F.3d 336, 351–52 (3d Cir. 2016) (en banc) (plurality); and (5) the potential for physical harm to others created by the offense, *Holloway v. Att'y Gen.*, 948 F.3d 164, 173 (3d Cir. 2020). *Range*, 557 F. Supp. 3d at 613–14.

The Government conceded that four of the five factors favored Range because he was convicted of a nonviolent, non-dangerous misdemeanor and had not been incarcerated. *Id.* at 614. But the District Court held the "cross-jurisdictional consensus" factor favored the Government because about 40 jurisdictions would have classified his crime as a felony. *Id.* at 614–15. Noting that our decisions in *Holloway*, 948 F.3d at 177, and *Folajtar v. Att'y Gen.*, 980 F.3d 897, 900 (3d Cir. 2020), had rejected as-applied challenges to § 922(g)(1) despite only one of the relevant factors weighing in the Government's favor, the District Court held that the cross-jurisdictional consensus alone sufficed to disarm Range. *Range*, 557 F. Supp. 3d at 615–16. Range timely appealed.

While Range's appeal was pending, the Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). The parties then submitted supplemental briefing on *Bruen*'s impact. A panel of this Court affirmed the District Court's summary judgment, holding that the Government had met its burden to show that § 922(g)(1) reflects the Nation's historical tradition of firearm regulation such that Range's conviction "places him outside the class of people traditionally entitled to Second Amendment rights." *Range v. Att'y Gen.*, 53 F.4th 262, 266 (3d Cir. 2022) (per curiam).

Range petitioned for rehearing en banc. We granted the petition and vacated the panel opinion. *Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2023). The en banc Court reversed and remanded for the District Court to enter a declaratory judgment for Range. We concluded that Range remained one of "the people" protected by the Second Amendment and that the Government did not show the Nation has a longstanding history and tradition of disarming people like Range. *Range v. Att'y Gen.*, 69 F.4th 96, 98 (3d Cir. 2023) (en banc). The Government petitioned the Supreme Court for a writ of certiorari.

While the Government's petition was pending, the Supreme Court decided *United States v. Rahimi*, 144 S. Ct. 1889 (2024). The Court then vacated our en banc decision in *Range* and remanded for further consideration. *Garland v. Range*, 144 S. Ct. 2706 (2024). The parties and amicus filed more briefs and we heard argument again.

II

The District Court had jurisdiction under 28 U.S.C. § 1331 because Range's complaint raised a federal question: whether the federal felon-in-possession law, 18 U.S.C. § 922(g)(1), violates the Second Amendment as applied to Range. We have jurisdiction under 28 U.S.C. § 1291.

III

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to keep and bear arms unconnected with militia service. 554 U.S. 570, 583–84 (2008). Given that right, the Court held unconstitutional a District of Columbia law that banned handguns and required other "firearms in the home be rendered and kept inoperable at all times." *Id.* at 630. It reached that conclusion after scrutinizing the text of the Second Amendment and deducing that it "codified a *pre-existing* right." *Id*. at 592. The *Heller* opinion did not apply intermediate or strict scrutiny. In fact, it did not apply means-end scrutiny at all. But in response to Justice Breyer's dissent, the Court noted in passing that the challenged law would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628–29.

Many courts around the country, including this one, overread that passing comment to require a two-step approach in Second Amendment cases, utilizing means-end scrutiny at the second step. We did so for the first time in *Marzzarella*, 614 F.3d at 97, and we continued down that road for over a decade. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 429, 434–40 (3d Cir. 2013); *Binderup*, 836 F.3d at 344–47, 353–56; *Ass'n*

of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 117 (3d Cir. 2018); *Beers v. Att'y Gen.*, 927 F.3d 150, 154–55 (3d Cir. 2019), *vacated as moot sub nom. Beers v. Barr*, 140 S. Ct. 2758 (2020); *Holloway*, 948 F.3d at 169–72; *Folajtar*, 980 F.3d at 901.

Bruen rejected the two-step approach as "one step too many." 597 U.S. at 19. The Supreme Court declared: "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Id*. Instead, those cases teach "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 17. And "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Applying that standard, *Bruen* held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 10. But the "where" question decided in *Bruen* is not at issue here. Range's appeal instead requires us to examine *who* is among "the people" protected by the Second Amendment. U.S. Const. amend. II; *see Bruen*, 597 U.S. at 72 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm . . . ."); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443 (2009) (distinguishing among "who," "what," "where," "when," and "how" restrictions). Range claims he is one of "the people" entitled to keep and bear arms and that our Nation has no historical tradition of disarming people like him. The Government responds that Range has not

been one of "the people" since 1995, when he pleaded guilty in Pennsylvania state court to making a false statement on his food stamp application, and that his disarmament is historically supported.

IV

Having explained how *Bruen* abrogated our Second Amendment jurisprudence, we now apply the Supreme Court's established method to the facts of Range's case. Both sides agree that we no longer conduct means-end scrutiny. And as the panel wrote: "*Bruen*'s focus on history and tradition," means that "*Binderup*'s multifactored seriousness inquiry no longer applies." *Range*, 53 F.4th at 270 n.9.

After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. 597 U.S. at 31–33. If it does, the government now bears the burden of proof: it "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19.

A

We begin with the threshold question: whether Range is one of "the people" who have Second Amendment rights. The Government contends that the Second Amendment does not apply to Range at all because "[t]he right to bear arms has historically extended to the political community of law-abiding, responsible citizens." Gov't En Banc Br. at 2. So

Range's 1995 conviction, the Government insists, removed him from "the people" protected by the Second Amendment.

The Supreme Court referred to "law-abiding citizens" in *Heller*. In response to Justice Stevens's dissent, which relied on *United States v. Miller*, 307 U.S. 174 (1939), the Court reasoned that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. In isolation, this language seems to support the Government's argument. But *Heller* said more; it explained that "the people" as used throughout the Constitution "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. So the Second Amendment right, *Heller* said, presumptively "belongs to all Americans." *Id*. at 581. Range cites these statements to argue that "law-abiding citizens" should not be read "as rejecting *Heller*'s interpretation of 'the people.'" Range Pet. for Reh'g at 8. We agree with Range for four reasons.

First, the criminal histories of the plaintiffs in *Heller*, *McDonald*, and *Bruen* were not at issue in those cases. So their references to "law-abiding, responsible citizens" were dicta. And while we heed that phrase, we are careful not to overread it as we and other circuit courts did with *Heller*'s statement that the District of Columbia firearm law would fail under any form of heightened scrutiny.

Second, other constitutional provisions refer to "the people."[1] For instance, "the people" are recognized as having

[1] *See, e.g.*, U.S. Const. pmbl. ("We *the People* of the United States . . . ." (emphasis added)); *id*. amend. IX (recognizing

rights to assemble peaceably, to petition the government for redress,[2] and to be protected against unreasonable searches and seizures.[3] Felons are not categorically barred from First Amendment or Fourth Amendment protection because of their status. It is true, however, that prisoners have no First Amendment right to peaceably assemble, *see Pell v. Procunier*, 417 U.S. 817, 822 (1974), and no Fourth Amendment right as to prison-cell searches. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). We see no reason to adopt a reading of "the people" that excludes Americans from the scope of the Second Amendment while they retain their constitutional rights in other contexts.

Third, as the plurality stated in *Binderup*: "That individuals with Second Amendment rights may nonetheless be denied possession of a firearm is hardly illogical." 836 F.3d at 344 (Ambro, J.). That statement tracks then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, in which she persuasively explained that "all people have the right to keep and bear arms," though the legislature may constitutionally "strip certain groups of that right." 919 F.3d 437, 452 (7th Cir. 2019).

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rights "retained by the people"); *id*. amend. X (acknowledging the powers reserved "to the people").

[2] U.S. Const. amend. I ("Congress shall make no law respecting . . . the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added)).

[3] U.S. Const. amend. IV ("The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added)).

We agree with that statement in *Binderup* and then-Judge Barrett's reasoning.

Fourth, as the Government concedes, *see* Gov't Range II En Banc Br. 25, *Rahimi* makes clear that citizens are not excluded from Second Amendment protections just because they are not "responsible." *See Rahimi*, 144 S. Ct. at 1903. The Supreme Court cautioned that "responsible" is too vague a concept to dictate the Second Amendment's applicability and using the term that way would create an "unclear . . . rule" that does not "derive from [Supreme Court] case law." *Id.* So too with the phrase "law-abiding." Does it exclude those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine? No. We are confident that the Supreme Court's references to "law-abiding, responsible citizens" do not mean that every American who gets a traffic ticket is no longer among "the people" protected by the Second Amendment. Perhaps, then, the category refers only to those who commit "real crimes" like felonies or felony-equivalents? At English common law, felonies were so serious they were punishable by estate forfeiture and even death. 4 William Blackstone, Commentaries on the Laws of England 54 (1769). But at the Founding, many states were moving away from making felonies—including crimes akin to making false statements—punishable by death in America. *See United States v. Moore*, 111 F.4th 266, 270–72 (3d Cir. 2024) (citing various Founding-era felony laws and penalties). For example, in Massachusetts, New Jersey, Kentucky, Virginia, Connecticut, and New York, forgery and counterfeiting were punishable with imprisonment, hard labor, fines, or corporal

punishment, but *not* death.[4] Federally, the Crimes Act of 1790 criminalized conduct involving falsification of records and stealing property of the United States, and punished such conduct with fines, corporal punishment, or a term of imprisonment.[5] And today, felonies include a wide swath of crimes, some of which seem minor.[6] Meanwhile, some

[4] James T. Mitchell et al., Compiled Statutes at Large of Pennsylvania from 1682 to 1801 (1700-1809); An Act to Prevent Forgery, And For the Punishment of Those Who Are Guilty of the Same. 1784 Mass. Acts Ch. 67; Virginia, Collection of All Such Acts of the General Assembly of Virginia, of a Public or Permanent Nature, as are Now in Force (1803); Harry Toulmin, Collection of All the Public and Permanent Acts of the General Assembly of Kentucky Which Are Now in Force (1802); Acts and Laws of the State of Connecticut (1784); William Paterson, Laws of the State of New Jersey (1800); Thomas Greenleaf, Laws of the State of New York, Comprising the Constitution, and the Acts of the Legislature, since the Revolution, from the First to the Fifteenth Session (1797).

[5] *See* Crimes Act of 1790, §§ 14–15, 1 Stat. 122, 115–16.

[6] *See, e.g.*, 18 U.S.C. § 1464 (uttering "any obscene, indecent, or profane language by means of radio communication"); Mich. Comp. Laws Ann. § 445.574a(2)(d) (returning out-of-state bottles or cans); 18 Pa. Cons. Stat. Ann. § 3929.1 (third offense of library theft of more than $150); *id.* § 7613 (reading another's email without permission).

misdemeanors seem serious.[7] As the Supreme Court noted recently: "a felon is not always more dangerous than a misdemeanant." *Lange v. California*, 594 U.S. 295, 305 (2021) (cleaned up).

At root, the Government's claim that "felons are not among 'the people' protected by the Second Amendment," *see* Gov't Range II En Banc Br. 9 n.1, devolves authority to legislators to decide whom to exclude from "the people." We reject that approach because such "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting). And that deference would contravene *Heller*'s reasoning that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S. at 636; *see also Bruen*, 597 U.S. at 26 (warning against "judicial deference to legislative interest balancing").

In sum, we reject the Government's contention that "felons are not among 'the people' protected by the Second Amendment." *Heller* and its progeny lead us to conclude that Bryan Range remains among "the people" despite his 1995 false statement conviction.

Having determined that Range is one of "the people," we turn to the easy question: whether § 922(g)(1) regulates Second Amendment conduct. It does. Range's request—to possess a rifle to hunt and a shotgun to defend himself at home—tracks the constitutional right as defined by *Heller*. 554

[7] *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 2504 (involuntary manslaughter); *id.* § 2707 (propulsion of missiles into an occupied vehicle or onto a roadway); 11 Del. Code § 881 (bribery).

U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."). So "the Second Amendment's plain text covers [Range's] conduct," and "the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17.

B

Because Range and his proposed conduct are protected by the Second Amendment, we now ask whether the Government can strip him of his right to keep and bear arms. To answer that question, we must determine whether the Government has shown that applying § 922(g)(1) to Range would be "consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. We hold that the Government has not carried its burden.

To preclude Range from possessing firearms, the Government must show that § 922(g)(1), as applied to him, "is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. Historical tradition can be established by analogical reasoning, which "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30. To be compatible with the Second Amendment, modern laws must be "'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*.

In attempting to carry its burden, the Government relies on the Supreme Court's statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding

prohibitions on the possession of firearms by felons." 554 U.S. at 626. A plurality of the Court reiterated that point in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). In his concurring opinion in *Bruen*, Justice Kavanaugh, joined by the Chief Justice, wrote that felon-in-possession prohibitions are "presumptively lawful" under *Heller* and *McDonald*. 597 U.S. at 81 (quoting *Heller*, 554 U.S. at 626–27 & n.26).[8]

Section 922(g)(1) is a straightforward "prohibition[ ] on the possession of firearms by felons." *Heller*, 554 U.S. at 626. And since 1961 "federal law has generally prohibited individuals convicted of crimes punishable by more than one year of imprisonment from possessing firearms." Gov't En Banc Br. at 1; *see* An Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). But the earliest version of that statute, the Federal Firearms Act of 1938, applied only to *violent* criminals. Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938). As the First Circuit explained: "the current federal felony firearm ban differs considerably from the [original] version . . . . [T]he law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011); *see also United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

Even if the 1938 Act were "longstanding" enough to warrant *Heller*'s assurance—a dubious proposition given the

[8] The *Heller*, *McDonald*, and *Bruen* Courts cited no such "longstanding prohibitions," presumably because they did "not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Heller*, 554 U.S. at 626.

Rahimi Court's focus on Founding-era sources, 144 S. Ct. at 1899–900, and the *Bruen* Court's emphasis on Founding- and Reconstruction-era sources, 597 U.S. at 34, 59–60—Range would not have been a prohibited person under that law. Whatever timeframe the Supreme Court might establish in a future case, *see Rahimi*, 144 S. Ct. at 1898 n.1, we are confident that a law passed in 1961—some 170 years after the Second Amendment's ratification and nearly a century after the Fourteenth Amendment's ratification—falls well short of "longstanding" for purposes of demarcating the scope of a constitutional right. So the 1961 iteration of § 922(g)(1) does not satisfy the Government's burden.[9]

The Government's attempt to identify older historical analogues also fails. The Government argues that "legislatures traditionally used status-based restrictions" to disarm certain groups of people. Gov't En Banc Br. at 4 (quoting *Range*, 53 F.4th at 282). Apart from the fact that those restrictions based

[9] Nor are we convinced by the 1920s and 1930s state statutes banning firearm possession by felons, or the 1960s laws disarming drug addicts and drug users, 1980s laws disarming persons unlawfully present in the United States and persons dishonorably discharged from the armed forces, or 1990s laws disarming domestic violence misdemeanants. Gov't Range II En Banc Br. 17, 20–21. These are all too late: "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 66 n.28; *Rahimi*, 144 S. Ct. at 1924 (Barrett, J. concurring) ("[T]he history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function.").

on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to Range. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today. And any such analogy would be "far too broad[ ]." *See Bruen*, 597 U.S. at 31 (noting that historical restrictions on firearms in "sensitive places" do not empower legislatures to designate any place "sensitive" and then ban firearms there). For instance, as the Government notes, colonial laws disarmed Loyalists for helping the British army or "bearing arms against" the Continental Congress. Gov't Range II En Banc Br. 13 (quoting Resolution of Mar. 13, 1776*, in Journal of the Provincial Congress of South Carolina*, 1776, at 77 (1776)). The colonies reasonably feared that Loyalists might take up arms again. But there is no such basis to fear that Range is disloyal to his country.

According to the Government, taken together, these proposed historical analogues support a principle that "American legislatures disarmed classes of individuals who posed a danger of misusing firearms." Gov't Range II En Banc Br. 19.

Rahimi did bless disarming (at least temporarily) physically dangerous people. The law that it upheld required "a finding that [the defendant] represents a credible threat to [someone else's] physical safety." 18 U.S.C. § 922(g)(8)(C)(i); 144 S. Ct. at 1894, 1896, 1898, 1901–02. It did so "because the Government offer[ed] ample evidence" of a tradition of disarming people who "pose[ ] a clear threat of physical violence to another." *Id.* at 1898, 1901; *accord id.* at 1898 ("credible threat to the physical safety of others"). But the

Government does not try to justify disarming Range on this ground, and with good reason: it has no evidence that he poses a physical danger to others or that food-stamp fraud is closely associated with physical danger. It conceded as much the first time this Court heard the case en banc. Oral argument at 35:05–34:10; 32:55–31:52; 28:45–28:10.

Rather, the Government seeks to stretch dangerousness to cover all felonies and even misdemeanors that federal law equates with felonies. It notes that *Rahimi* left open the possibility of "banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." Gov't Range II En Banc Br. 19 (quoting 144 S. Ct. at 1901). And it argues that those "convicted of serious crimes, as a class, can be expected to misuse firearms." *Id.* at 22 (internal quotation marks omitted); *accord United States v. Jackson*, 110 F.4th 1120, 1127–29 (8th Cir. 2024).

Even if that categorical argument could suffice to uphold the original 1938 felon-in-possession ban, it does not support the current one. Again, it is "far too broad[ ]." *Bruen*, 597 U.S. at 31. It operates "at such a high level of generality that it waters down the right." *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring). Like the Sixth Circuit, we refuse to defer blindly to § 922(g)(1) in its present form. *See United States v. Williams*, 113 F.4th 637, 658–61 (6th Cir. 2024) (categorizing crimes as crimes against the person, crimes like burglary and drug trafficking that "pose a significant threat of danger," and nondangerous ones).

To support the de facto permanent disarmament that § 922(g)(1) imposes, the Government points out that "the Founding generation determined that many criminal offenses were of such 'gravity' that they should 'expose offenders to the

harshest of punishments, including death.'" Gov't Range II En Banc Br. 10 (citation omitted). Our dissenting colleagues likewise reason "that fraudsters could lose their life, and hence their firearms rights." Dissent of Shwartz, J., at 5. It is true that "founding-era practice" was to punish some "felony offenses with death." Gov't Range II En Banc Br. 10. For example, the First Congress made forging or counterfeiting a public security a capital offense. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 115 (1790). That said, the crime to which Range pleaded guilty—making a false statement to obtain food stamps—may be more analogous to other offense defined in the same law punishable by a term of imprisonment or fine.[10] While some states at first punished nonviolent crimes "such as forgery and horse theft" with death, *see Folajtar*, 980 F.3d at 904 (citations omitted), by the early Republic, many states assigned lesser punishments.[11]

Yet the Founding-era practice of punishing some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue here—de facto lifetime disarmament for all felonies and felony-equivalent misdemeanors—is rooted in our Nation's history and tradition.

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[10] *See e.g.*, Crimes Act of 1790, § 15, 1 Stat. 122, 115–16 ("any person [who] shall feloniously . . . alter [or] falsify . . . any record . . . in any of the courts of the United States, by means whereof any judgment shall be reversed" is punishable by fine, whipping, or "imprison[ment] not exceeding seven years"); *id.* § 16 ("any person . . . [in] custody . . . of any victuals provided for the victualing of any soldiers . . . [who] for any lucre or gain, . . . embezzle, purloin or convey away [such goods]" is punishable by fine or public whipping).

[11] *See supra* note 4.

Though our dissenting colleagues read *Rahimi* as blessing disarmament as a lesser punishment generally, the Court did not do that. Instead, it authorized temporary disarmament as a sufficient analogue to historic temporary imprisonment *only* to "respond to the use of guns to threaten the physical safety of others." *Compare Rahimi*, 144 S. Ct. at 1902, *with United States v. Diaz*, 116 F.4th 458, 469–70 (5th Cir. 2024) (similarly broad reasoning).

For similar reasons, Founding-era laws that forfeited felons' weapons or estates are not sufficient analogues either. Such laws often prescribed the forfeiture of the specific weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally. *See, e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343–344 ("An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns"); Act of Apr. 20, 1745, ch. 3, N.C. Laws 69–70 ("An Act to prevent killing deer at unseasonable times, and for putting a stop to many abuses committed by white persons, under pretence of hunting"). So in the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society.

Against this backdrop, it's important to remember that Range's crime—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession. The Government has not cited a single statute or case that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime. Nor has the Government cited forfeiture cases in which the convict was prevented from

regaining his possessions, including firearms (unless forfeiture preceded execution). That's true whether the object forfeited to the government was a firearm used to hunt out of season, a car used to transport cocaine, or a mobile home used as a methamphetamine lab. And of those three, only firearms are mentioned in the Bill of Rights.[12]

For the reasons stated, we hold that the Government has not shown that the principles underlying the Nation's historical tradition of firearms regulation support depriving Range of his Second Amendment right to possess a firearm.[13] *See Rahimi*, 144 S. Ct. at 1898; *Bruen*, 597 U.S. at 17.

* * *

Our decision today is a narrow one. Bryan Range challenged the constitutionality of 18 U.S.C. § 922(g)(1) only

[12] Even arms used to commit crimes bordering on treason were sometimes returned to the perpetrators during the Founding era. After the Massachusetts militia quelled Shays's Rebellion in 1787, the state required the rebels and those who supported them to "deliver up their arms." 1 Private and Special Statutes of the Commonwealth of Massachusetts from 1780–1805, 145–47 (1805). But those arms were to be returned after three years upon satisfaction of certain conditions. *Id.* at 146–47.

[13] Our concurring colleague criticizes that our opinion "creates more questions than it answers" and that we "decline to adopt any articulable methodology of [our] own." Concurrence of Krause, J., 67, 65. But in this as-applied constitutional challenge, our task is to decide only Mr. Range's case, rather than preview how this Court would decide future Second Amendment challenges.

as applied to him given his violation of 62 Pa. Stat. Ann. § 481(a). Range remains one of "the people" protected by the Second Amendment, and his eligibility to lawfully purchase a rifle and a shotgun is protected by his right to keep and bear arms. More than two decades after he was convicted of food-stamp fraud and completed his sentence, he sought protection from prosecution under § 922(g)(1) for any future possession of a firearm. The record contains no evidence that Range poses a physical danger to others. Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights. We will reverse the judgment of the District Court and remand so the Court can enter a declaratory judgment for Range, enjoin enforcement of § 922(g)(1) against him, and conduct any further proceedings consistent with this opinion.

MATEY, *Circuit Judge*, concurring.

Having "arms for [one's] defence . . . is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation." 1 William Blackstone, Commentaries *143–44. I agree with the majority that the Justice Department has not shown that § 922(g)(1) can be applied to disarm Bryan Range. I write separately to explain why that conclusion follows classical principles respecting the natural rights that inform "our regulatory tradition." *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024). Doing so demonstrates the "reason and spirit" of the law, 1 Blackstone, Commentaries *61, or the "principles underlying the Second Amendment," *Rahimi*, 144 S. Ct. at 1898. Although historical practices need not be a "dead ringer" or a "historical twin," *Rahimi*, 144 S. Ct. at 1898 (quoting *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1, 30 (2022)), they must always faithfully follow the "the first and primary end of human laws, [which] is to maintain and regulate [the] absolute rights of individuals," Alexander Hamilton, The Farmer Refuted (1775), *reprinted in The Revolutionary Writings of Alexander Hamilton* 53 (Richard B. Vernier ed., 2008) (emphasis omitted) (quoting 1 Blackstone, Commentaries *124). That is the tradition informing our historical practice, and the principle that necessarily guides our analysis.

I.

Preserving "unalienable rights" justified our separation from England, Declaration of Independence para. 2 (U.S. 1776), and required a government "ordain[ed]" to "promote the general Welfare" and "secure the Blessings of Liberty," U.S. Const., pmbl. That is because "natural liberty is a gift of the beneficent Creator," while "[c]ivil liberty is only natural

liberty, modified and secured by the sanctions of civil society." Hamilton, *supra*, at 70 (emphasis omitted); *see also Collected Works of James Wilson* 1083 (Kermit L. Hall & Mark David Hall eds., 2007) ("[M]an does not exist for the sake of government, but government instituted for the sake of man."). But the fundamental rights that predate America are not unlimited, and like any law, never license acting contrary to the common good.[1] These inherent limitations apply to all of man's "natural rights," and are consistent with the Supreme Court's repeated explanation that the "pre-existing" "individual right to keep and bear arms" for self-defense is "not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 592, 595 (2008) (emphasis omitted); *see also Bruen,* 597 U.S. at 20; *Rahimi*, 144 S. Ct. at 1897.[2]

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[1] *See Collected Works of James Wilson* 1055–56. ("[S]elfishness and injury are as little countenanced by the law of nature as by the law of man."); Thomas Aquinas, *Summa Theologica*, pt. I-II, q. 90, art. 2 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) (c. 1271) ("Consequently, since the law is chiefly ordained to the common good, any other precept in regard to some individual work, must needs be devoid of the nature of a law, save in so far as it regards the common good. Therefore every law is ordained to the common good.").

[2] *See Collected Works of James Wilson* at 1056. ("Upon the whole, therefore, man's natural liberty, instead of being abridged, may be increased and secured in a government, which is good and wise. As it is with regard to his natural liberty, so it is with regard to his other natural rights."); *The Unsigned Essays of Supreme Court Justice Joseph Story: Early American Views of Law* 262 (Valerie L. Horowitz ed., 2015)

Surveying history helps us understand the reasons relied on to regulate the right, *see Bruen*, 597 U.S. at 27–29; *Rahimi*, 144 S. Ct. at 1898, ensuring a "[c]ontinuity of [p]rinciples" faithful to our inherited tradition.[3] We look, in other words, for "markers or indicators that the later doctrine is essentially continuous with the earlier one and grows out of it, rather than representing a break with the past that mutilates or fundamentally transforms the core and essence of the doctrine." Adrian Vermeule, *Common Good Constitutionalism* 123 (2022). So we must consider the sources that animate the

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("[U]nder certain circumstances, life, and liberty, and property, may justly be taken away; as, for instance, in order to prevent crimes, to enforce the rights of other persons, or to secure the safety and happiness of society.").

[3] John Henry Newman, *An Essay on the Development of Christian Doctrine* 178 (Longmans, Green, & Co. 1909) (1845); *see also id.* at 178–79 ("[P]rinciples are permanent," so "[d]octrines stand to principles, as the definitions to the axioms and postulates of mathematics."); Jamie G. McWilliam, *A Classical Legal Interpretation of the Second Amendment*, 28 Tex. Rev. L. & Pol. 125, 159 (2024) ("Even when circumstances evolve, the principles remain the same" so any "statutes governing arms for the common good must be evaluated for their compliance with the principles of the *ius naturale* and the determinations thereof embodied in the Second Amendment."); *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 630–31 (1853) ("[*L*]*aw* is the *perfection* of *reason*, and that it is the *reason* and *justice* of a legal principle, which give to its *vitality*," therefore, "recurrence should be had to fundamental principles, and the authority of precedent regarded so far only as there is to be found a conformity to *reason* and the *true nature* of our own government.").

natural right to bear arms, and the origin of the tradition that inspired that right, since "the object" of declaring our independence was "not to find out new principles, or new arguments, never before thought of, [or] merely to say things which had never been said before." Letter from Thomas Jefferson to Henry Lee (May 8, 1825). Instead, we sought to "place before mankind the common sense of the subject . . . giv[ing] to that expression the proper tone and spirit called for by the occasion. [A]ll [its] authority rests then on the harmonising sentiments of the day, whether expressed, in conversns in letters, printed essays or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney Etc." *Id.*[4]

[4] I follow the well-established practice of consulting classical authorities discussing natural law to inform the determination of written rights. "[S]eventeenth- and eighteenth-century jurists such as Hugo Grotius, Samuel Pufendorf, Emmerich de Vattel, and William Blackstone" all held a "jurisprudential worldview" that reflects an "interpretive tradition" of viewing "natural law not simply as a collection of universally valid substantive moral principles grounded in human nature, but also as an interpretive approach." Robert Lowry Clinton, *The Supreme Court Before John Marshall*, 27 J. Sup. Ct. Hist. 222, 227 (2002). The theory that "the substance of the law *pre-exists* its 'declaration' by courts or other authoritative interpreters" "formed the horizon within which the pre-Marshall and Marshall Courts understood the judicial function and its limitations." *Id.* Examples from the early years following the Founding abound. *See, e.g.*, *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (Story, Circuit Justice, C.C.D. Mass. 1822) (No. 15,551) ("[E]very doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral

obligation, may theoretically be said to exist in the law of nations . . . . And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admits the injustice or cruelty of it."); *United States v. Libellants & Claimants of The Schooner Amistad* (*The Amistad*), 40 U.S. (15 Pet.) 518, 595 (1841) (relying on the "enteral principles of justice and international law"); *Coffin v. United States*, 156 U.S. 432, 453–57 (1895) (tracing the "principle that there is a presumption of innocence in favor of the accused" back to the Roman law). That practice continued into the Twentieth Century. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 65–67 (1905) (Harlan, J., dissenting) (explaining that although the "inherent rights" to "'be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, [and] to pursue any livelihood or avocation'" are free from "undu[e] interference," the government may exercise its "police power" to "promote the general welfare, or to guard the public health, the public morals, or the public safety" (quoting *Allgeyer v. Lousiana*, 165 U.S. 578, 589 (1897))); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Berea Coll. v. Kentucky*, 211 U.S. 45, 67–68 (1908) (Harlan, J.,

Absent exploration of the natural principles that support our legal tradition, we overlook those "certain primary truths, or first principles, upon which all subsequent reasonings must depend." The Federalist No. 31, at 193 (Alexander Hamilton) (C. Rossiter ed., 1961). In other words, an appropriate historical inquiry cannot be conducted while blind to the "reason and spirit" of the law, 1 Blackstone, Commentaries *61, which provided for its validity and natural purpose.[5]

Rightly framed, history reveals two principles informing a consistent tradition. First, because the right to self-defense is protected by the Second Amendment and preexists our Founding, laws extensively regulating the types of firearms a person can possess and the places where possession is permitted can "eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 597 U.S. at 31;

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dissenting) ("The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. . . . The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law."); *Farrington v. Tokushige*, 273 U.S. 284, 299 (1927) (explaining that despite "grave problems" incident to changing social conditions, the government cannot infringe on the "fundamental rights of the individual" that the Fourteenth Amendment was enacted to protect).

[5] "The Founders saw nothing particularly strange, or insuperable, in the task of appealing to those laws of reason . . . ." Hadley Arkes, *Constitutional Illusions and Anchoring Truths: The Touchstone of Natural Law* 25 (2010).

see also Heller, 554 U.S. at 636. All showing a robust protection of the right to bear arms by those within the civil society that can rarely be circumvented by the sovereign.

Second, because "public Virtue is the only Foundation of Republics,"[6] the natural right to self-defense, like all other natural rights, can be exercised only by "a virtuous people who were controlled from within by a moral compass" that "respect[] social order, legitimate authority," and "civic virtue."[7] This principle provides the reason for restrictions of the right to bear arms on those who set themselves against civil

[6] Letter from John Adams to Mercy Otis Warren (Apr. 16, 1776); *see also* Washington's Farewell Address (Sept. 17, 1796), *in* 1 *A Compilation of Messages and Papers of the President, 1789–1897*, 213, 220 (James D. Richardson ed., 1896) ("It is substantially true, that virtue or morality is necessary spring of popular government. The rule indeed extends with more or less force to every species of free government."); Letter from John Adams to Zabdiel Adams (June 21, 1776) ("[I]t is Religion and Morality alone, which can establish the Principles upon which Freedom can securely stand . . . . The only foundation of a free Constitution, is pure Virtue, and if this cannot be inspired into our People, in a greater Measure, than they have it now, They may change their Rulers, and the forms of Government, but they will not obtain a lasting Liberty.—They will only exchange Tyrants and Tyrannies.").

[7] Daniel L. Dreisbach, *Reading the Bible with the Founding Fathers* 68 (2017); *see also* John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798) ("Our Constitution was made only for a moral and religious people.").

society by individual actions inconsistent with the common good.[8] *See Rahimi*, 144 S. Ct. at 1901 ("[C]ommon sense suggests [that] [w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."); 1 Blackstone, Commentaries *251 ("For civil liberty, rightly understood, consists in protecting the rights of individuals by the united force of society; society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power; and obedience is an empty name, if every individual has a right to decide how far he himself shall obey."). Regulations concerning *what* types of firearms a person may carry and *where* a person may carry uniformly apply to everyone. But regulations on *who* may carry center on remedying, through punishment, present threats to the community stemming from individualized conduct. And rightfully so, because "[t]he object of human punishment" includes "depriving the offender of the power of doing mischief" in order to "secure the safety of the community." *The Unsigned Essays of Supreme Court Justice Joseph Story: Early American Views of Law* 98 (Valerie L. Horowitz ed., 2015) [hereinafter *Essays of Justice Story*]. Because it is "the right of every society to protect its own peace and interests," necessary measures may be implemented as "punishment, if the safety of society requires it." *Id*.; *see also* Thomas Aquinas, *Summa*

[8] This principle is not synonymous with the Justice Department's erroneous argument that the Second Amendment can be exercised only by law-abiding and responsible citizens, which the Supreme Court rejected in *Rahimi*. *See* 144 S. Ct. at 1903 (rejecting "responsible" as too vague a term). As explained, "responsible" is not defined by the whim of the sovereign or the will of the majority, but instead flows from the classical concept of the common good.

Theologica, pt. I-II, q. 96, art. 2 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) ("[H]uman laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.").[9]

A.

I begin with a brief examination of the liberty to defend oneself with arms, a right inherent in natural society that "[t]he law very wisely, and in a manner silently, gives a man." Marcus Tullius Cicero, *Speech in Defence of Titus Annius Milo* (c. 52 B.C.), *in* 3 *Orations of Marcus Tullius Cicero* 390, 394 (C.D. Yonge trans., 1913). Cicero explained that "if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our

[9] Underexplored in this debate is the role of punishment in "depriving the offender of the power of doing mischief" in order to "secure the safety of society." *Essays of Justice Story*, *supra*, at 98. Moving forward, litigants and scholars alike should consider the role of government in punishing individuals who have exhibited dangerous conduct setting themselves against the general welfare of the community. *See Summa Theologica*, *supra*, pt. I-II, q. 87, art. I ("It has passed from natural things to human affairs that whenever one thing rises up against another, it suffers some detriment therefrom. . . . Consequently, whatever rises up against order, is put down by that order or by the principle thereof."); John Locke, *Second Treatise of Government*, §§ 87–88 (1690); Adam Smith, *The Theory of Moral Sentiments*, pt. II, § 2, ch. 1 (1759).

safety is honorable." *Id.* This law of self-defense "is a law . . . not written, but born with us, —which we have not learnt, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made." *Id.*

The Roman empire echoed Cicero's points "for centuries to come." Stephen P. Halbrook, *That Every Man Be Armed* 20 (1984). The *Lex Cornelia de sicariis* of 81 B.C. stated that carrying weapons was lawful but not carrying a "sword of vengeance" or "weapons for the purpose of homicide." J. Inst. 4.18.5 (J. Moyle trans. 1913). Accordingly, "whatever a person does for his bodily security he can be held to have done rightfully." Dig. 1.1.3 (Florentinus, Institutes 1) (Alan Watson, trans., 1998). But "rightfully" is the condition that justifies the action. Dig. 1.1.1 (Ulpian, Institutes 1). "The basic principles of right are: to live honorably, *not to harm any other person*, [and] to render to each his own." Dig. 1.1.10 (Ulpian, Rules 1) (emphasis added). Thus, "it is a grave wrong for one human being to encompass the life of another." Dig. 1.1.3 (Florentinus, Institutes 1).

Centuries later, Thomas Aquinas likewise taught that the "act [of killing another in self-defense], since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in 'being,' as far as possible." *Summa Theologica*, *supra*, pt. II-II, q. 64, art. 7. But killing a just or innocent is wrong because "the life of the righteous men preserves and forwards the common good." *Id.* art. 6, resp. Aquinas also noted that the fundamental right to defense did not extend to tumultuously rising up against the government in opposition to the "unity and peace of a people." *Id.* q. 42, art. 1. "[S]edition is contrary to the unity of the multitude." *Id.* q. 42, art. 2. Citing to Augustine, Aquinas

defines "sedition" as being against "the assembly of those who are united together in fellowship recognized by law and for the common good," making "sedition . . . opposed to justice and the common good." *Id.*; *see also* 2 St. Augustine, *City of God*, Book II, ch. 21, at 75–76 (Marcus Dods, ed. & trans., Edinburgh, Murray & Gibb 1871) (defining "the people" as "being not every assemblage or mob, but an assemblage associated by a common acknowledgment of law, and by a community of interests"). But "[t]hose, however, who defend the common good, and withstand the seditious party, are not themselves seditious, even as neither is a man to be called quarrelsome because he defends himself." *Summa Theologica*, *supra*, pt. II-II, q. 42, art. 2.[10]

These elementary sources teach that persons have a fundamental right to use arms to preserve innocent human life. But this liberty cannot be used harm another human life, or to rebel against a just government. Taken together, these principles instruct that the natural right of self-preservation does not extend to bearing arms in a manner that undermines the common good.

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[10] This principle does not criminalize individuals of the community from uprising against a tyrannical government. A "tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler." *Summa Theologica*, *supra*, pt. II-II, q. 42, art. 2. So "there is no sedition in disturbing a government of this kind." *Id.*; *see also* McWilliam, *supra*, at 154 ("Resistance to an unjust ruler is also an application of the *ius naturale* principle of self-defense. . . . As such, the natural law has a deep condemnation for unjust rulers who act for their own private good rather than for the common good and justice of all.").

B.

English practices applied and developed these principles. Blackstone pointed out that the right of all Englishmen to "hav[e] arms for [one's] defence" is rooted in "the natural right of resistance and self-preservation." 1 Blackstone, Commentaries *143–44.[11] It was a "birthright," 1 Blackstone, Commentaries *140, that "appertain[ed] to every Englishmen," *id.* at *136, an "ancient right[] and libert[y]," later codified by Parliament in the English Bill of Rights in 1689, *see* Bill of Rights, 1 W. & M. Sess. 2 c. 2 ("[S]ubjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law."). John Locke echoed similar points, explaining that "by the fundamental law of nature . . . one may destroy a man who makes war upon him . . . for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence." John Locke, *Second Treatise of Government*, § 16 (1690). This

[11] *See also* William Blizard, *Desultory Reflect on Police: With an Essay on the Means of Preventing Crimes and Amending Criminals* 59–60 (London, 1785) ("The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom . . . . [This right is] most unquestionabl[e] . . . [and] most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense."); 3 Blackstone, Commentaries *3–4 ("Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.").

comports with reason that "man [must] be preserved as much as possible," but "when all cannot be preserved, the safety of the innocent is to be preferred." *Id.*

But English history reflects the ancient prohibition on men exercising their fundamental rights to intentionally harm the life or safety of another, or to rebel against a just government.

1. For example, kings prohibited using arms against the community, with violators subject to disarmament. Alfred the Great proscribed violent acts with arms.[12] The Statute of Northampton, 2 Edw. 3, c. 3, followed in 1328 to address the dangers from "[b]ands of malefactors, knights as well as those of lesser degree," that "harried the country, committing assaults and murders," and the resulting "spirit of insubordination." K. Vickers, *England in the Later Middle Ages* 107 (C. Oman ed., 4th ed. 1926); *see also* Edward Coke, *The Third Part of the Institutes of the Laws of England* 160 (London, M. Flesher 1644) ("For in those daies this deed of Chivalry was at random, whereupon great perill ensued . . . ."). To enforce the Statute, Edward III ordered sheriffs to investigate "the malefactors who have made assemblies of men-at-arms or have ridden or gone armed in his bailiwick, contrary to the statute and the king's proclamation." Letter to

[12] *See* The Laws of King Alfred the Great §§ 7, 19, 38 (c. 878), *reprinted in* 3 *The Whole Works of King Alfred the Great* 119, 127, 129, 133 (Oxford, Messrs J.F. Smith & Co. 1852) (prohibiting "fight[ing]" or "draw[ing] out his weapon" in the "king's hall," "lend[ing] [one's] weapon to another," with the intent that the borrower would "slay a man with it," use, by "a sword-whetter," of another's weapon to commit a crime, and "disturb[ing] the folk-mote with weapon drawing").

Keeper and Justices of Northumbridge (Oct. 28, 1332), *reprinted in* 2 *Calendar of the Close Rolls, Edward III, 1330–1333* 610 (H.C. Maxwell Lyte ed., London, Eyre & Spottswood 1898). The Statute allowed the sovereign to "punish people who go armed to terrify the King's subjects." *Sir John Knight's Case* (1686) 87 Eng. Rep. 75, 76; 3 Mod. 117, 118 (KB). That was "likewise a great offence at the common law, as if the King were not able or willing to protect his subjects." *Id.* The Statute of Northampton thus followed the path of the classical law, demonstrating the right to carry arms could not license a right to cause public terror. *See Bruen*, 597 U.S. at 45–46; *United States v. Williams*, 113 F.4th 637, 650 (6th Cir. 2024); *Kanter v. Barr*, 919 F.3d 437, 456–57 (7th Cir. 2019) (Barret, J. dissenting), *abrogated by Bruen*, 597 U.S. at 70–71.

But the Statute did not displace the right of using arms for self-defense and continued the understanding that an individual "may not onely use force and armes" but also "assemble his friends and neighbors to keep his house against those that come to rob, or kill him, or to offer him violence." *The Third Part of the Institutes of the Laws of England*, at 161–62. Use of force to oppose unlawful force is "by construction excepted out of this [Statute]" because the laws permit the taking up of arms against armed persons. *Id.* at 162 ("Armaque in Armatos sumere jura sinunt."). As a result, individuals with the "intent to defend themselves against their adversaries, are not within the meaning of this Statute, because they do nothing *in terrorem populi*." 2 William Hawkins, *A Treatise of the Pleas of the Crown* ch. 63, § 9, at 22 (7th ed. 1795).

Along with prohibiting affrays, the English surety system dating back to the Saxons also grounded the right to

bear arms. *See* 4 Blackstone, Commentaries *252. Though initially in the form of "decennaries or frank pledges" where the community mutually promised for a person's good behavior, surety laws later converted into an individual offer of security guaranteeing their own good behavior. *Id.*; *see also Rahimi*, 144 S. Ct. 1899–1900. Under this system, "[a]ny justices of the peace" could demand a surety "according to their own discretion" or at the request of another provided "due cause [was] shown." 4 Blackstone, Commentaries *253. Sureties were used to prevent two distinct types of future harm by keeping the peace and ensuring good behavior. *Id.* at *251, 254–56. Sureties complemented recognizances,[13] and "[a]ny justice of the peace" could "bind all those to keep the peace[,] who in his presence make any affray, or threaten to kill or beat another, or contend together with hot and angry words, or go about with unusual weapons or attendance, to the terror of the people." *Id.* at *254. Similarly, an individual could demand a surety from another when he "hath just cause to fear" that

[13] Recognizances for good behavior included "security for the peace," but also covered "somewhat more." 4 Blackstone, Commentaries *256. Justices of the peace were empowered "to bind over to the good behaviour towards the king and his people" all individuals "that be not of good fame." *Id.* The general phrase "not of good fame," described men that acted "*contra bonos mores*," meaning against good morals, or "*contra pacem*" meaning against the peace. *Id.*; *see id.* (elaborating that this phrase applied to men who kept the company of "women of bad fame," those who "tend[] to scandalize the government," those who "abuse the officers of justice," "common drunkards," or "eaves-droppers"). All showing the moral basis for regulation to preserve the common good.

another in the community would "do him a corporal injury, by killing, imprisoning[,] or beating him." *Id.* at *255.

Accordingly, regardless of whether surety laws serve as proper historical evidence supporting disarmament before an individualized conviction of a violent crime, *see Rahimi*, 144 S. Ct. at 1938–42 (Thomas, J., dissenting), the surety system illustrates the long-standing idea that liberty cannot be used for lawless violence, consistent with the natural law principles prohibiting individuals from exercising their right to bear arms to tarnish the shared life or dignity of the community.

2. English law also curtailed the right to bear arms of individuals suspected of treason or sedition against the sovereign. The Militia Act of 1662 authorized officers of the Crown to disarm any individual that either a Lieutenant or two or more Deputies "judge[d] dangerous to the Peace of the Kingdome," to "[s]ecure the Peace of the Kindgome." City of London Militia Act 1662, 14 Car. 2, c. 3, § 13. In practice, the law was used to confiscate arms from anyone threatening the absolute rule of King Charles II. *See* Stephen P. Halbrook, *The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class?* 35–36, 60–61 (2021).

Similarly, the Game Act of 1670 imposed a property requirement for gun ownership, and effectively disarmed most commoners. 22 & 23 Car. 2, c. 25 (1670); *The Right to Bear Arms*, *supra*, at 36. As Blackstone explains, "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people . . . is a reason oftener meant than avowed by the makers of forest or game laws." 2 Blackstone, Commentaries *412. And both laws were often used to disarm persons presumed disloyal, including Protestants under Charles II and James II. *That Every Man Be*

Armed, *supra*, at 43; *see* The Somers Papers, *in* 2 *Miscellaneous State Papers from 1501–1726* at 407, 417–18 (W. Strahan and T. Cadell 1778).

But arbitrary use of this power left James II exiled, William and Mary on the throne, and Catholics disarmed under Protestant rule. *See* 1 W. & M. c. 15, § 4 (1688) (requiring all Catholics and presumed Catholics to swear loyalty to the Crown or forfeit their arms); *see also The Right to Bear Arms*, *supra*, at 60; Bill of Rights, 1 W. & M. Sess. 2 c. 2, § 7 (1689) (codifying that only Protestants may have arms for self-defense). Under the reign of William and Mary, there was "cause to fear that a person, although technically an English subject, was because of his beliefs effectively a resident enemy alien liable to violence against the king." *See* C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 723 (2009). Any such violence was considered treason because it would "affect the supreme executive power," "amount[ing] either to a total renunciation of that allegiance, or at the least a criminal neglect of that duty, which is due from every subject to his sovereign." 4 Blackstone, Commentaries *75. As a result, "being Roman Catholic was equated with supporting James II and thus with presumptive treason." Marshall, 32 Harv. J.L. & Pub. Pol'y at 721. This is because Roman Catholics essentially "acknowledge[d] a foreign power, superior to the sovereignty of the kingdom," and thus they "[could not] complain if the laws of that kingdom [did] not treat them upon the footing of good subjects." 4 Blackstone, Commentaries *55. But despite this presumption, disarmament did not occur until an individual declined to swear an oath of loyalty to the Protestant king. *Id.* at 722–23. And even upon such refusal, an individual could still keep "necessary [w]eapons . . . for the defence of his

House or person." 1 W. & M. c. 15, § 3 (1688); *see also* Joyce Lee Malcolm, *To Keep And Bear Arms* 122–23 (1994) ("They assumed that everyone had a right to own firearms unless he could be conclusively convicted of Catholicism. Even in this time of danger, Catholics were considered to have a right to own arms for their personal defence and the defence of their households."). This historical strife between Catholics and Protestants reveals a fundamental principle about the right to have arms for self-defense: the king could disarm classes of people who posed true risk of sedition or treason to the sovereign. [14]

* * *

In sum, as reflected in the English Bill of Rights, bearing arms for self-defense was a fundamental right, originating from the laws of nature. But that right was restricted by laws prohibiting the use of arms to intentionally cause terror or harm to members of the community. And government could disarm classes of people that posed an actual risk of sedition or treason. These traditions follow the classical

[14] Notably, groups that were disarmed as dangerous by posing risk of sedition or treason differed from individuals viewed as dangerous by causing intentional physical harm to another. Rather than posing harms directly to the subjects of the King, groups likely to revolt against the King posed a threat to the Order of the King. *See* 4 Blackstone, Commentaries *81–82 ("[T]reason" and "insurrection" amount to "a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority."). But "riot[s]" or crimes imagined to a neighbor's land, home, or life were considered "no high treason" because they amount to "no general defiance of the public government." *Id.* at *82.

principles of self-preservation, disallowance of public harm, and the elementary view that because government exists for the common good of the community, it may defend its own existence.

C.

These principles are reflected in our Founding and the Second Amendment, exhibiting respect for the fundamental right to bear arms and its natural limitation that one must not use that liberty to subvert the common good.

Spanning from the colonial generation to the Founders, history reveals that bearing arms for self-defense is rooted in the natural law.[15] Recounting British history, Samuel Adams noted that James II disregarded the "*natural, inherent, divinely[,] hereditary[,] and indefeasible* rights of [his] subjects," but praised the English constitution for restoring the country's "original principles" and noted that the "bill of rights" "stands as a bulwark to the natural rights of subjects." Samuel Adams, *Boston Gazette*, Feb. 27, 1769, at 3, col. 1. The natural right of self-defense was the core of John Adams's defense of the soldiers on trial for the Boston Massacre, contending that "every private person is authorized to arm himself, and on the strength of this authority, [he did] not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence." 3 *Legal Papers of John Adams*

[15] This truth is not a historic relic. Today, still recognizing that certain rights predate government, "35 state constitutions expressly declare that rights are inherent or natural." Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 316 (Rachel E. Barkow et al., 3d ed. 2022).

248 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); *see also id.* at 245 ("The rules of the common law therefore, which authorize a man to preserve his own life at the expence of another's, are not contradicted by any divine or moral law."). Adams explained that the right of self-preservation "is not only our indisputable right, but our clearest duty, by the laws of nature, this is interwoven in the heart of every individual." *Id.* at 244.

These principles influenced colonial America's collective declaration of independence from Great Britain.[16]

[16] *See* Simeon Howard, A Sermon Preached to the Ancient and Honorable Artillery Company in Boston (June 7, 1773), *in* 1 *American Political Writing During the Founding Era, 1760–1805* 186, 201–02 (Charles S. Hyneman & Donald S. Lutz eds., 1983) ("Men are bound to preserve their own lives, as long as they can, consistently with their duty in other respects" and are "bound both by the law of nature and revelation, to provide in the best manner [they] can, for the temporal happiness of [their] famil[ies]. . . . It is therefore an act of benevolence to oppose and destroy that power which is employed in injuring others; and as much, when it is that of a tyrant, as of a wild beast."); Thomas Paine, *The Crisis I: These Are the Times that Try Men's Souls* (Dec. 23, 1776), *reprinted in* 1 *The Complete Writings of Thomas Paine* at 50, 55–56 (Phillip S. Foner, ed., 1945) ("[I]f a thief breaks into my house, burns and destroys my property, and kills or threatens to kill me, or those that are in it, and to 'bind me in all cases whatsoever' to his absolute will, am I to suffer it? What signifies it to me, whether he who does it is a king or a common man; my countryman or not my countryman; whether it be done by an individual villain, or an army of them?").

Following the Revolution, several states recognized a right to bear arms for self-defense rooted in the natural law. *See The Right to Bear Arms*, *supra*, at 147–52 (detailing the specific protections in Virginia, Pennsylvania, North Carolina, Vermont, and Massachusetts declarations of rights); Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 309–17 (Rachel E. Barkow et al., 3d ed. 2022) (same). So too with the Second Amendment, which was "considered as the true palladium of liberty" because "[t]he right of self defence is the first law of nature." 1 Blackstone, Commentaries, app. at 300 (St. George Tucker ed., 1803).

At the core of early America's robust regard of the right to bear arms was "the great natural law of self-preservation" that gives rise to the necessity "for the defence of one's person or house." *Collected Works of James Wilson* 1142 (discussing the principles behind the Pennsylvania Constitution's protection of the right to bear arms that date back to the Saxon era, where individuals "were bound" "to keep arms for the preservation of the kingdom, and of their own persons"). Affirming what reason suggests, American law holds that "a man has a perfect right to his life, to his personal liberty, and to his property," thereby permitting a man "by force [to] assert and vindicate those rights against every aggressor." *Essays of Justice Story*, *supra*, at 262. But the right to possess arms for self-preservation has long been regulated to prohibit violence against the people, and violence against the State—the same the two limitations found in English history, and the classical tradition.

1. Laws prohibiting use of arms to cause terror to members of the community date back to colonial America. In 1736, a Justice of the Peace in Virginia provided that it is the

duty of "[e]very constable, as a Minister of the Justice," to "take away Arms from such who ride, or go, offensively armed, in Terror of the People, and may apprehend the Persons, and carry them, and their Arms, before a Justice of Peace." George Webb, *The Office and Authority of a Justice of Peace* 92–93 (Williamsburg, William Parks 1736). Justices of the Peace in New Hampshire were instructed to do the same.[17] If "legal proof of any such offence" was presented, the justice was permitted to "commit him to prison" and "cause his arms or weapons to be taken away." Acts and Laws of His Majesty's Province of New Hampshire ch. 11 § 5 (1771). And colonial Massachusetts similarly prohibited "rid[ing] or go[ing] armed Offensively." Mass. Province Laws ch. 18, § 6 (1692).

These laws, which essentially copied the Statute of Northampton, carried over into Founding-era America.[18] Like

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[17] *See* Acts and Laws of His Majesty's Province of New Hampshire ch. 11 § 5 (1771) ("[E]very justice of the peace within this province, may cause to be stayed and arrested all affrayers, rioters, disturbers or breakers of the peace, or any other that shall go armed offensively, to put his majesty's subjects in fear by threat[e]ning speeches.").

[18] For example, Virginia enacted a near duplicate of the Statute: "No man, great nor small, of what condition soever he be . . . go nor ride armed by night nor by day, in fair or markets, or in other places, in terror of the county." *A Collection of All Such Acts of the General Assembly of Virginia* at 33 (Virginia, Augustine Davis 1794). So too did North Carolina. *See A Collection of Statutes of the Parliament of England in Force in the State of North Carolina* 60–61 (New Bern, Francois-Xavier Martin 1792) ("[N]o man great nor small, of what condition soever he be, . . . [shall] bring no force in affray of peace, nor

the original, these statutes prohibited persons from going armed to commit affrays or cause terror to the community.[19] The English surety regime also persisted, allowing temporary disarmament for violations. *Rahimi*, 144 S. Ct. at 1900–01. All consistent with the traditional principle that the right to bear arms for self-defense must not be abused to physically harm members of the community.

2. Laws addressing danger to the State focused on groups viewed as disloyal to the government. Take Beacon's Rebellion in 1676, when the rebels in James City County were temporarily disarmed. *See The Right to Bear Arms*, *supra*, at 111–13; *id.* at 113 ("The restraint was only during the rebellion. Now every man may bear arms."). And during the French and Indian War, Catholics who refused to swear an oath of undivided allegiance were prohibited from possessing "in his house or elsewhere" any "arms, weapons, gunpowder[,] or

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to go nor ride armed by night nor by day, in fairs, markets nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere."). The District of Columbia seemingly proposed similar draft legislation, although it is unclear whether that draft legislation ever carried force of law. *See Code of Laws for the District of Columbia: Prepared Under the Authority of The Act of Congress of the 29th of April, 1816* 253–54 (Washington, Davis & Force 1818).

[19] Because affrays were considered "crimes against the personal safety of the citizens," *Collected Works of James Wilson* 1138, as a penalty, individuals had to forfeit their armour to the government. *See Essays of Justice Story*, *supra*, at 97 ("The right of society to punish offences against its safety and good order will scarcely be doubted by any considerate person.").

ammunition." 7 William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia* 36–37 (Richmond, Franklin Press 1820).[20] Why? Because "Protestant colonial governments feared that loyalty to the Pope would cause Catholics to take up arms for France." *United States v. Jackson*, 85 F.4th 468, 471 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing en banc).

Unsurprisingly, the Revolutionary War led to widespread disarmament of loyalists. *See* Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 61–63 (2024) (detailing eight orders and laws disarming loyalists to "suppress[]" "enemies to American Liberty," one of which was issued by George Washington). In New York, "any person or persons" convicted of "having furnished the ministerial army or navy . . . with provisions or other necessaries . . . shall be disarmed." Resolutions of September 1, 1775, *reprinted in* 1 *Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York* 131, 132 (Albany, Thurlow Weed 1842). South Carolina prohibited any person from "bear[ing] arms against" or

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[20] *See also* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 157 (2007) (explaining that colonial Virginia "acted to disarm Catholics" "not on the basis of faith" but on "the basis of allegiance"); Johnson et al., *supra*, at 197 (summarizing Maryland laws that forbid possession of firearms and ammunition by "Marylanders who refused to swear loyalty to King George III" and legislation passed by the lower house to disarm any "Papist within [the] Province").

"opposing the measures of the Continental or Colony Congress," punishable by disarmament. *Resolutions of March 13, 1776*, *reprinted in Journal of the Provincial Congress of South Carolina*, *1776* 77, 77 (London, J. Almon 1776). And Massachusetts disarmed any person convicted of "being notoriously inimical to the cause of *American* Liberty." Resolutions of July 25 and July 26, 1776, *reprinted in* 1 *American Archives: Fifth Series* 588, 588 (Peter Force ed., 1848). All show that those who committed the specific offense of sedition or treason could be disarmed for a time.

3. Practices around the Founding reflect principles that allowed disarmament of individuals who endangered the community by physically harming another, and of individuals who exhibited dangerousness by seeking to overthrow the government. The Second Amendment's ratification process exhibits both the distinctiveness and enduring nature of these two principles. At their state ratifying conventions, Massachusetts, New Hampshire, and Pennsylvania each proposed limiting language to the Second Amendment arguably tied to dangerousness. *See Kanter*, 919 F.3d at 454 (Barret, J., dissenting) (noting that "each of these proposals included limiting language arguably tied to criminality").[21]

Language proposed in Pennsylvania and Massachusetts reflects that those who breached the peace were proscribed from bearing arms. In Massachusetts, Samuel Adams drafted the following proposed amendment, "[T]hat the said Constitution be never construed to authorize Congress . . . to

[21] These proposed amendments are part of "[t]he best-available-evidence" of "the practice in the early Republic." Lee J. Strang, *Originalism's Promise: A Natural Law Account of the American Constitution* 69 (2019).

prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms." Massachusetts Convention Journal (Feb. 6, 1788), *reprinted in* 6 *The Documentary History of the Ratification of the Constitution* 1452, 1453 (John P. Kaminski et al. eds., 2000) (emphasis added). "Peaceable citizens" were those who did not commit a "breach of the peace," meaning those who did not "violat[e] . . . the public peace, as by a riot, affray, or any tumult which is contrary to law, and destructive to the public tranquility." *Breach*, *in* 1 Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828). And in Pennsylvania, twenty-one of the twenty-three members who voted against ratification proposed the following amendment: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, *unless for crimes committed, or real danger of public injury from individuals*." *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents* (Dec. 18, 1787), *reprinted in* 2 *The Documentary History of the Ratification of the Constitution* 618, 623–24 (Merrill Jensen et al. eds., 1976) (emphasis added). The natural reading of these proposals is that "crimes committed" concern acts posing a "real danger of public injury." *Kanter*, 919 F.3d at 456 (Barrett, J., dissenting). This reading accords with the natural law principle against taking innocent life that informs American firearm regulations.

In contrast, the language proposed by New Hampshire restricted the right to bear arms to those who had not engaged in rebellion: "Congress shall never disarm any Citizen, *unless such as are or have been in actual Rebellion*." *New Hampshire*

Form of Ratification (June 21, 1788), *reprinted in* 28 *The Documentary History of the Ratification of the Constitution* 376, 378 (John P. Kaminski et al. eds., 2017) (emphasis added). Citizens who "are or have been in actual Rebellion" is not synonymous with all felons or criminals. This proposal targets individuals who committed the distinct crime of rebellion, which means "taking up Arms against the Supreme Power." *Rebellion*, New Universal Etymological English Dictionary (20th ed. 1763). But New Hampshire's proposal "does not say anything about disarming those who have committed other crimes, much less nonviolent ones." *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting).

4. At least two distinct principles run continuous throughout history from Cicero to Founding-era America. First, the right to bear arms is not a license to physically harm another. Second, an individual cannot exercise that right to rebel against a just government ordered for the common good. Penalty for acting adverse to either principle often amounted to disarmament.[22] These principles are the hallmark of our Nation's firearm regulations.

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[22] But such disarmament was not absolute, and I echo Judge Roth's call for greater executive review of petitions to restore firearm rights, regardless of whether Congress provides funding for 18 U.S.C. § 925(c). *See* Concurring Op. at 11 n.18; *see also Cross v. Buschman*, No. 22-3194, 2024 WL 3292756, at *5 (3d Cir. July 3, 2024) (Matey, J., concurring) ("The Eighth Amendment binds all federal actors, and the President has a duty to ensure his subordinates comply with the Amendment's demands."). That is because "the President holds an independent duty to ensure that the Constitution's guarantees are followed." *Cross*, 2024 WL 3292756, at *5

Many reasonable minds read this history to support a different answer, and only one broad principle: the legislature can categorically disarm anyone labeled "dangerous."[23] But that is too vague a conception of "dangerousness." True, both ideas contain types of dangerous individuals, and both center on classifications designed, or at least recognized, by government. But the type of danger posed, and the punishment prescribed, makes the difference. Laws imposing class wide disarmament were enacted during times of war or civil strife

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(citing Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1287 (1996) ("Once the President has interpreted the law that he has the power to enforce or execute, a second interpretative stage emerges: the President must then determine whether the law is consistent with the Constitution. The President, no less than Congress or the courts, operates under the Constitution as supreme positive law . . . . The need to interpret the Constitution as a source of positive law, and to prefer the Constitution to any other source of law with which it may conflict, is as much a part of '[t]he executive Power' vested in the President as it is part of '[t]he judicial Power' vested in the federal courts. The Constitution is law, and the executive power of law interpretation includes the power and duty to interpret the Constitution.")). All to say, it is time to examine the Attorney General's independent obligation to review these petitions, as well as the propriety of continuing to delegate this responsibility to the Justice Department's Bureau of Alcohol, Tobacco, Firearms and Explosives when that agency has been thwarted from carrying out its duty.

[23] *See Williams*, 113 F.4th at 656–57; *United States v. Jackson*, 110 F.4th 1120, 1127 (8th Cir. 2024); *see also* Dissenting Op. at 6–8, 8 n.8.

where separate sovereigns competed for loyalty. *See Jackson*, 85 F.4th at 472 (Stras, J., dissenting from denial of rehearing en banc) ("[T]he decades surrounding the ratification of the Second Amendment showed a steady and consistent practice. People considered dangerous lost their arms. But being a criminal had little to do with it."). And laws disarming an individual for dangerous conduct harming another member of the community centered on individualized review of specific acts.[24] Combining these principles to reach a higher level of generality discounts the history and, most importantly, disregards the natural law principles explaining *why* we possess the right to bear arms.

D.

We have wandered far from the reason and spirit of the Second Amendment. The first federal ban on felons possessing firearms arrived one hundred and forty-seven years after the

[24] In theory, the implications of both principles may not be as siloed when assessing a facial challenge to § 922(g)(1). For example, there are many individuals convicted of felonies for sedition or murder, which could show that § 922(g)(1) may not be unconstitutional in all contexts. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (explaining that in a "facial challenge to a legislative Act . . . the challenger must establish that no set of circumstances exists under which the Act would be valid"). But that is not the case here because Range asserts an as-applied challenge. *See United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) ("An as-applied attack, in contrast, does not contend that a law is unconstitutional as written[,] but [rather] that its application to a particular person under particular circumstances deprived that person of a constitutional right.").

Amendment's ratification. The Federal Firearms Act, § 922(g)(1)'s predecessor, prohibited any individual convicted of a "crime of violence" to possess a firearm or ammunition. An Act to Regulate Commerce in Firearms, ch. 850, § 2(f), 52 Stat. 1250, 1251 (1938). Congress defined a "crime of violence" as "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking[,] assault with intent to kill, commit rape, or rob[,] assault with a dangerous weapon, or assault with intent to commit any offense publishable by imprisonment for more than one year." *Id.* § 1(6). Disarming individuals who exhibited that conduct made sense because they engaged in conduct that harmed the physical safety of individuals in the community. But twenty-three years later, Congress swept in all felonies, not just crimes of violence, *see* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342 § 2, 75 Stat. 757, 757 (1961), thus abandoning reason, which permitted disarmament of individuals to protect the safety of the community or the existence of the government. That hollowed place is where the enacted law remains today.

Such a law cannot be applied to Range who does not exhibit behavior intentionally threatening the life or safety of another. And there is no suggestion that Range threatens the government's existence with sedition or treason. So disarming him is unnecessary to ensure the physical safety of the community, or the continuity of government. *See* McWilliam, *supra,* at 158 ("[O]ne must ask not only whether the statute comports with the broader *ius naturale* principles, but also with the general principles specifically determined within the Second Amendment.").

Because the majority correctly concludes that § 922(g)(1)'s application to Range is repugnant to the

fundamental principles captured by the Second Amendment, I concur.

PHIPPS, *Circuit Judge*, concurring.

I join the Majority Opinion in full because this case may be resolved on narrow grounds: there is no historical analogue for permanently disarming a citizen based on a prior conviction for food-stamp fraud.[1] I write separately to point out additional important "principles that underpin our regulatory tradition,"[2] specifically those related to the liberties of a free people. Application of these principles lends further support to the outcome in this case and in future cases will balance and safeguard the legal analysis so that it does not skew in favor of disarmament.

Appreciation of these principles begins with a recognition that the Founders were practical, prudent, and well-read.[3] They

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[1] *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 30 (2022) ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." (internal quotation marks omitted) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010))).

[2] *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

[3] *See* Carl J. Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment* 53–168 (1994) (detailing how the Founders used Roman and Greek history and political thought to guide their critique of Britain and design of America); *id.* at 118 ("Ancient history provided the founders with a large body of information, knowledge which they used both to make sense of the confusing events of their day and to construct arguments for their political positions."); Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189, 192–95 (1984) (detailing the Founders' fluency in Montesquieu, Blackstone, Locke, Hume, and Beccaria, as well as Plutarch, Cicero, Livy, Tacitus, and Plato).

fled from and rebelled against a nation that took away the right to keep and bear arms[4] and that used its military to occupy

[4] *See* Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 23–134 (1997) (tracing English republicans' disarming of Royalist sympathizers and Catholics; the restored Royalists' disarming of republicans and the "disaffected"; the aristocracy's disarming of commoners with game laws enforceable by the aristocrats themselves; and the renewed disarming of Catholics by a Protestant king and then Protestants by a Catholic king, until the right was affirmed in 1689); Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* 9–74 (2008) (detailing British attempts to disarm Colonists from the late 1760s, and the resistance up and down the colonies, until the outbreak of hostilities); 1 James Burgh, *Political Disquisitions; or, An Enquiry into Public Errors, Defects, and Abuses* 464 (1775) ("A general exercise of the best of their people in the use of arms, was the only bulwark of their liberties."); Leonard W. Levy, *Origins of the Bill of Rights* 138 (1999) (opining that Burgh's *Political Disquisitions* "was probably more influential in America than John Locke's work"); *A Declaration by the Representatives of the United Colonies of North America, Now Met in General Congress at Philadelphia, Setting Forth the Causes and Necessity of Their Taking Up Arms*, *reprinted in* 37 *Documentary History of the Ratification of the Constitution and the Bill of Rights* 49 (John P. Kaminski et al. eds., 2020) (complaining to King George III, alongside the last-ditch Olive Branch Petition, that Colonists had "delivered up their arms" to be later returned, yet "the Governor [of Massachusetts] ordered the arms . . . to be seized by a body of soldiers"); *id.* at 46 ("Our forefathers, inhabitants of the island of Great Britain, left their native land, to seek on these shores a residence for civil and religious freedom."); St. George Tucker, 1 *Blackstone's Commentaries* app. 300 (1803) ("In England, . . . the right of bearing arms is confined to [P]rotestants, and the words suitable to their condition and

several American cities.[5] The Founders wished to enshrine that right in the core organic document of this Nation – our Constitution.[6] Of course, the Founders knew that firearms were dangerous and capable of abuse. But an individual right to keep and bear arms[7] promotes self-defense and protects

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degree, have been interpreted to authorize the prohibition of keeping a gun . . . [s]o that not one man in five hundred can keep a gun in his house without being subject to a penalty.").

[5] *See generally* Donald F. Johnson, *Occupied America: British Military Rule and the Experience of Revolution* (2023) (detailing British military occupations of Boston, New York, Newport, Philadelphia, Charleston, and Savannah, and those occupations' catalyst effect upon revolutionary sentiment); *see also BOSTON, March 12.*, Bos. Gazette, Mar. 12, 1770, at 3 (counting three dead and eight wounded at the Boston Massacre); L. Kinvin Wroth & Hiller B. Zobel, *The Boston Massacre Trials*, 55 A.B.A. J. 329, 329 (1969) (reporting that two of the wounded succumbed to their injuries, bringing the death total to five).

[6] *See* U.S. Const. amend. II; *see also* 3 Joseph Story, *Commentaries on the Constitution* §§ 1890–91 (1833), *reprinted in* 5 *The Founders' Constitution*, *supra*, at 214 ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; . . . it is at present in England more nominal then real, as a defensive privilege."); William Rawle, *A View of the Constitution of the United States* 125–26 (2d ed. 1829), *reprinted in* 5 *The Founders' Constitution*, *supra*, at 214 (Philip B. Kurland & Ralph Lerner eds., 1987) ("No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people . . . .").

[7] *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and

against anarchy, rebellion, and foreign invasion.[8] And so, the right was sewn into our Nation's founding fabric, with the enemies of this Country and our individual liberties being the ones who had most opposed it.[9]

It is against these principles – deeply against them – to flog the historical record until it suggests some analogue or principle justifying disarmament, no matter how abstracted, attenuated, or ahistorical that analogue or principle may be. In particular, it is a mistake to read the Second Amendment as permitting the most extreme forms of disarmament in the history of England and colonial America. While the Founders adopted many venerable English legal principles and traditions, such as those developed at common law and in

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history, that the Second Amendment conferred an individual right to keep and bear arms.").

[8] *See, e.g.*, Burgh, *supra* note 4, at 401 ("And if the generality of housekeepers were only half-disciplined, a designing prince, or ministry, would hardly dare to provoke the people by an open attack against their liberties . . . . But without the people's having some knowledge of arms, I see not what is to secure them against slavery, whenever it shall please a daring prince, or minister, to resolve on making the experiment. See the histories of all the nations of the world."); Richard Henry Lee, *Federal Farmer No. 3* (1787), *reprinted in* 19 *Documentary History of the Ratification of the Constitution and the Bill of Rights* 219 (John P. Kaminski et al. eds., 2020) ("[T]he yeomanry of the country . . . possess arms, and are too strong a body of men to be openly offended . . . .").

[9] *See, e.g.*, Halbrook, *supra* note 4, at 78–109 (recounting how, after British soldiers executed civilians on their retreat from Lexington and Concord, royal governors attempted to disarm the people, and Great Britain placed an embargo on the importation of arms to America).

equity,[10] they broke ranks with the past in several respects. For instance, titles of nobility were used in England, but the Constitution expressly prohibits them.[11] If that prohibition did not include titles of nobility that were part of the English historical tradition, then it would be close to meaningless. Similarly, the Second Amendment cannot be read to permit the extreme forms of disarmament used in England and colonial America while under British rule; the Founders rejected those forceful suppressions of their liberties.[12] Nor do the disarmament measures taken by the American States during the Revolutionary War in response to a person's refusal to take a loyalty oath serve as useful analogues.[13] As the Majority

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[10] *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . .").

[11] *See* U.S. Const. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . . .").

[12] *See* The Declaration of Independence para. 13 (U.S. 1776) ("[The King] has kept among us, in times of peace, Standing Armies without the Consent of our legislatures."); *id.* para. 14 ("He has affected to render the Military independent of and superior to the Civil power."); *id.* para. 27 ("He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny . . . ."); *id.* para. 28 ("He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country . . . .").

[13] *See, e.g.*, 4 *Journals of the Continental Congress, 1774–1789* 205 (Worthington Chauncey Ford ed., 1906) (calling upon the States "immediately to cause all persons to be disarmed . . . who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies, against the hostile attempts of the British fleets and armies"); G.A. Gilbert, *The Connecticut Loyalists*, 4 Am. Hist. Rev. 273, 280–82 (1899) (recounting Connecticut's disarming those who spoke against the Continental Congress and were "inimical" to the American

Opinion explains, 'the people' entitled to the right to keep and bear arms consists only of citizens. So, a person who did not wish to belong to the new American nation would hardly have been one of 'the people' entitled to keep and bear arms. In sum, the most relevant historical principles for disarming a citizen are those grounded in the more stable and enduring aspects of our legal tradition, such as the common law and equity – as opposed to the principles underlying the excesses of the Crown or Parliament or even those supporting Revolutionary War measures in response to persons who retained foreign allegiances.

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cause); Act of Mar. 14, 1776, 1775–76 Mass. Acts ch. 21 §§ 1–2, 8 (Massachusetts's disarming all persons over sixteen not being Quakers who would not adopt the American cause as their own and swear to assist its defense); An Act Empowering the Members of the Upper and Lower Houses of Assembly, to Tender to Such of the Inhabitants as are Hereinafter Mentioned, a Declaration, or Test, for Subscription (1776), *reprinted in* 7 *Records of the Colony of Rhode Island and Providence Plantations in New England* 566–68 (John Russell Bartlett ed., 1862) (same); Act of May 1777, 177 Va. Acts ch. 3, *reprinted in* 9 *The Statutes at Large: Being a Collection of All the Laws of Virginia* 281–82 (William Waller Hening ed., 1821) (disarming all who refused a loyalty oath and were not excepted from taking it); Act of 1777, 1777 S.C. Acts ch. 6 § 9, *reprinted in* 24 *The State Records of North Carolina* 90 (Walter Clark ed., 1905) (same); Resolution of Mar. 13, 1776, *reprinted in Journal of the Provincial Congress of South Carolina, 1776* 77–78 (1776) (disarming those who bore arms against the Continental or Colony Congress, or opposed either, and requiring a loyalty oath to be rehabilitated and rearmed); An Ordinance Respecting the Arms of Non-Associators, 1776 Pa. Laws ch. 729 (July 19, 1776), *reprinted in* 9 *The Statutes at Large of Pennsylvania from 1682 to 1801* 11 (James T. Mitchell & Henry Flanders eds., 1903) (ordering the disarmament of "non-associators").

From that perspective, I see no historical analogue for the lifetime disarmament of an otherwise free citizen. It is as ancient as it is obvious that a person who is imprisoned or otherwise confined does not have the right to bear arms for the duration of confinement. Similarly, non-confined citizens who are still within the criminal justice system through parole or supervised release may have their freedoms, including the right to bear arms, limited if justified as a penal measure. Critically, in those circumstances, the loss of the right to bear arms is effectuated through an adjudicative process with the availability of the full panoply of constitutional rights for the accused and the convicted – and there are procedures available to directly appeal and collaterally challenge any infringement of a constitutional right.[14] But once a citizen repays his debt to society, a legislative restriction on the right to keep and bear arms based on nothing more than a prior conviction is without relevant historical antecedent.[15] And legislation permanently

[14] Similar procedures are available in civil commitment proceedings to protect against a permanent revocation of liberty for persons with serious mental illnesses – a loss of liberty may occur only as long as it is constitutionally justified, and it must be subject to periodic review. *See O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (explaining that "even if [a person's] involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed" (citations omitted)); *see Clark v. Cohen*, 794 F.2d 79, 86 (3d Cir. 1986) (explaining that "due process require[s] periodic reviews of [a person's] continuing need for institutionalization . . . because if the basis for a commitment ceases to exist, continued confinement violates the substantive liberty interest in freedom from unnecessary restraint" (internal citation omitted)).

[15] *See* Story, *supra* note 6, at §§ 1890–91 ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power

disarming a person who has already repaid his debt to society is even further removed from our Founding-era heritage.[16]

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of rulers; . . . it is at present in England more nominal then real, as a defensive privilege."); Rawle, *supra* note 6, at 125–26 ("No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people . . . .").

[16] It is true that before enacting the felon-in-possession statute in 1965, the Subcommittee to Investigate Juvenile Delinquency of the Senate Judiciary Committee heard testimony from Attorney General Katzenbach in which he opined that "[w]ith respect to the second amendment, the Supreme Court of the United States long ago made it clear that the amendment did not guarantee to any individuals the right to bear arms." *Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juv. Delinq.*, 89th Cong. 41 (1965) (statement of Att'y Gen. Nicholas deBelleville Katzenbach); *see also id.* (exhibit 7) (reporting with respect to the felon-in-possession's predecessor statute that "[a]t the time of the passage of the National Firearms Act in 1934 and the consideration and passage by Congress of the Federal Firearms Act from 1935 to 1938, the second amendment was not considered to be an obstacle" and advising that "[d]ecisions applying Federal firearms legislation hold that the second amendment was not, as the first amendment was, adopted with individual rights in mind, but was a prohibition upon Federal action which would interfere with the organization by States of their militia"). That advice has not aged well. *See Heller*, 554 U.S. at 595 (2008), *see also* Op. Off. of Legal Counsel, *Whether the Second Amendment Secures a Legal Right* 28 (2004) ("[T]he Second amendment secures a personal right of individuals, not a collective right that may only be invoked by a state or a quasi-collective right restricted to those persons who serve in organized militia units."). So there is more than a hairline crack in the legal foundation for the felon-in-possession statutory provision.

Thus, any law imposing a permanent restriction on "the right of the people to keep and bear Arms"[17] is constitutionally suspect as a facial matter, and here, the application of 18 U.S.C. § 922(g)(1) to permanently disarm Bryan Range after he repaid his debt to society for his food-stamp fraud violates the Second Amendment.

[17] U.S. Const. amend. II.

KRAUSE, *Circuit Judge*, concurring in the judgment, with whom ROTH, *Circuit Judge*, joins in part.

When this case was previously before us, I urged that we assess whether firearm regulations were constitutionally permissible in the present by comparing historical analogues in principle, not with precision. Hewing *precisely* to history and tradition would only make sense in a world where "arms" still meant muskets and flintlock pistols,[1] and where communities were still small and "close-knit."[2] In contrast, the firearms of America today include semi-automatic handguns, assault rifles,[3] and high-capacity magazines; our population of more than 330 million is mobile and far-flung; and, tragically, brutal gun deaths and horrific mass shootings—exceeding 490 this

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[1] *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 153 (2023) ("Americans in 1791 generally owned muzzle-loading flintlocks, liable to misfire and incapable of firing multiple shots. Guns thus generally were not kept or carried loaded in 1791." (quotation omitted)); Akhil Reed Amar, *Second Thoughts*, 65 Law & Contemp. Probs. 103, 107 (2002) ("At the Founding . . . [a] person often had to get close to you to kill you, and, in getting close, he typically rendered himself vulnerable to counterattack. Reloading took time, and thus one person could not ordinarily kill dozens in seconds.").

[2] Stephanos Bibas, *The Machinery of Criminal Justice* 2 (2012).

[3] *See* Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 Law & Contemp. Probs. 231, 240 (2020) ("[A]ssault weapons play a disproportionately large role in three types of criminal activity: mass shootings, police killings, and gang activity.").

year—are a daily occurrence in our schools, our streets, and our places of worship.[4] After observing that the balancing of public safety with the right to bear arms has historically been a core function of the legislature in our system of separated powers,[5] that the balance Congress struck in 18 U.S.C. § 922(g)(1) by categorically disarming convicted felons[6] comported with traditional legislative authority to impose even

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[4] *See Mass Shootings in 2024*, Gun Violence Archive, https://www.gunviolencearchive.org/reports/mass-shooting (last visited Dec. 23, 2024).

[5] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 715 (2007) ("Achievement of that balance requires highly complex socio-economic calculations regarding what kinds of weapons ought to be possessed by individuals and how to limit access to them by those deemed untrustworthy or dangerous. Such complicated multi-factor judgments require trade-offs that courts are not institutionally equipped to make. Legislatures, by contrast, are structured to make precisely those kinds of determinations."); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 371 (1978) (noting the "relative incapacity of adjudication to solve 'polycentric' problems").

[6] Section 922(g)(1) makes it illegal for anyone convicted of "a crime punishable by imprisonment for a term exceeding one year" to possess a firearm, unless the crime is a state misdemeanor "punishable by a term of imprisonment of two years or less" or relates to "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. §§ 921(a)(20), 922(g)(1). For ease of reference, this opinion refers to all crimes covered by § 922(g)(1) as "felonies" and individuals falling within § 922(g)(1)'s purview as "felons."

greater deprivations like capital punishment, and that Congress had provided mechanisms in 18 U.S.C. §§ 921(a)(20) and 925(c) by which an individual offender could seek to lift his disability, I concluded that § 922(g)(1) was constitutional as applied to all felons within its scope, and I dissented on that basis. I also urged that, rather than proceeding on an offense-by-offense basis and implying that § 922(g)(1) had never been enforceable against a felon "like Range,"[7] the majority instead should make clear that Range had successfully challenged only its future enforcement, in effect, lifting the disability that had been lawfully imposed based on § 922(g)(1)'s rebuttable presumption of constitutionality.

Since then, the Supreme Court decided *United States v. Rahimi*, 144 S. Ct. 1889 (2024), and vacated and remanded our Court's en banc decision for reconsideration in light of its teachings.[8] I take from *Rahimi* several lessons that compel a different rationale than the majority's today and that lead me now to concur in the judgment.

The first three confirm the premises of my prior opinion: (1) we should indeed determine "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition"—not whether it "precisely match[es] its historical precursors," *id.* at 1898 (emphasis added); (2) the Second Amendment does permit "the enactment of laws banning the possession of guns by *categories of persons* thought by a legislature to present a special danger of misuse," *id*. at 1901 (emphasis added), and

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[7] *Range v. Attorney Gen. (Range I)*, 69 F.4th 96, 106 (3d Cir. 2023), *judgment vacated sub nom. Garland v. Range*, 144 S. Ct. 2706 (2024).

[8] *See Garland*, 144 S. Ct. at 2706–07.

in particular, "prohibitions . . . on the possession of firearms by 'felons and the mentally ill,'" which the Court reiterated are "presumptively lawful," *id*. at 1902 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008)); and (3) the availability of a greater penalty for an analogous offense at the Founding implies that a lesser penalty is constitutional today, e.g., "if imprisonment was permissible" at the Founding for an offense, the "lesser restriction" of disarmament in modern times "is also permissible," *id.*

In addition, however, *Rahimi* also flagged two aspects of a dispossession law as constitutionally relevant: first, that the burden the law imposes has at least the potential to be "of limited duration," and, second, that—notwithstanding the authority of legislatures to disarm entire "categories of persons" presumed dangerous in the first instance—the law allows an individual to challenge that presumption and establish that he does not currently "present a special danger of [firearm] misuse" or a "credible threat" to the safety of others. *Id*. at 1901–02.[9]

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[9] The Court attached constitutional significance to these two statutory attributes in the context of a law that prohibited possession of a firearm only while "subject to a [domestic violence restraining] order" that included "a finding that such person represents a credible threat to the physical safety" of his domestic partner (or child). 18 U.S.C. § 922(g)(8). It also cautioned that its holding was a narrow one. *See United States v. Rahimi*, 144 S. Ct. 1889, 1903 (2024) ("[T]oday . . . we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.").

Notwithstanding these lessons, my colleagues in the majority have treated the Supreme Court's remand as essentially pro forma and file an opinion today that is largely unchanged. True, the majority now acknowledges that the relief it provides Range is only prospective protection from prosecution for "any future possession of a firearm," and it seemingly acknowledges that § 922(g)(1) may be categorically applied, consistent with the Second Amendment, to at least "physically dangerous" felons.[10] But it still disavows Congress's power to categorically disarm other felons who fall within § 922(g)(1)'s parameters, and to do so on a presumptively permanent basis. It also still insists on analyzing § 922(g)(1) on an offense-by-offense basis, demanding that any historical analogue match with high precision, rather than reasoning by principle. And it again declines to articulate any clear framework by which courts may distinguish between constitutional and unconstitutional applications of § 922(g)(1).

These aspects of the majority opinion are in error. I ultimately concur in the judgment, however, because *Rahimi*'s reasoning persuades me that—even though our historical tradition supports § 922(g)(1)'s categorical disarmament of all

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Nonetheless, the repeated references to these attributes in the majority and concurring opinions and their anchoring in historical tradition suggest they carry constitutional weight more broadly. *See, e.g.*, *id.* at 1902–03 (emphasizing the presence of "judicial determinations," "f[indings] by a court," and that those who posed a credible threat to the physical safety of another were only "temporarily disarmed"); *id.* at 1908–10 (Gorsuch, J., concurring) (same); *see also infra* Section I.C.2.

[10] Maj. Op. at 20; *see also id.* at 25.

felons on a presumptively permanent basis—the Second Amendment demands that the disability it imposes has at least the potential to be "of limited duration," *Rahimi*, 144 S. Ct. at 1902, and that a felon have a meaningful opportunity, after successfully serving his sentence,[11] to show that the burden should be lifted based on individualized findings. Indeed, the same historical analogues demonstrating that those who commit serious crimes can be disarmed as a class of persons that presumptively "present[s] a special danger of misus[ing]" firearms, *id.* at 1901, also confirm the necessity of providing individual class members with a later opportunity to rebut that presumption and reclaim their Second Amendment rights going forward.

I write to clarify three points: First, the historical record reveals that, contrary to the majority's view, legislatures dating back to the Founding had the authority to disarm not just "physically dangerous" felons, but a wide range of groups considered to present a special danger, while also allowing for individual pre-enforcement challenges. Second, the majority's reasoning cannot be squared with Supreme Court and historical precedent, and its continued insistence on historical twins portends confusion and inconsistency among the district courts. And third, while we hold today that Range's declaratory judgment entitles him to protection only for future firearm possession, at least two circuits have suggested that

[11] *See United States v. Moore*, 111 F.4th 266, 272 (3d Cir. 2024) (holding that § 922(g)(1) is constitutional as applied to felons who are serving a criminal sentence on parole, probation, or supervised release because our historical tradition "yield[s] the principle that a convict may be disarmed while he completes his sentence and reintegrates into society").

successful as-applied challenges operate retroactively, making enforcement void ab initio and jeopardizing both pending § 922(g)(1) indictments and convictions on direct appeal. *See United States v. Williams*, 113 F.4th 637, 657, 661–63 (6th Cir. 2024); *United States v. Diaz*, 116 F.4th 458, 461, 469–70 & n.4 (5th Cir. 2024). I take this opportunity to highlight the drastic consequences of that approach and to explain why a prospective approach comports with *Bruen* and *Rahimi*, is faithful to our regulatory tradition, and is administrable in practice.

I. The Historical Validity of § 922(g)(1)

More than a decade of precedent now illuminates the constitutionality of felon-in-possession bans and the Supreme Court's methodology for reviewing them. The analysis that follows will (A) summarize the Court's pronouncements concerning those bans, (B) survey the relevant regulatory tradition, and (C) consider how § 922(g)(1) fits within that regulatory tradition.

A. Felon-Dispossession Laws in the Court's Recent Precedent

Repeatedly, the Supreme Court has told us that felon-in-possession statutes are presumptively constitutional. In holding the "right of the people"[12] protected by the Second

[12] In the first part of its analysis, the majority defends its belief that felons remain part of "the people," so their firearm possession is presumptively protected, and the Government must prove its disarmament regulation comports with historical tradition. Maj. Op. at 11–16. Other jurists believe that historical

Amendment was an "individual right," Justice Scalia's seminal opinion in *Heller* specified this meant "the right of law-abiding, responsible citizens" to keep and bear arms, and therefore characterized "prohibitions on the possession of firearms by felons" as both "longstanding" and "presumptively lawful."[13] 554 U.S. at 579, 592, 626, 627 n.26, 635.

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court clarified who qualifies as a "law-abiding" citizen when it explained that, despite the infirmity of New York's may-issue open-carry licensing regime, "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes . . . [,] which often require applicants to undergo a [criminal] background check" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding,

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tradition permits the disarmament of felons precisely because "the people" historically meant "law-abiding, responsible citizens." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 26 (2022) (citation omitted). But that debate—unlike the test for what constitutes an adequate "historical analogue," *id.* at 30 (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021))—is largely academic. As then-Judge Barrett recognized, the "same body of evidence" can be used to illuminate who is part of the people or "the scope of the legislature's power," and either approach "yield[s] the same result." *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

[13] *See also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality) ("repeat[ing] those assurances"); *Bruen*, 597 U.S. at 72 (Alito, J., concurring) (same); *id.* at 80–81 (Kavanaugh, J., concurring) (same).

responsible citizens.'"[14] 597 U.S. 1, 38 n.9 (2022) (quoting *Heller*, 554 U.S. at 635). And it directed us, in considering whether modern-day regulations are consistent with historical ones, to compare "how and why the regulations burden *a law-abiding citizen's* right to armed self-defense." *Id.* at 29 (emphasis added).

Most recently, in *Rahimi*, the Court reiterated that the Constitution does not prohibit regulations that ban "the possession of firearms by 'felons and the mentally ill,'" which the Court held "presumptively lawful" even as applied to the "core"[15] right of self-defense inside the home. 144 S. Ct. at 1902 (quoting *Heller*, 554 U.S. at 626, 627 n.26). Citing *Heller*'s own assurance about the presumptive constitutionality of felon-dispossession laws, the Court disavowed any suggestion "that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at 1901. And it again told us to focus our historical analysis on "a law-abiding citizen's" right to bear arms. *Id.* at 1932 (Thomas, J., dissenting) (quoting *Bruen*, 597 U.S. at 29). Thus, time and again, the Supreme Court has acknowledged that the deep roots of felon-possession bans in American history impart a presumption of lawfulness to § 922(g)(1).

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[14] Those background checks screen for both violent and non-violent offenses. *See, e.g.*, Wash. Rev. Code Ann. § 9.41.070(1)(a); Colo. Rev. Stat. Ann. § 18-12-203(1)(c); Kan. Stat. Ann. § 75-7c04(a)(2); Miss. Code. Ann. § 45-9-101(2)(d); N.H. Rev. Stat. Ann. § 159:6(I)(a); N.C. Gen. Stat. Ann. § 14-415.12(b)(1).

[15] *District of Columbia v. Heller*, 554 U.S. 570, 630, 634 (2008).

As to methodology, *Rahimi* was also instructive, clarifying that "the appropriate analysis involves considering whether the challenged *regulation* is consistent with the *principles* that underpin our regulatory tradition," 144 S. Ct. at 1898 (emphasis added), and that "if imprisonment was permissible" as a penalty for an offense at the Founding, "the lesser restriction" of disarmament imposed by a modern analogue "is also permissible," *id*. at 1902. There, the Court derived the relevant principles from "two distinct legal regimes"—surety laws and going armed laws—"[t]aken together." *Id.* at 1899, 1901. Even though the regulation at issue, § 922(g)(8), was "by no means identical to these founding era regimes," the Court emphasized that "it does not need to be," *id.* 1901, because a regulation that "does not precisely match its historical precursors . . . 'still may be analogous enough'" to withstand constitutional scrutiny. *id.* at 1898 (quoting *Bruen*, 597 U.S. at 30). Rather than seeking out a "dead ringer" or "historical twin," we were instructed to determine whether the modern-day regulation "comport[s] with the principles underlying the Second Amendment" by considering whether the challenged regulation is "'relevantly similar' to laws that our tradition is understood to permit." *Id*. at 1898 (quoting *Bruen*, 597 U.S. at 29).

B. Relevantly Similar Historical Analogues

When we go to compare "relevantly similar" laws, "not all history is created equal." *Bruen*, 597 U.S. at 34. Founding-era laws "surrounding the ratification of the text" are generally considered to be "the history that matters most," *Rahimi*, 144 S. Ct. at 1924 (Barrett, J., concurring), because Second Amendment rights "are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634–35. But we also look to "English history dating

from the late 1600s, along with American colonial views leading up to the founding," *Bruen*, 597 U.S. at 20, because the right to keep and bear arms was a "*pre-existing* right," *id.* (quoting *Heller*, 554 U.S. at 592). In addition, post-enactment history and tradition "through the end of the 19th century" is a "critical tool" for determining the principles underlying the Second Amendment. *Id.* at 35 (quoting *Heller*, 554 U.S. at 605).[16]

Here, the Government identifies two sets of relevantly similar laws from which comparable principles can be derived: (1) laws that categorically disarmed entire classes of people, and (2) felony punishment laws. I address each below before

[16] The Supreme Court has approvingly cited and relied on post-enactment sources in each of its recent Second Amendment cases. *See Rahimi*, 144 S. Ct. at 1899–1901 (citing laws and tradition from the early nineteenth century); *Bruen*, 597 U.S. at 50–57 & nn.15–24 (analyzing nineteenth-century laws and cases); *McDonald*, 561 U.S. at 778 (Alito, J.) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *Heller*, 554 U.S. at 605 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century."); *see also Rahimi*, 144 S. Ct. at 1915–16 (Kavanaugh, J., concurring) ("As the Framers made clear, and as th[e] Court has stated time and again for more than two centuries, post-ratification history . . . can also be important for interpreting vague constitutional text and determining exceptions to individual constitutional rights."); *id.* at 1924 (Barrett, J., concurring) (explaining that "postenactment history can be an important tool").

comparing the principles derived from these analogues to § 922(g)(1).

1. *Categorical Disarmament Laws*

a. England's Restoration and Glorious Revolution

During the late seventeenth century, the English government repeatedly disarmed individuals whose conduct indicated that they could not be trusted to abide by the sovereign and its dictates.

Following the tumult of the English Civil War, the restored Stuart monarchs disarmed nonconformist (i.e., non-Anglican) Protestants.[17] Of course, not all nonconformists were dangerous; to the contrary, many belonged to pacificist denominations like the Quakers.[18] However, they refused to participate in the Church of England, an institution headed by the King as a matter of English law.[19] And nonconformists

[17] *See* Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 45 (1994) (describing how Charles II "totally disarmed . . . religious dissenters").

[18] *See* Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285, 304 n.117 (1983) ("Persons judged to be suspicious by the royal administration were those . . . who belonged to the Protestant sects that refused to remain within the Church of England. The Quakers were prominent sufferers.").

[19] *See Church of England*, BBC (June 30, 2011), https://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml (describing "the Act of Supremacy" enacted during the reign of Henry VIII).

often refused to take mandatory oaths acknowledging the King's sovereign authority over matters of religion.[20] As a result, Anglicans accused nonconformists of believing their faith exempted them from obedience to the law.[21]

Protestants had their rights restored after the Glorious Revolution of 1688 replaced the Catholic King James II with William of Orange and Mary, James's Protestant daughter.[22] But even then, Parliament enacted the English Bill of Rights, which declared: "Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and *as allowed by Law*."[23] This "predecessor to our Second Amendment," *Bruen*, 597 U.S. at 44 (quoting *Heller*, 554 U.S. at 593), reveals that the legislature—Parliament—had the authority to decide who was law-abiding enough to keep and bear arms.[24]

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[20] *See* Frederick B. Jonassen, "*So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 Cardozo Pub. L., Pol'y & Ethics J. 303, 322 (2014) (describing Charles II's reinstation of the Oath of Supremacy); Caroline Robbins, *Selden's Pills: State Oaths in England, 1558–1714*, 35 Huntington Lib. Q. 303, 314–15 (1972) (discussing nonconformists' refusal to take such oaths).

[21] *See* Christopher Haigh, *'Theological Wars': 'Socinians' v. 'Antinomians' in Restoration England*, 67 J. Ecclesiastical Hist. 325, 326, 334 (2016).

[22] *See* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 Nw. U. L. Rev. 203, 228 (2021).

[23] 1 W. & M., Sess. 2, ch. 2, § 7 (Eng. 1689) (emphasis added).

[24] *Cf.* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 47–48 (2000)

In 1689, the pendulum of distrust swung the other way. Parliament enacted a statute prohibiting Catholics who refused to take an oath renouncing the tenets of their faith from owning firearms, except as necessary for self-defense.[25] As with nonconformists, this prohibition was not based on the notion that every single Catholic was dangerous. Rather, the categorical argument English Protestants made against Catholicism at the time was that Catholics' faith put the dictates of a "foreign power," namely the Vatican, before English law.[26] Accordingly, the disarmament of Catholics in 1689 reflects Protestant fears that Catholics could not be trusted to obey the law.

That restriction could be lifted only prospectively and on an individual basis. That is, Parliament permitted Catholics who "repeated and subscribed" to the necessary oath before

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(explaining how the English Bill of Rights preserved Parliament's authority to limit who could bear arms).

[25] An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M., Sess. 1, ch. 15 (Eng. 1689); *see* Malcolm, *supra* note 17, at 123.

[26] *See* Diego Lucci, *John Locke on Atheism, Catholicism, Antinomianism, and Deism*, 20 Etica & Politica/Ethics & Pol. 201, 228–29 (2018). Official Anglican doctrine—regularly preached throughout England—warned that the Pope taught "that they that are under him are free from all burdens and charges of the commonwealth, and obedience toward their prince." *An Exhortation Concerning Good Order, and Obedience to Rulers and Magistrates*, *in* Sermons or Homilies Appointed to Be Read in Churches in the Time of Queen Elizabeth of Famous Memory 114, 125 (new ed., Gilbert & Rivington 1839).

"any two or more Justices of the Peace" to resume keeping arms.[27] But, needless to say, disavowal of religious tenets hardly demonstrated that the swearing individual no longer had the capacity to commit violence; rather, the oath signified allegiance to the English government and an assurance of conformity to its laws. This status-based disarmament of Catholics evinces the "historical understanding"[28] not only that legislatures could categorically disarm groups they viewed as unwilling to obey the law, but also that disarmed members had an opportunity to prospectively regain their right to bear arms.

b. Colonial America

The English notion that the government could disarm those not considered law-abiding traveled to the American colonies. Although some of the earliest firearm laws in colonial America forbid Native Americans and Black people from owning guns,[29] the colonies also repeatedly disarmed

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[27] 1 W. & M., Sess. 1, ch. 15 (Eng. 1689).

[28] *Bruen*, 597 U.S. at 26. That the same Parliament that enacted the predecessor to our Second Amendment also passed laws categorically disarming groups of people is particularly relevant to our historical inquiry. *See* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1472 (2024) (explaining that early American courts described the right to arms codified in "the English Bill of Rights, the Second Amendment to the U.S. Constitution, and various state constitutions as codifying the same preexisting right").

[29] *See* Clayton E. Cramer, *Armed America: The Remarkable Story of How and Why Guns Became as American as Apple Pie* 31, 43 (2006). Today, we emphatically reject these bigoted and

full-fledged members of the political community as it then existed—i.e., free, Christian, white men—who the authorities believed could not be trusted to obey the law. Those restrictions are telling because they were imposed at a time before the advent of the English Bill of Rights, when the charters of Virginia and Massachusetts provided unprecedented protections for colonists' firearm rights.[30]

The Virginia Company carried out one of the earliest recorded disarmaments in the American colonies in 1624. For his "opprobrious" and "base and detracting speeches concerning the Governor," Richard Barnes was "disarmed" by the Virginia Council and "banished" from Jamestown.[31] By disrespecting the colonial authorities, Barnes demonstrated that he could no longer be trusted as a law-abiding member of the community and thus forfeited his ability to keep arms.

During the late 1630s, a Boston preacher named Anne Hutchinson challenged the Massachusetts Bay government's authority over spiritual matters by advocating for direct,

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unconstitutional laws, as well as their premise that one's race or religion correlates with disrespect for the law. I cite them here only to demonstrate the tradition of categorical, status-based disarmaments. *See* Blocher & Ruben, *supra* note 1, at 165 (urging courts examining historical disarmament laws that would violate the Constitution today to "ask[] *why* earlier generations disarmed certain groups of people, rather than asking only *whom* they disarmed").

[30] *See* Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 174 (3d ed. 2022).

[31] David Thomas Konig, *"Dale's Laws" and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 Am. J. Legal Hist. 354, 371 (1982).

personal relationships with the divine.[32] Governor John Winthrop accused Hutchinson and her followers of being Antinomians—those who viewed their salvation as exempting them from the law—and banished her.[33] The colonial government also disarmed at least fifty-eight of Hutchinson's supporters, not because those supporters had shown a propensity for violence, but "to embarrass the offenders" who were forced to personally deliver their arms to the authorities in an act of public submission.[34] The Massachusetts authorities therefore disarmed Hutchinson's supporters to shame those colonists because the authorities concluded their conduct evinced a willingness to disobey the law.[35]

Again, however, restoration of the right to bear arms was available, but only prospectively, and only for individuals who affirmatively sought relief: Hutchinson's followers who renounced her teachings and confessed their sins to the authorities "were welcomed back into the community and able

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[32] *See* Edmund S. Morgan, *The Case Against Anne Hutchinson*, 10 New Eng. Q. 635, 637–38, 644 (1937).

[33] *Id.* at 648; Ann Fairfax Withington & Jack Schwartz, *The Political Trial of Anne Hutchinson*, 51 New Eng. Q. 226, 226 (1978).

[34] James F. Cooper, Jr., *Anne Hutchinson and the "Lay Rebellion" Against the Clergy*, 61 New Eng. Q. 381, 391 (1988).

[35] *Cf.* John Felipe Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and the Massachusetts Bay Colony*, 92 Chi.-Kent L. Rev. 743, 761 (2017) (describing other shaming punishments used at the time, including scarlet letters).

to retain their arms," as they had shown that they could once again be trusted to abide by the law.[36]

Like the Stuart monarchs in England, the Anglican colony of Virginia disarmed nonconformist Protestants in the 1640s due to their rejection of the King's sovereign power over religion. When a group of nonconformist Puritans from Massachusetts resettled in southeastern Virginia, Governor William Berkeley "acted quickly" to head off any "[o]pposition to the king" by disarming them.[37] And after the Glorious Revolution, the American colonies followed England's example by disarming their Catholic residents.[38]

The colonies redoubled the disarmament of Catholics during the Seven Years' War of 1756–1763 based on their perceived unwillingness to adhere to the King's sovereign

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[36] Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 263 (2020).

[37] Kevin Butterfield, The Puritan Experiment in Virginia, 1607–1650, at 21 (June 1999) (M.A. thesis, College of William and Mary) (on file with William and Mary Libraries); *see* Charles Campbell, *History of the Colony and Ancient Dominion of Virginia* 211–12 (1860).

[38] Just three years after designating Anglicanism as the colony's official religion, *see* George J. Lankevich, *New York City: A Short History* 30 (2002), New York Governor Benjamin Fletcher disarmed Catholic colonists in 1696, *see* Shona Helen Johnston, Papists in a Protestant World: The Catholic Anglo-Atlantic in the Seventeenth Century 219–20 (May 11, 2011) (Ph.D. dissertation, Georgetown University) (on file with the Georgetown University Library).

dictates.[39] Maryland, for example, though founded as a haven for persecuted English Catholics,[40] confiscated Catholics' firearms and ammunition during the war.[41] Notably, that decision was not in response to violence; indeed, the colony's governor at the time observed that "the Papists behave themselves peaceably and as good subjects."[42] Neighboring Pennsylvania followed suit and took "all arms, military accoutrements, gunpowder and ammunition" from all Catholics and "reputed" Catholics.[43] Virginia likewise prohibited Catholics and "suspected" Catholics from owning

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[39] *See* Greenlee, *supra* note 36, at 263. Colonies disarmed other religious minorities during the Seven Years' War, too. For instance, New Jersey confiscated firearms from Moravians, a group of nonconformist Protestants from modern-day Germany, because the governor deemed their nonconformist views sufficient evidence that they could not be trusted to obey authority. *See* Johnson et al., *supra* note 30, at 198.

[40] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1424 (1990).

[41] *See* Acts of May 22, 1756, *reprinted in* 52 *Archives of Maryland*: *Proceedings and Acts of the General Assembly, February 1755 – October 1756*, at 448–49, 454 (J. Hall Pleasants ed., 1935) [hereinafter Md. Act of 1756]; Greenlee, *supra* note 36, at 263; Johnson et al., *supra* note 30, at 197.

[42] Elihu S. Riley, *A History of the General Assembly of Maryland* 224 (1912) (quoting a July 9, 1755 letter from Governor Sharpe).

[43] An Act for Forming and Regulating the Militia of the Province of Pennsylvania, *reprinted in* 5 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 627 (James T. Mitchell & Henry Flanders eds., 1898) [hereinafter Pa. Act of 1757].

weapons or ammunition, declaring that it was "dangerous at this time to permit Papists to be armed."[44]

Again, these generalizations led to overinclusive bans. Not all Catholics posed a threat of misusing their firearms. That said, these laws reveal that legislatures had the authority to disarm every member of a group based on class-wide presumptions about law-abiding behavior. And under each regime, Catholics who violated the ban and were caught in possession of arms—whether or not they were dangerous—were subject to severe penalties.

To account for this overbreadth, colonial governments provided individual Catholics with the opportunity to prospectively restore their armament rights by persuading a government official that they themselves were unlikely to misuse firearms. A Catholic in Virginia who "desire[d] to submit and conform" could "present himself before the justices of the peace," and upon taking a loyalty oath "in open court," would "*thenceforth* be discharged of and from all disabilities and forfeitures, which he might or should be liable to for the *future*."[45] Similarly, a Catholic in Maryland who persuaded a local justice of the peace that he was law-abiding and not dangerous could keep weapons necessary for the defense of his home.[46] But Catholics under these regimes had to affirmatively regain their right to possess arms *before* violating

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[44] An Act for Disarming Papists, and Reputed Papists, Refusing to Take the Oaths to the Government, *reprinted in* 7 *The Statutes at Large; Being A Collection of All the Laws of Virginia* 35–38 (William W. Hening ed., 1820) [hereinafter Va. Act of 1756].

[45] *Id.* at 38 (emphasis added).

[46] Md. Act of 1756, *supra* note 41, at 448.

the disarmament law. Those discovered possessing firearms without first lifting their firearm disability would be arrested, imprisoned without bail, forced to forfeit all their weapons, and subjected to onerous fines.[47] In short, the restoration of armament rights during the Colonial era occurred through pre-enforcement actions, which provided prospective relief to law-abiding challengers who complied with the disarmament law and demonstrated that they did not pose a risk of misusing arms.

c. Revolutionary War

As the colonies became independent states, legislatures continued to disarm individuals whose status indicated that they could not be trusted to obey the law. John Locke—a philosopher who profoundly influenced the American revolutionaries[48]—argued that the replacement of individual judgments of what behavior is acceptable with communal

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[47] *Id.* (proclaiming that a Catholic who violated the disarmament law "shall forfeit and lose . . . his Heirs and Successors, his and their said Armour, Gunpowder, and Ammunition; and shall also be imprisoned"); *see also* Va. Act of 1757, *supra* note 44, at 37 (punishing non-oath taking Catholics with forfeiture of all their arms and ammunition, imprisonment without bail, and fines); Pa. Act of 1757, *supra* note 43, at 627 (imposing forfeiture and imprisonment without bail).

[48] *See* Thad W. Tate, *The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument*, 22 Wm. & Mary Q. 375, 376 (1965); *see also Gundy v. United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J., dissenting) (observing "John Locke [was] one of the thinkers who most influenced the framers[]").

norms is an essential characteristic of the social contract.[49] Members of a social compact, he explained, therefore have a civic obligation to comply with communal judgments regarding proper behavior.[50]

Drawing on Locke, state legislatures conditioned their citizens' ability to keep arms on compliance with that civic obligation, and several states enacted statutes disarming all those who refused to recognize the sovereignty of the new nation.[51] In Connecticut, for instance, as tensions with England rose, concerns that loyalists could not be trusted to uphold their civic duties as members of a new state culminated in a 1775 statute that forbid anyone who defamed resolutions of the Continental Congress from keeping arms, voting, or serving as a public official.[52]

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[49] *See* John Locke, *Two Treatises of Government* § 163 (Thomas I. Cook ed., Hafner Press 1947) (reasoning "there only is political society where every one of the members hath quitted his natural power [to judge transgressions and] resigned it up into the hands of the community").

[50] Locke grounded that duty in the consent of those within a political society; however, he argued that mere presence in a territory constitutes tacit consent to the laws of the reigning sovereign. *See id.* § 119.

[51] *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 158 (2007).

[52] G.A. Gilbert, *The Connecticut Loyalists*, 4 Am. Hist. Rev. 273, 282 (1899) (describing this resolution as "a fair sample of most of the others passed at this time").

In 1776, most of the states heeded the Continental Congress's call to disarm those who "are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, the[] United Colonies, against the hostile attempts of the British fleets and armies,"[53] by disarming those who did not take a loyalty oath or were suspected of being disloyal.[54]

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[53] 4 *Journals of the Continental Congress, 1774–1789*, at 205 (Worthington C. Ford ed., 1906).

[54] *See United States v. Jackson*, 110 F.4th 1120, 1126–27 (8th Cir. 2024); *see, e.g.*, Act of May 1, 1776, ch. 21, §§ 1–2, *reprinted in* 5 *Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* 479–80 (1886) (requiring every non-Quaker "male person above sixteen years of age" to take an oath of loyalty and disarming those who refused of "all such arms, ammunition and warlike implements, as, by the strictest search, can be found in his possession or belonging to him") [hereinafter Mass. Act of 1776]; Act of 1776, *reprinted in* 7 *Records of the Colony of Rhode Island and Providence Plantations in New England* 566–67 (John R. Bartlett ed., 1862) (disarming every male above sixteen years of age who refused to take an oath of loyalty without providing "satisfactory reasons" for their refusal) [hereinafter R.I. Act of 1776]; Act of May 5, 1777, ch. 3, *reprinted in* 9 *The Statutes at Large; Being a Collection of all the Laws of Virginia* 281–82 (William W. Hening ed., 1821) (disarming "all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service" who refused to swear their "allegiance" to the state) [hereinafter Va. Act of 1777]; Act of Nov. 15, 1777, ch. 6, § 9, 1777 N.C. Sess. Laws 231–32 (declaring that "all persons failing or refusing to take the oath of

George Washington approved of these disarmament laws and stated that "the other colonies ought to adopt similar" measures.[55]

Pennsylvania in particular passed a flurry of laws disarming entire groups whose status suggested they could not be trusted to follow the law. In 1776, Pennsylvania ordered the blanket disarmament of all "non-associators," regardless of whether they were disaffected to the cause of liberty.[56] The

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allegiance" that were not exiled "shall not keep guns or other arms within his or their House" and that any such weapons "may be seized by a written Order of a justice of the county") [hereinafter N.C. Act of 1777]; Resolution of Mar. 13, 1776, *in Journal of the Provincial Congress of South Carolina, 1776*, at 77–78 (1776) (disarming convicted non-associators unless and until they took a loyalty oath) [hereinafter S.C. Res. of 1776]; Act of Sept. 20, 1777, ch. 40, § 20, *in Acts of the General Assembly of the State of New-Jersey* 90 (1777) (directing the Council of Safety to "deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements and Ammunition which they own or possess").

[55] Letter from George Washington to Governor Cooke (Jan. 6, 1776), *in* 3 *The Writings of George Washington* 323 (Worthington C. Ford ed., 1889).

[56] Act of July 19, 1776, *reprinted in* 9 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 11 (James T. Mitchell & Henry Flanders eds., 1903) (ordering local officials to "take all the arms . . . which are in the hands of non-associators in the most expeditious and effectual manner"); Churchill, *supra* note 51, at 160 n.52 ("Pennsylvania ordered the blanket

following year, it gave all adult males an ultimatum—swear a loyalty oath or "be disarmed" by local authorities.[57] In 1778, Pennsylvania amended the act to require all adult males who refused or neglected to take an oath to "deliver up [their] arms" to the state.[58] Those who failed to comply and were caught "carry[ing] . . . or keep[ing] any arms or ammunition in [their] house or elsewhere" faced forfeiture of their arms and disarmament which "continue[d] for and during the life of the . . . offender."[59] Finally, in 1779, it authorized local officials to disarm "any person" they "suspected to be disaffected to the independence of this state."[60]

These statutes are especially illuminating because Pennsylvania's 1776 constitution strongly protected the

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disarmament of non-associators, dropping its [ ] distinction between the disaffected and well affected.").

[57] Act of June 13, 1777, *reprinted in* 9 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 110–13 (James T. Mitchell & Henry Flanders eds., 1903) [hereinafter Pa. Act of 1777].

[58] Act of Apr. 1, 1778, *reprinted in* 9 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 238–39, 242 (James T. Mitchell & Henry Flanders eds., 1903) [hereinafter Pa. Act of 1778].

[59] *Id.* at 242–43; *see also* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702696 (explaining that "Pennsylvania amended the act" in 1778 to make disarmament permanent).

[60] Act of Mar. 31, 1779, *reprinted in* 9 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 347–48 (James T. Mitchell & Henry Flanders eds., 1903).

people's right to bear arms.[61] *See Heller*, 554 U.S. at 600–01 (relying on Pennsylvania's "analogous arm-bearing right[]" to "confirm[]" its interpretation of the Second Amendment); *Williams*, 113 F.4th at 654 n.11 ("As of 1776, the Pennsylvania Constitution protected the right to keep and bear arms, so pre-Founding examples from that state are highly probative of the federal right's scope."). Nonetheless, Pennsylvania deprived sizable numbers of pacifists of that right, including Quakers, Moravians, Mennonites, and other groups whose religious convictions prohibited oath-taking.[62] Those groups were not disarmed because they were dangerous,[63] but because their refusal to swear allegiance demonstrated an unwillingness to submit to communal judgments embodied in law when they conflicted with personal conviction and thus posed a special

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[61] PA. Const. of 1776, Decl. of Rights, art. XIII ("That the people have a right to bear arms for the defence of themselves and the state."); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 724 (2009).

[62] *See* Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, 2 N.Y.U. J.L. & Liberty 28, 51 (2006); *see also* Thomas C. McHugh, *Moravian Opposition to the Pennsylvania Test Acts, 1777 to 1789*, at 49–50 (Sept. 7, 1965) (M.A. thesis, Lehigh University) (on file with the Lehigh Preserve Institutional Repository).

[63] *See Heller*, 554 U.S. at 590 ("Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever . . . ."); Johnson et al., *supra* note 30, at 301 (noting that states disarmed "Quakers and other pacifists; although they were not fighters, they did own guns for hunting").

risk of danger.[64] Only those who affirmatively established that they were indeed law-abiding by swearing a loyalty oath before state authorities had their firearm rights prospectively restored.[65]

These class-wide disarmament statutes from the Revolutionary War era shared three characteristics with the group-based disarmament laws of the past. First, Revolution-era legislatures categorically disarmed entire groups of people believed to be dangerous, likely to misuse firearms, or inclined to behave unlawfully. These broad generalizations inevitably led to under- and over-inclusive regulatory schemes. Pennsylvania's loyalty oath, for example, failed to ferret out Benedict Arnold's treachery[66] while simultaneously precluding many peaceful and non-dangerous people from possessing arms.

Second, individuals disarmed by these revolutionary-period statutes could prospectively regain their rights by proving to a government official that they no longer posed a danger of misusing firearms. In Connecticut, persons reported as "inimical" to the revolutionary cause were "disarmed and not allowed to have or keep any arms," but only until they persuaded the local "civil authority, selectmen, and committees of inspection" that they were "friendly to this and the other

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[64] *See* Wedeking, *supra* note 62, at 51–52 (describing how Quakers were "penal[ized] for allegiance to their religious scruples over the new government").

[65] Pa. Act of 1777, *supra* note 57, at 111–13.

[66] *See United States v. Jackson*, 85 F.4th 468, 476 (8th Cir. 2023) (Stras, J., dissenting from the denial of rehearing en banc).

United Colonies."[67] Suspected non-associators in South Carolina who successfully "convince[d]" the committee on safety that they "sincerely desire[d] to join in support of the American cause" would have their "arms . . . restored."[68] Non-associators in Massachusetts could have their right to bear arms restored by "order of" the "general court" or "committees of correspondence, inspection or safety."[69] Males older than sixteen in New Hampshire could retain their arms despite failing to take a loyalty oath if they provided the legislature with "satisfactory reasons" for their refusal,[70] while males in Pennsylvania, Virginia, and North Carolina who were initially disarmed for refusing to take a loyalty oath could regain their right to bear arms by affirmatively seeking out a justice of the peace and taking a loyalty oath, thereby proving that they were no longer dangerous, disloyal, or untrustworthy.[71]

Third, the burden was on members of a disarmed class to rebut the class-wide presumption of firearm misuse *before* possessing a firearm, and those who violated disarmament laws without first satisfying the steps to lift their disability prospectively faced serious consequences. For example, a disaffected South Carolinian who was "found in possession of

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[67] Act of Dec. 1775, *reprinted in* 15 *The Public Records of the Colony of Connecticut From May, 1775 to June 1776*, at 193 (Charles J. Hoadly ed., 1890) [hereinafter Conn. Act of 1775].
[68] S.C. Res. of 1776, *supra* note 54, at 78.
[69] Mass. Act of 1776, *supra* note 54, at 484; *see* Churchill, *supra* note 51, at 159.
[70] R.I. Act of 1776, *supra* note 54, at 567.
[71] *See* Va. Act of 1777, *supra* note 54, at 282–83; N.C. Act of 1777, *supra* note 54, at 231–32; Pa. Act of 1777, *supra* note 57, at 112–13.

arms or ammunition" without first having his rights restored by a legislative committee would "again be disarmed" and, this time, also imprisoned.[72] And statutorily disarmed males in Pennsylvania who were caught in possession before having taken a loyalty oath before a justice of the peace were imprisoned, "prosecute[d]," required to "forfeit [their] arms and ammunition to the state," fined "double the value" of their forfeited possessions, and disarmed for "life."[73]

d. Ratification Debates

It is apparent from the debates around ratification that the Founders believed the Second Amendment permitted legislatures to disarm serious criminals.

The debates between the Federalists and Anti-Federalists in Pennsylvania "were among the most influential and widely distributed of any essays published during ratification."[74] Those essays included "The Dissent of the Minority," a statement of the Anti-Federalist delegates' views[75] that proved "highly influential" for the Second

[72] S.C. Res. of 1776, *supra* note 54, at 78.
[73] Pa. Act of 1778, *supra* note 58, at 242–43 (declaring that "all disabilities and incapacities which any person . . . shall incur or be liable to by reason of [the disarmament acts] shall be and continue for and during the life of the delinquent or offender").
[74] Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 227 (1999).
[75] *See id.* at 232–33.

Amendment.[76] *Heller*, 554 U.S. at 604. The Dissent of the Minority proposed an amendment stating:

> [T]he people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them *unless for crimes committed*, or real danger of public injury from individuals.[77]

And, at the Massachusetts convention, Samuel Adams, a prominent Anti-Federalist, proposed an amendment that the Constitution shall "never [be] construed . . . to prevent the people . . . who are *peaceable citizens*, from keeping their own arms."[78] "Given the Anti-Federalists' vehement opposition" to

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[76] *See also* Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 Yale L.J. 774, 797 (2020) ("Although one might question why we should listen to the debate's 'losers,' the Anti-Federalist Papers are relevant for the same reason that the Federalist Papers are: to quote Justice Scalia, 'their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.' Plus, the Anti-Federalists did not exactly 'lose,' in the same way in which a party who settles a case but gets important concessions does not 'lose' the case." (quoting Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Amy Gutmann ed., 1997))).

[77] 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971) (emphasis added).

[78] *Id.* at 675, 681 (emphasis added).

federal power, it is particularly "revealing" that even they understood that government could disarm criminals and dangerous people. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 664 (2013) (Thomas, J., concurring).

While these amendments were not adopted,[79] they "reveal a great deal about the Second Amendment." *Williams*, 113 F.4th at 655; *see Heller*, 554 U.S. at 604 (relying on the "minority proposal in Pennsylvania" and "Samuel Adams' proposal"). The Second Amendment codified a "pre-existing," "venerable," and "widely understood" right, making it unlikely that "different people of the founding period had vastly different conceptions" of its scope. *Heller*, 554 U.S. at 603–05. The Anti-Federalist proposals thus reflect the understanding of the Founding generation—particularly among those who favored enshrining the right to bear arms in the Constitution—that "crimes committed," whether dangerous or not, justified disarmament.[80]

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[79] The Federalists, who considered a bill of rights unnecessary, defeated the Pennsylvania proposal, while the Massachusetts ratifying convention rejected Adams's proposal because he had waited until the morning of ratification to present it. *See* Letter from Jeremy Belknap to Ebenezer Hazard (Feb. 10, 1788), *in* 7 *Documentary History of the Ratification of the Constitution* 1583 (John P. Kaminski et al. eds., 2001).

[80] *See* Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* 273 (2008) (explaining that the Founders "did not object to the lack of an explicit exclusion of criminals from the individual right to keep and bear arms" during the debates over "what became the Second Amendment," because this limitation "was understood"); Don

e. Post-Ratification Tradition

The historical tradition of legislatures disarming categories of people whom they considered unfit to possess firearms continued into the nineteenth century.[81] As the concerns from the Revolutionary War faded into the past, so did the disarmament laws targeting perceived disloyal Americans. But the pernicious tradition of prohibiting slaves and Native Americans from possessing firearms persisted,[82] and as worries of slave uprisings grew, many citizens feared that freedmen were untrustworthy or inclined to misuse firearms. *See Williams*, 113 F.4th at 656. Antebellum era

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B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983) ("Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent").

[81] As *Rahimi* makes clear, post-ratification history, at least when it is consistent with Founding-era history, is highly probative of the Second Amendment's meaning. *See supra* note 16.

[82] Act of 1797, ch. 43 § 6, *in* 1 *Laws of the State of Delaware* 104 (1797); Act of 1798, *reprinted in* 2 *The Statute Law of Kentucky* 113 (William Littell ed., 1810); 1804 Ind. Acts 108, § 4; Act of Mar. 6, 1805, *reprinted in A Digest of the Laws of the State of Alabama* 627 (Harry Toulmin ed., 1823); Act of June 7, 1806, *reprinted in* 1 *A New Digest of the Statute Laws of the State of Louisiana* 50 (Henry A. Bullard & Thomas Curry eds., 1842); 1805 Miss. Laws 90, § 4.

legislatures responded with a familiar tactic—disarming freedmen on a class-wide basis.[83]

Like the earlier categorical bans, these statutes unquestionably swept in many peaceable, trustworthy, and law-abiding Americans who posed no danger of misusing their firearms. A few were absolute,[84] but nearly all of these laws allowed a freedman to make an individualized showing that he was not apt to misuse firearms, and, if successful, to receive a certificate or a license restoring his right to possess arms.[85]

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[83] *See, e.g.*, *infra* notes 84–91.

[84] *See, e.g.*, Act of Feb. 17, 1833, *reprinted in Compilation of the Public Acts of the Legislative Council of the Territory of Florida, Passed Prior to 1840*, at 65 (John P. Duval ed., 1839); 1850 Ky. Acts 296, § 12; Del. Laws 332, § 7 (1863).

[85] *See, e.g.*, Act of Dec. 1792, *reprinted in* 1 *Collection of All Such Acts of the General Assembly of Virginia* 187 (1803) (declaring that no freedman "shall keep or carry any gun . . . or other weapon whatsoever," but "permit[ing them] to keep and use guns, powder, shot, and weapons offensive or defensive, by license from a Justice of Peace of the County"); Act of Oct. 1, 1804, §§ 4–5, *reprinted in Laws of Arkansas Territory* 521 (J. Steele & J. M'Campbell, eds., 1835) (same); Act of Oct. 1, 1804, §§ 4–5, *in Laws for the Government of the District of Louisiana* 108 (1804) (same); Act of Oct. 1, 1804, §§ 4–5, *reprinted in Digest of the Laws of the Missouri Territory* 374 (Henry Geyer ed., 1818) (same); Little Rock City Ordinance, *in* Arkansas Gazette, Jan. 12, 1836, at 1 (allowing any freedman "to keep one gun and ammunition therefor, by obtaining a license for that purpose from the City Court, which license may be granted upon giving bond and security for good behavior").

Delaware, for example, made it unlawful for a freedman to "have, own, keep or possess any gun, pistol, sword or any warlike instruments whatsoever."[86] But a freedman could seek the resumption of that right by submitting an application to the local justice of the peace, and if "five or more respectable and judicious citizens" certified that the freedman was a "person of fair character," the justice of the peace could "issue a license" authorizing the freedman to "keep or possess" a gun.[87] In Florida, a local judge could grant a freedman's application if "two respectable citizens of the county [certified] to the peaceful and orderly character of the applicant."[88] And a freedman in Maryland could possess a firearm if "at the time of his" possession, he had "a certificate from a justice of the peace, that he is an orderly and peaceable person."[89]

Also consistent with the prior categorical disarmament laws, restoration under these Antebellum regimes was always prospective, and freedmen had to demonstrate that they did not fit the class-wide generalization of misusing firearms *before* possessing a firearm in violation of a disarmament statute.[90] If

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[86] Del. Laws 180–81, § 1 (1832).
[87] *Id.*
[88] 1865 Fla. Laws 25, § 12.
[89] 1806 Md. Laws 44–45, § 2.
[90] *See* 1805 Va. Acts 51, §§ 1–3 (prohibiting freedmen from "keep[ing] or car[rying] any firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license" from the court); 1806 Md. Laws 44–45, § 2 (prohibiting a freedman from "carrying a gun" unless "at the time of his carrying the same, [he has] a certificate from a justice of the peace, that he is an orderly and peaceable person"); 1837 Ark.

a freedman was caught possessing a firearm without first having his disability lifted by an executive or judicial officer, he would be arrested, imprisoned, fined, and forced to forfeit all his arms and ammunition.[91] In short, restoration was limited to pre-enforcement actions brought by law-abiding freedmen.

Acts 587, § 17 ("No free[dman] shall be [allowed] to keep or carry any gun or rifle, or weapon of any kind, or any ammunition without a license first had and obtained, for that purpose, from some justice of the peace."); 1854–55 Mo. Laws 1094, § 2 (prohibiting a freedman from "keep[ing] or carry[ing] any firelock, or weapon of any kind, or any ammunition, without a license first had and obtained for the purpose, from a justice of the peace"); 1840–41 N.C. Sess. Laws 61–62 ("[I]f any . . . free Person of colour shall wear or carry about his or her person, or keep in his or her house, any Shot-gun, Musket, Rifle, Pistol, Sword, Dagger or Bowie-knife, unless he or she shall have obtained a license therefor from the Court of Pleas and Quarter Sessions of his or her County, within one year preceding the wearing, keeping or carrying thereof, he or she shall be guilty of a misdemeanor, and may be indicted therefor.").

[91] 1805 Va. Acts 51, §§ 1–3 (ordering "every constable to give information against, and prosecute every free[dman] who shall keep or carry any arms or ammunition . . . without first obtaining a license" and requiring a convicted freedman to "forfeit all such arms and ammunition" upon conviction); 1806 Md. Laws 44–45, § 2 (requiring a freedman to who was caught "carrying" arms without a "certificate from a justice of the peace" to "forfeit" his arms and pay a fine); Del. Laws 181, § 2 (1832) (authorizing justices of the peace to arrest and punish any freedman found "in possession of any Gun without a license or

With the enactment of the Fourteenth Amendment, religion- and race-based disarmament laws became a sordid relic of our Nation's past.[92] Still, the tradition of disarming

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permit"); 1837 Ark. Acts 587, § 18 (punishing every freedman caught possessing "weapon[s] of any kind" without "having a license" with "seizure" of his arms and large fines); 1854–55 Mo. Laws 1094, § 3 (same); 1865 Fla. Laws 25, §§ 12–13 (declaring that "any . . . person of color" who possesses "fire-arms or ammunition of any kind" without "first obtain[ing] a license to do so . . . shall be deemed to be guilty of a misdemeanor, and . . . shall forfeit . . . all such fire-arms and ammunition, and . . . be sentenced" to other punishments); *see also* 1840–41 N.C. Sess. Laws 61–62.

[92] Although many of these laws are repugnant and would be unconstitutional today under the 14th Amendment, *Rahimi* instructs us to determine whether § 922(g)(1) "comport[s] with the *principles* underlying the Second Amendment." 144 S. Ct. at 1898 (emphasis added). Like the Sixth Circuit in *Williams* and the Eighth Circuit in *Jackson*, we reference these bans only to demonstrate the tradition of legislatures disarming people they presumed posed a special risk of danger to the public. *See Jackson*, 110 F.4th at 1127 ("While some of these categorical prohibitions of course would be impermissible today under other constitutional provisions, they are relevant here in determining the historical understanding of the right to keep and bear arms."); *United States v. Williams*, 113 F.4th 637, 656–57 (6th Cir. 2024) ("Classifying people as dangerous simply because of their race or religion was wrong from the beginning and unconstitutional from 1868. Nevertheless, these pre-Fourteenth Amendment laws provide insight into how early Americans conceived of the right to bear arms embodied in the

categories of persons thought by legislatures to present a "special danger of [firearm] misuse," *Rahimi*, 144 S. Ct. at 1901, continued into the Reconstruction Era and the Gilded Age. Most states restricted the sale of firearms to, or the possession of firearms by, persons under the age of eighteen or twenty-one.[93] Over a dozen states disarmed vagrants, often referred to as "tramps."[94] Many states prohibited drunks from purchasing or carrying guns.[95] And several states banned the sale of arms to mentally ill persons.[96]

Although the "who," "how," and "why," *Rahimi*, 144 S. Ct. at 1898, underlying these categorical disarmament laws somewhat differed from their historical counterparts, "19th-century courts and commentators," *Heller*, 554 U.S. at 603, viewed these laws as constitutional. A "massively popular" nineteenth-century treatise written by "the most famous" voice on the Second Amendment at the time, *Heller*, 554 U.S. at 616, explained that some groups were "almost universally excluded" from exercising certain civic rights, including "the idiot, the lunatic, and the felon, on obvious grounds," and that states "may prohibit the sale of arms to minors."[97]

These laws, like those of earlier decades, were unquestionably overbroad. Not every freedman, drunk,

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Second Amendment. The key point is that entire groups could be presumptively disarmed.").

[93] Brief of the United States at 24 & n.16, *United States v. Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915).

[94] *Id.* at 25 & n.18.

[95] *Id.* at 25–26 & n.19.

[96] *Id.* at 24–25 & n.17.

[97] Thomas, M. Cooley, *Treatise on Constitutional Limitations* 41, 739 n.4 (5th ed. 1883).

beggar, minor, or mentally ill person had a propensity to misuse firearms. To the contrary, many members of these disarmed classes likely posed no greater danger of firearm misuse than their fellow citizens who retained their armament rights. Yet state high courts routinely upheld these categorical disarmaments as consistent with their state constitutional rights to bear arms,[98] which were understood to be coextensive with the Second Amendment.[99] For example, despite observing that some tramps were "less . . .vicious than others," the Ohio Supreme Court nonetheless found a state law categorically disarming "tramps" consistent with the state constitutional right to keep and bear arms because the right "was never intended as a warrant for vicious persons to carry weapons with which to terrorize others." *State v. Hogan*, 58 N.E. 572, 575 (Ohio 1900).

In sum, these post-ratification laws, like the colonial ones preceding them, show that legislatures were empowered to disarm entire groups based on prevailing judgments about which categories of people posed "a special danger of

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[98] *See, e.g.*, *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (upholding a ban on carrying arms while intoxicated as a "reasonable regulation" that prevented the "mischief to be apprehended from an intoxicated person going abroad with firearms"); *State v. Callicutt*, 69 Tenn. 714, 716–17 (1878) (concluded that a state law "prevent[ing] the sale, gift, or loan of a pistol or other like dangerous weapon to a minor [was] not only constitutional as tending to prevent crime but wise and salutary in all its provisions").

[99] *See* Baude & Leider, *supra* note 28, at 1472 ("[I]n the context of the right to bear arms, courts treated . . . state and federal constitutional provisions as approximately equivalent.").

misu[ing]" firearms. *Rahimi*, 144 S. Ct. at 1901. Although the targeted groups changed over time, as did the legislatures' precise calculus for disarming them, the three features of those colonial-era laws remained constant. First, every categorical disarmament law was overbroad—sweeping in law-abiding people who were not dangerous, violent, untrustworthy, or unstable—yet they comported with the Second Amendment. Second, these laws almost universally provided some mechanism for members of a disarmed class to prospectively lift their disability by persuading an executive or judicial official that the class-wide presumption of likely firearm misuse did not apply to them. Third, if a member of a disarmed class violated these disarmament laws without first affirmatively lifting the disability, he was penalized accordingly. Thus, prospective relief was limited to those who abided by the ban unless and until demonstrating that they no longer (if ever) presented a special danger to others.

2. *Criminal Punishment*

Rahimi teaches that if a greater deprivation of rights was permissible as a penalty for an offense in the relevant past, the "lesser restriction" of disarmament is also permissible in a modern-day regulation. *See* 144 S. Ct. at 1902. With that precept in mind, the numerous historical laws punishing non-violent, as well as violent, felons with death, life imprisonment, estate forfeiture, and permanent loss of certain other civil rights show that an indefinite deprivation of the right to bear arms is

a permissible consequence of a felony conviction within our historical tradition.

a. English Law and Colonial America

In eighteenth-century England, the standard penalty for a felony—even for non-violent felonies like fraud and forgery—was death and forfeiture of land, goods, and chattels, and executed felons traditionally forfeited all their firearms, as well as the rest of their estate, to the government.[100] That practice persisted in the American colonies and the Early Republic—those who committed serious felonies, both violent and non-violent, were executed and subject to permanent estate forfeiture.[101]

Individuals who committed less serious crimes also lost their firearms on a temporary, if not permanent, basis. Virginia punished a person convicted for "base" and "opprobrious" speech by ordering him "disarmed" and declaring him ineligible to exercise "any priviledge or freedom" in the colony.[102] The Massachusetts Bay Colony disarmed individuals for merely *supporting* someone who was convicted

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[100] *See* 4 William Blackstone, *Commentaries on the Laws of England* 54, 97–98, 389 (1769); *id.* at 155, 162 (listing fraudulent bankruptcy and forging a marriage license as such felonies).

[101] *See Bucklew v. Precythe*, 587 U.S. 119, 129 (2019) ("[D]eath was 'the standard penalty for all serious crimes' at the time of the founding.") (quoting Stuart Banner, *The Death Penalty: An American History* 23 (2002)); *Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring).

[102] Konig, *supra* note 31, at 371.

of a crime.[103] One New York law "disarmed" anyone who was "convicted" of "oppos[ing] or deny[ing]" colonial or local authority, or "dissuad[ing]" others "from obeying the recommendations" of the Continental or colonial Congress,[104] while another punished those who counterfeited state bills of credit with life imprisonment and the forfeiture of their entire estate, including firearms.[105] South Carolina "disarmed" persons "upon due conviction" of "opposing the measures of the Continental or Colony Congress."[106] In Hampshire County, Massachusetts, "all persons . . . convicted of being notoriously inimical to the cause of American Liberty" were "disarmed."[107] And in Connecticut, anyone "duly convicted" of "libel[ing] or defam[ing]" any acts of the Continental Congress or the Connecticut General Assembly was "disarmed and not allowed to have or keep any arms."[108]

Alternatively, where legislatures stipulated that certain offenses were not punishable by death or life imprisonment,

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[103] *See supra* notes 32–36 and accompanying text (explaining how supporters of Anne Hutchinson, who was convicted for criticizing the colony's clergy's legalistic interpretation of the Bible, were disarmed).

[104] Resolutions of Sept. 1, 1775, *reprinted in* 1 *Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of the State New-York* 132 (1842).

[105] Act of Apr. 18, 1786, *reprinted in* 2 *Laws of the State of New York Passed at the Sessions of the Legislature 1785–1788*, at 253, 260–61 (1886) [hereinafter N.Y. Act of 1786].

[106] S.C. Res. of 1776, *supra* note 54, at 77.

[107] Resolution of July 25–26, 1776, in 1 *American Archives: Fifth Series* 588 (Peter Force ed., 1848)

[108] Conn. Act of 1775, *supra* note 67, at 193.

but rather forfeiture,[109] the offender was stripped of his then-existing estate, including any firearms,[110] and only upon successfully serving of his sentence and reintegrating into society could he presumably repurchase arms.[111] Even minor infractions were often punished with the seizure of firearms involved in the offense.[112]

Of particular relevance are the Founding-era felonies most similar to Range's crime of defrauding the government—forgery, counterfeiting, fraud, and theft—which, in many

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[109] *See Moore*, 111 F.4th at 270–72 (collecting historical forfeiture laws).

[110] *See, e.g.*, Act of Apr. 5, 1790, *reprinted in* 13 *Statutes at Large of Pennsylvania* 511, 511–12 (James T. Mitchell & Henry Flanders eds., 1908) (providing for "forfeit[ure of] all . . . goods and chattels . . . possessed at the time the crime was committed and at any time afterwards").

[111] As this Court has recognized, "the early American forfeiture laws . . . yield the principle that a convict may be disarmed while he completes his sentence and reintegrates into society." *Moore*, 111 F.4th at 272.

[112] For example, individuals who hunted in certain prohibited areas had to forfeit any weapons used in the course of that violation. *See, e.g.*, Ordinance of Oct. 9, 1652, *reprinted in Laws and Ordinances of New Netherland 1638–1674*, at 138 (E.B. O'Callaghan ed., 1868); Act of Apr. 20, 1745, *in* 23 *Acts of the North Carolina General Assembly, 1745*, at 218, 219 (1805); 1771 N.J. Laws 19–20; 1832 Va. Acts 70; 1838 Md. Laws 291–92; 12 Del. Laws 365 (1863).

jurisdictions, were punishable by death from the Colonial era through the Revolutionary War.[113]

Although the majority suggests that the death penalty soon fell out of use for such offenses,[114] historical records show otherwise. In 1790, the First Congress made counterfeiting and forgery capital offenses.[115] On December 14, 1792, within a year of the ratification of the Bill of Rights, Georgia passed an "An Act for the More Effectually Preventing and Punishing Forgery," which penalized fraud, counterfeiting, and forgery

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[113] *See* Maj. Op. at 14, 22; *see, e.g.*, *A Digest of the Laws of Maryland* 255 (Thomas Herty ed., 1799) (punishing forgers with "death as a felon, without benefit of clergy"); *Acts and Laws of The English Colony of Rhode Island and Providence-Plantations in New-England in America* 33–34 (1767) (punishing any person convicted of forging or counterfeiting bills of credit with "Pains of Death"); 10 *Statutes at Large of Pennsylvania* 307, 384 (James T. Mitchell & Henry Flanders eds., 1904) (making forgery and counterfeiting capital crimes in 1781); *Acts of the General Assembly of the State of New Jersey* 8, 136 (Peter Wilson ed., 1784) (listing counterfeiting and theft as capital offenses); *see generally* Banner, *supra* note 101, at 7–8; Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 337, 340, 342, 343, 344, 348 (1982) (detailing capital punishment for non-violent offenses in Massachusetts, Pennsylvania, Virginia, and New York).

[114] *See* Maj. Op. at 14–15.

[115] *See* Act of April 30, 1790, ch. 9, § 14, 1 Stat. 112, 115 ("every such person" convicted of forgery, dealing in forged securities, or counterfeiting "shall suffer death").

with death.[116] Five days later, the General Assembly of Virginia passed an "Act[] for Punishing Persons Guilty of Certain Thefts and Forgeries," which added forgery, counterfeiting, and theft to the list of nonclergyable capital offenses.[117] In New York, people convicted of counterfeiting, forgery, and larceny continued to "suffer death as a felon" for years after the Second Amendment's ratification.[118] In 1796, New Jersey declared that anyone convicted of forgery for a second time "shall suffer death."[119] And at the turn of the nineteenth century, forgery and counterfeiting remained capital crimes in the first instance in Maryland and North Carolina,[120]

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[116] *A Digest of the Laws of the State of Georgia* 467–68 (1800); *see also id.* at 181, 342–43, 449.

[117] *A Collection of All Such Acts of the General Assembly of Virginia, of a Public or Permanent Nature, as are Now in Force* 260–61 (1794). Two years later, Virginia doubled down, clarifying that anyone convicted of forging or counterfeiting, or assisting in the forging or counterfeiting, of "any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note . . . or other valuable thing . . . shall suffer death as a felon without benefit of clergy." *Id.* at 333.

[118] 2 *Laws of the State of New York* 41–42, 74 (1792). Between 1791 and 1796, New York executed at least 10 people for forgery. *See* Mark Espy, *Executions in the U.S. 1608–2002*, Death Penalty Info. Ctr. 41–44, https://dpic-cdn.org/production/legacy/ESPYyear.pdf (last visited Dec. 23, 2024).

[119] An Act of Mar. 18, 1796, *reprinted in Laws of the State of New-Jersey* 221 (William Paterson ed., 1800).

[120] *See A Digest of the Laws of Maryland*, *supra* note 113, at 255–56; 1 *The Public Acts of the General Assembly of North-Carolina* 242 (James Iredell & Francois-Xavier Martin eds.,

while Alabama made forgery, counterfeiting, fraud, and other crimes of deceit capital offenses in 1807.[121]

To be sure, a few states dispensed with capital punishment for forgery, counterfeiting, and other crimes of deceit in the decade following ratification.[122] But a handful of "outlier" laws from the Early Republic does not negate what had become a regulatory tradition. *Bruen*, 597 U.S. at 70; *id.* at 46 (expressing "doubt that *three* colonial regulations could suffice to show a tradition"). And concluding from the laws of a few more lenient jurisdictions that the Constitution precluded more severe penalties not only ignores the historical reality in other jurisdictions, but also wrongly "assumes that founding-era legislatures maximally exercised their power to regulate." *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring).

Regardless, the inference drawn by the majority from this history—that Founding-era legislatures lacked authority to permanently punish non-violent felons—is mistaken. Instead, the statutes cited by the majority prove that even when the most progressive states in our Early Republic dispensed with the death penalty for certain crimes, they continued to exercise their authority to permanently punish non-violent felons. For example, Connecticut, as the majority points out, ended capital punishment for counterfeiting and forgery in 1784.[123] But rather than being executed, twice-convicted forgers and

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1804); Banner, *supra* note 101, at 139 (explaining that counterfeiting and horse stealing remaining capital offenses in Maryland until 1809).

[121] *A Digest of the Laws of the State of Alabama* 210–11 (Harry Toulmin ed., 1823).

[122] *See* Maj. Op. at 14–15, 15 n.4.

[123] *See id.*

counterfeiters in Connecticut were imprisoned and "kept to hard Labour during the Term of his or her natural Life," while Connecticut continued to punish other non-violent crimes like perjury with death.[124] New York likewise experimented with eliminating capital punishment for these non-violent crimes. In 1786, its legislature passed a law punishing those who counterfeited state bills of credit with life imprisonment and complete estate forfeiture.[125] But it reversed course just two years later and reinstated capital punishment for all counterfeiters.[126] For forgery, New York also "chang[ed] the punishment . . . from death into imprisonment for life" in 1796, but again, "the legal consequences of the conviction, as to disability . . . remained the same. The party was incapacitated, forever" from exercising his Second Amendment rights because a felon sentenced to life in prison was "deemed to be

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[124] *Acts and Laws of the State of Connecticut in America* 24, 66 (1784). When Connecticut updated its criminal codes in 1796, theft, forgery, fraud, counterfeiting, and perjury continued to be subject to permanent punishment. *See Acts and Laws of the State of Connecticut in America* 184 (1796) (establishing that a thrice-convicted thief, forger, counterfeiter, or user of counterfeit coins would be "imprison[ed]" for the duration of "his natural life"); *id.* at 182 (listing perjury as a capital offense).

[125] N.Y. Act of 1786, *supra* note 105, at 260–61 (declaring that anyone convicted of counterfeiting or altering a newly minted bill of credit or knowingly using a counterfeited or altered bill of credit "shall forfeit all his or her estate both real and personal to the . . . State, and be committed to the [city jail] for life, and there confined to hard labor").

[126] *See* An Act for Preventing and Punishing Forgery and Counterfeiting (Feb. 7, 1788), *reprinted in* 2 *Laws of the State of New York* 41–42 (1792).

civilly dead, to all intents and purposes."[127] So even the laws cited by the majority confirm that early legislatures had the flexibility to punish non-violent felons in a variety of ways, up to and including physical and civil death, both of which permanently extinguished the felon's civil rights. *See Folajtar v. Att'y Gen.*, 980 F.3d 897, 920 (3d Cir. 2020) (Bibas, J., dissenting).

b. Post-Ratification Tradition

As the Nation's footprint expanded to the south and the west, legislative authority to permanently disarm non-violent criminals followed in tow. Although some states continued to execute thieves, counterfeiters, forgers, and fraudsters until the mid-nineteenth century,[128] other legislatures, during the Era of Good Feelings, transitioned to stripping these non-law-abiding citizens of fundamental rights.

In 1820, one of the Nation's early leading lawyers and "best known" proponents of abolishing capital punishment,

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[127] *Troup v. Wood*, 4 Johns. Ch. 228, 247–48 (N.Y. Ch. 1820); *see also Kanter*, 919 F.3d at 459 (Barrett, J., dissenting) ("Civil death was a state in which a person 'though living, was considered dead'—a status 'very similar to natural death in that all civil rights were extinguished.'" (quoting Harry David Saunders, Note, *Civil Death—A New Look at an Ancient Doctrine*, 11 Wm. & Mary L. Rev. 988, 988–89 (1970))).

[128] South Carolina, Alabama, Georgia, Texas, and California executed white people for counterfeiting, forgery, and theft until the 1850s. *See* Banner *supra* note 101, at 18, 139–40; *see also, e.g.*, Espy, *supra* note 118, at 51, 70, 80 (forgery); *id.* at 56, 62 (counterfeiting); *id.* at 71, 94, 95 (theft); *id.* at 49, 50, 52, 63, 64, 93 (horse theft).

Edward Livingston, was tasked with preparing a systematic code of criminal law for Louisiana.[129] At the time, Louisiana's laws consisted of a "medley of laws and customs" from France, Spain, and English common law that often imposed harsh and unequal punishments, including death for non-violent crimes.[130] Livingston's proposed codes, which brought "*moderation* to the system of crimes and punishments,"[131] eliminated the death penalty for many crimes—including forgery, perjury, and fraud. Capital punishment was replaced with the lesser punishments of "imprisonment" and the "suspension" and permanent "forfeiture" of "political or civil rights"—including the "right of bearing arms."[132] Under Livingston's code of punishments, those convicted of perjury and forgery were permanently disarmed, while fraudsters lost their armament rights for only five years.[133]

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[129] Banner, *supra* note 101, at 138.

[130] Elon H. Moore, *The Livingston Code*, 19 J. Am. Inst. Crim. L. & Criminology 344, 345 (1928).

[131] Carleton Hunt, *Life and Services of Edward Livingston* 31 (1903) (emphasis added).

[132] Edward Livingston, *A System of Penal Law for the State of Louisiana* 377, 378 (1833); *see id.* at 745 (defining "political rights" as "those which are given by the constitution" and "civil rights" as "those which every free person is authorized, by law, to exercise for the preservation either of his own person [or] property").

[133] *Id.* at 393 (seven years' imprisonment and permanent disarmament for perjury); *id.* at 409 (fifteen years' imprisonment and permanent disarmament for forgery); *id.* at 454 (one-year imprisonment and five-years' disarmament for fraudulent

Many contemporaries concurred with Livingston's proposals to deprive convicts of only certain rights—including the right to bear arms—instead of extinguishing all of their rights through capital punishment. His work won wide acclaim from such Founders as Jefferson, Madison, and Story.[134] Chief Justice Marshall, who read one of these codes "with attention and interest," likewise saw no constitutional concerns, writing in a letter to Livingston: "Among your penalties a deprivation of civil and political rights is frequently introduced. I believe no former legislator has relied sufficiently on this provision; and I have strong hopes of its efficacy."[135]

Although Livingston's codes were not ultimately adopted, the Supreme Court has repeatedly relied on his proposed model legal codes for Louisiana and then for the United States as evidence of the types of laws that would have been considered permissible at the Founding.[136] And

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interference with an inheritance). These proposals are particularly notable considering Livingston's desire to create a criminal code that was consistent with the "right[s] secured by the constitution," including "the right to bear arms." *Id.* at 62; *see also* Edward Livingston, *A System of Penal Law for the United States* 19-20, 40, 79, 126 (1828) (similar provisions in model penal code for the United States).

[134] *See* Moore, *supra* note 130, at 345, 355.

[135] Letter from John Marshall to Edward Livingston (Oct. 24, 1825), https://findingaids.princeton.edu/catalog/C0280_c3493.

[136] *See, e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250, 255 n.4 (1952) (citing Livingston's "famous draft System of Penal law for Louisiana" as example of historical libel laws); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 294 (1990) (Scalia, J.,

Livingston's proposal to punish certain non-violent felons with permanent disarmament is consistent not only with Founding-era penalties that explicitly or necessarily deprived non-violent felons of their right to bear arms, but also, as social mores continued to evolve, laws in the early 1800s that permanently stripped non-violent felons of other fundamental rights.[137]

Alabama, for instance, deprived "any person . . . convicted of bribery, forgery, [or] perjury" from exercising several fundamental rights, including holding state office, serving as a juror, or voting in any election.[138] In Missouri, convicted forgers, embezzlers, counterfeiters, fraudsters, bribers, and thieves could not serve as witnesses or jurors, vote, or hold public office.[139] And while Indiana continued to punish horse thieves and recipients of stolen horses with death, it deprived those who committed or helped commit perjury,

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concurring) (citing Livingston's draft code for our history of criminalizing assisted suicide).

[137] Because the traditional punishment for serious crimes was death, early legislatures had little occasion to enact laws explicitly disarming persons convicted of such crimes. Nonetheless, they did enact laws disarming perpetrators of a variety of non-violent offenses. *See supra* notes 102–112 and accompanying text.

[138] Act of Nov. 17, 1819, *reprinted in A Digest of the Laws of the State of Alabama* 230 (Harry Toulmin ed., 1823).

[139] *A Digest of the Laws of the Missouri Territory* 140–45, 149–50 (Henry Geyer ed., 1818).

forgery, fraud, embezzlement, or counterfeiting of their ability to serve in any public office, the military, or on juries.[140]

In sum, before, during, and for a period even after the dawn of our Republic, felons convicted of crimes of deceit could face death, life imprisonment, civil death, and deprivation of their fundamental rights because they were presumed to permanently pose a special risk of danger to society.[141] And the categorical disarmament laws show that legislatures could prophylactically disarm such categories of people, subject to individual applications for a restoration of rights.[142] With those regulatory traditions in mind, we next consider the constitutionality of § 922(g)(1) as applied to Range.

C. Section 922(g)(1) as Applied to Range

No doubt, the categorical disarmament laws and felony punishment laws are "two distinct legal regimes" and § 922(g)(1) "is by no means identical to these founding era regimes." *Rahimi*, 144 S. Ct. at 1899, 1901. But "it does not need to be," *id.* at 1901, because we are not looking for "historical twin[s]," but for "principles underlying the Second Amendment" that are "relevantly similar" to those animating the statute now before us, *id.* at 1898 (citation omitted). And "[t]aken together," *id.* at 1901, those two legal regimes demonstrate that § 922(g)(1)—with one qualification discussed below, *infra* Section I.C.2—"comport[s] with the

[140] *Laws of the Indiana Territory* 25–28, 30 (1807); *Compend of the Acts of Indiana* 73, 76, 87–88 (W. Johnston ed., 1817); Banner, *supra* note 101, at 131.
[141] *See generally supra* Section I.B.2.
[142] *See generally supra* Section I.B.1.

principles underlying the Second Amendment," *id.* at 1898, as applied to Range.

1. *Section 922(g)(1) Generally Comports with Regulatory Tradition*

In comparing a challenged regulation with the principles underlying its historic analogues, "[w]hy and how the regulation burdens the right are central to th[e] inquiry." *Id.*

As for the "why," four centuries of unbroken Anglo-American history shows that legislatures consistently disarmed entire categories of people who were presumed to pose a special risk of misusing firearms. Only after an individual made the requisite showing to a government official—rebutting the class-wide presumption of firearms misuse—was the disability on the individual's right to possess firearms lifted. The Founding generation understood that felons—who could be sentenced to death or life imprisonment, stripped of their fundamental rights, including their right to arms[143]—were one such group. It is no wonder that *Rahimi*, citing to *Heller*'s assurance of the presumptive constitutionality of felon-in-possession bans, repudiated the "suggest[ion] that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at 1901.

At the Founding, the purpose of capital punishment and life imprisonment for certain crimes of deceit, akin to Range's fraud offense, "was threefold: deterrence, retribution, and penitence." *Diaz*, 116 F.4th at 469. Those purposes continued

[143] *See supra* Section I.B.2.

to animate the early nineteenth century laws stripping such felons of other fundamental rights.[144] The justification for § 922(g)(1)—deterring lawlessness by those categorically presumed to pose a special risk of danger to society—is "relevantly similar." *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 29). In enacting § 922(g)(1), "Congress obviously determined that firearms must be kept away from" felons because they belong to a class "who might be expected to misuse them." *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 119 (1983).[145] And just as legislatures dating back to the

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[144] *See supra* notes 129–136 and accompanying text (discussing proposals to punish those convicted of forgery and perjury with permanent disarmament); *supra* notes 137–140 and accompanying text (discussing laws prohibiting forgers, counterfeiters, fraudsters, and thieves from holding office, voting, being on a jury, or serving in the military).

[145] *See also Lewis v. United States*, 445 U.S. 55, 63, 67 (1980) (explaining that federal gun laws, which were intended to be "a sweeping prophylaxis, in simple terms, against misuse of firearms," focus on felony convictions "in order to keep firearms away from potentially dangerous persons"); *Scarborough v. United States*, 431 U.S. 563, 572 (1977) ("Congress sought to . . . keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." (internal quotation marks omitted)); *Barrett v. United States*, 423 U.S. 212, 218 (1976) ("The very structure of the Gun Control Act demonstrates that Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous"); *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (explaining that the principle purpose of the Safe Streets

Founding determined that certain non-violent felons, including those who committed fraud offenses like Range's, should be prohibited from possessing firearms, "Congress' judgment that a convicted felon . . . is among the class of persons who should be disabled from . . . possessing firearms because of potential dangerousness is rational." *Lewis v. United States*, 445 U.S. 55, 67 (1980). Moreover, like the felony punishment laws of our nascent Republic that imposed punishments necessarily encompassing disarmament, § 922(g)(1) applies only to those convicted of crimes that, as reflected in their applicable prison terms, are deemed most serious by modern-day legislatures in their respective jurisdictions.

As to the "how," § 922(g)(1), like its Founding-era analogues, applies after a person is convicted of a felony and deprives that felon of the right to bear arms on a presumptively permanent basis. Capital punishment, life imprisonment, and civil death entailed permanent disarmament, as did estate forfeiture at times.[146] Thus, just as the availability of imprisonment to respond to the Founding-era offenses akin to § 922(g)(8) rendered "the lesser restriction of temporary disarmament that Section 922(g)(8) imposes . . . permissible" in *Rahimi*, 144 S. Ct. at 1902, the availability of capital punishment and life imprisonment to respond to non-violent crimes like theft, forgery, counterfeiting, fraud, and perjury at the Founding and beyond shows that "the lesser restriction" of

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Act and Gun Control Act "was to curb crime" and "lawlessness").

[146] *United States v. Diaz*, 116 F.4th 458, 469 (5th Cir. 2024) ("[T]he majority of the estate forfeiture laws . . . did not provide an opportunity for offenders to regain their possessions.").

disarmament imposed by § 922(g)(1) "is also permissible," *id*.[147]

2. *Range's Pre-Enforcement Challenge*

Although § 922(g)(1) on its face fits "neatly within" our historical tradition, *Rahimi*, 144 S. Ct. at 1901, there is one

[147] Our sister circuits have likewise relied on *Rahimi*'s greater-includes-the-lesser reasoning to hold that § 922(g)(1) is constitutional as applied to felons who committed a variety of non-violent crimes. *See, e.g.*, *United States v. Hunt*, No. 22-4525, 2024 WL 5149611, at *6 (4th Cir. Dec. 18, 2024) (adopting *Rahimi*'s "greater-includes-the-lesser theory" to foreclose as-applied challenges to § 922(g)(1)); *Diaz*, 116 F.4th at 469 ("Here, if capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible."); *Jackson*, 110 F.4th at 1125, 1127 (holding that § 922(g)(1) is constitutional as applied to a felon who committed "non-violent" drug offenses in part because early legislatures "authorized punishments that subsumed disarmament—death or forfeiture of a perpetrator's entire estate—for non-violent offenses involving deceit and wrongful taking of property"). They have also embraced *Rahimi*'s reasoning when upholding other subsections of § 922. *See, e.g.*, *United States v. Gore*, 118 F.4th 808, 815 (6th Cir. 2024) (rejecting as-applied challenge to § 922(n) because it imposed a "lesser burden" than its historical predecessors); *United States v. Veasley*, 98 F.4th 906, 915 (8th Cir. 2024) ("The 'burden' imposed by § 922(g)(3) is 'comparable,' if less heavy-handed, than Founding-era laws governing the mentally ill . . . It goes without saying that confinement with straitjackets and chains carries with it a greater loss of liberty than a temporary loss of gun rights." (quoting *Bruen*, 597 U.S. at 29)).

respect in which the regime it establishes—in practice—does not comport with the "how" of these relevantly similar historic regulations. As I read *Rahimi*, that qualification obligates us to consider and ultimately grant Range's request for declaratory relief.

Under categorical disarmament laws, where an individual was presumed to pose a special risk to society by virtue of his membership in a particular group and thus was lawfully disarmed as an initial matter, there was typically a mechanism for him to petition and attempt to rebut that presumption—whether by taking a loyalty oath, renouncing allegiance, obtaining a license, or securing a court order.[148] Even for offenses historically punishable by death or lifetime imprisonment, and hence, encompassing permanent disarmament, that punishment followed individualized determinations made by a judge and jury, and a convicted felon could also seek clemency or a pardon based on his individual circumstances.[149] And for both the categorical disarmament laws and the commutation of a permanent deprivation of liberty, the burden was on the petitioner to demonstrate that the class-wide presumption of dangerousness was inapplicable to him individually.[150] In short, our regulatory tradition—as well as *Rahimi*'s attention to the individualized findings required by

[148] *See supra* notes 27, 36, 45–46, 65, 67–71, 85, 87–89 and accompanying text.

[149] *See* Banner, *supra* note 101, at 53–56; Preyer, *supra* note 113, at 347–48; Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 Law & Hist. Rev. 53, 61–62, 73–74, 76 (1983).

[150] *See supra* notes 27, 36, 45–47, 72–73, 90–91 and accompanying text.

and the durational limit of the restriction in that case—reflects that where disarmament is based on a categorical presumption of special danger to society, there must be a meaningful opportunity for individualized review to survive constitutional scrutiny.

The necessity of such individualized review was evidently not lost on Congress when it enacted § 922(g)(1). The "plain meaning" of § 922(g)(1)'s text is that "a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action," *Lewis*, 445 U.S. at 60–61, and its enumeration of certain avenues for prospective relief in § 921(a)(20) and § 925(c) makes it "fully apparent" that Congress intended there to be a mechanism to challenge the permanent duration of the ban, *id.* at 64. Like its historical predecessors in the states and colonies,[151] Congress "clearly intended" that a felon "clear his status *before* obtaining a firearm," *id.* (emphasis in original), and that those who violated that ban without seeking dispensation be subject to prosecution and punishment, *see* 18 U.S.C. §§ 921(a)(20), 924(a)(8).

The problem is that the statutory mechanisms legislated by Congress are not, in practice, meaningfully available. True, § 925(c) authorizes the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to prospectively restore a felon's right to possess a firearm if he proves that he "will not be likely to act in a manner dangerous to public safety" and that the "public interest" supports rearmament,[152] and § 921(a)(20) exempts any felon whose conviction "has been expunged," who "has been pardoned," or who has had his "civil rights restored." But

[151] *See supra* Section I.B.1.
[152] 18 U.S.C. § 925(c); 27 C.F.R. § 478.144(d).

Congress defunded the ATF program in 1992.[153] Expungements are rare,[154] as are pardons.[155] And restoration of rights for a convicted felon is, in many cases, not a legal possibility: There is no federal procedure for restoring civil rights for a federal felon, *see Beecham v. United States*, 511 U.S. 368, 372–73 (1994), and in most states, there is no way, absent a state pardon, for a convicted felon to have his civil rights fully restored.[156]

In the absence of other channels for individualized review, the doors to the federal courthouse must be open.[157]

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[153] *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007); *United States v. Bean*, 537 U.S. 71, 74–75 & n.3 (2002); S. Rep. No. 102-353 (1992).

[154] Expungement is generally available for only a small subset of felonies. *See Expungement Laws and Forms: 50-State Survey*, Justia, https://www.justia.com/criminal/expungement-record-sealing/expungement-forms-50-state-resources/ (last updated Feb. 2023).

[155] Pardons are often discretionary and turn on political considerations. *See generally Fifty-State Comparison: Pardon and Policy Practice*, Restoration Rts. Project, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ (last updated July 2024).

[156] *See Fifty-State Comparison: Loss and Restoration of Civil/Firearms Rights*, Restoration Rts. Project, https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges-2/ (last updated Mar. 2024).

[157] I take issue with our dissenting colleagues' suggestion that federal courts lack authority to provide relief like I have

Neither our historical tradition nor our modern understanding of the Second Amendment as an "individual right"[158] permits us to blindly defer to a categorical presumption that a given individual permanently presents a special risk of danger without the opportunity for him to rebut it.[159] Even so, Congress' judgment that a felon "might be expected to misuse" firearms, *Dickerson*, 460 U.S. at 119, and thus belongs to a "class of persons who should be disabled from . . . possessing firearms because of potential dangerousness" is undoubtedly "rational," *Lewis*, 445 U.S. at 67. It is also wholly consistent with this Nation's historical tradition of disarming felons and other categories of people presumed by the legislature to pose a special danger of misusing firearms. *See supra* Section I.B. So once the Government establishes that an offender committed a felony, giving rise to that rational presumption, its burden to identify relevantly similar historical regimes has been satisfied, and the burden to seek a declaratory judgment,

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proposed (or like that proposed in Judge Roth's concurrence) in the face of a statute that would otherwise be unconstitutional. Dissent at 8 n.7. Congress explicitly gave us the authority for the "[c]reation of [a] remedy" in the Declaratory Judgment Act, *see* 28 U.S.C. § 2201, and "'serious constitutional question[s]' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," *Webster v. Doe*, 486 U.S. 592, 603 (1988).

[158] *See Heller*, 544 U.S. at 595; *Bruen*, 597 U.S. at 32.

[159] *Cf. Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

like the burden to take an oath of allegiance, falls to the felon. *See Williams*, 113 F.4th at 662.

Evaluating whether a felon has met that burden is not an unfamiliar exercise for federal judges. In rendering decisions about the possession of a firearm as a condition bail pending trial, district courts consider "the nature and circumstances of the offense charged, including whether the offense is a crime of violence," and determine whether the defendant poses a risk of "danger" to the public. 18 U.S.C. § 3142(c), (g). Similarly, when deciding whether a felon on supervised release or probation must "refrain from possessing a firearm," *id.* §§ 3563(b)(8), 3583(d), courts consider several of the federal sentencing factors, including "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as the need for disarmament to (1) "reflect the seriousness of the offense"; (2) "promote respect for the law, and to provide just punishment for the offense;" (3) "afford adequate deterrence to criminal conduct;" and (4) "protect the public from further crimes of the defendant," *id.* § 3553(a)(1–2); *see also Williams*, 113 F.4th at 657–58; *United States v. Jackson*, 85 F.4th 468, 478 (Mem.) (8th Cir. 2023) (Stras, J., dissenting from the denial of rehearing en banc).

Applying these factors here, the strength of the record precludes the need for remand. Unlike the majority—which places the burden on the Government not only to show that Range committed a felony, giving rise to the presumption that he poses a special risk of firearm misuse, but also to establish that he continues to pose that risk—I believe that historical tradition, *see supra* Section I.B, along with Supreme Court precedent, *see Lewis*, 445 U.S. at 61 (observing that the lifting of § 922(g)(1)'s ban requires "some affirmative action"), places the burden on Range, as a convicted felon seeking to re-arm,

to rebut the presumption that he still poses that risk. Ultimately, however, the majority and I land in the same place because I conclude that Range has carried that burden.

Nearly thirty years have passed since Range's predicate conviction—a non-violent offense involving a relatively small amount of funds—and besides a single summary offense for fishing without a license and a few minor traffic infractions, all evidence suggests that Range has been a law-abiding citizen in the intervening decades. Importantly, Range has complied with § 922(g)(1) until this point, and the Government itself concedes there is no evidence that Range is dangerous, violent, mentally unstable, or poses a threat to himself or the public if his disability is lifted.[160] Thus, considering the § 3553(a) factors and the present-day risk that Range will misuse firearms, I will concur in the judgment.

II. The Majority's Methodological Flaw

Unmoved on remand by *Rahimi*'s call to principles-based analogical reasoning, my colleagues in the majority continue to demand that the Government produce a precise historical match to § 922(g)(1), and, as a result, provide little guidance for our district court colleagues charged with adjudicating as-applied challenges going forward. That failure to provide a clear and workable methodology leaves courts, law enforcement, firearms dealers, and felons themselves guessing about when § 922(g)(1) can be constitutionally applied—disserving all with the resulting ambiguity.

[160] *See* J.A. 171; *Range I* Oral Arg. at 35:05–34:10; 32:55–31:52; 28:45–28:10.

Rahimi, as even the majority acknowledges, calls for examination of "the principles underlying our Nation's history and tradition of firearm regulation," Maj. Op. at 5, not for a regulation that "precisely match[es] its historical precursors," *Rahimi*, 144 S. Ct. at 1898. Because our law is not "trapped in amber" and "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791," relevantly similar historical laws are sufficient to uphold a modern firearm regulation. *Id*. at 1897–98. *Bruen* also cautioned that the Second Amendment does not impose "a regulatory straightjacket" by requiring a "historical *twin*," and it explained that "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." 597 U.S. at 30.

Yet how else would one describe the majority's opinion other than a doomed quest for historical dead ringers? Confronted with the Founding-era practice of imposing the far more severe penalty of death and life imprisonment for the offenses most analogous to welfare fraud—including fraud, forgery, counterfeiting, perjury, and theft—the majority responds that the permanent loss of *all* rights is not analogous to "the *particular* . . . punishment at issue here—de facto lifetime disarmament."[161] To *Rahimi*'s admonition that the greater punishment includes the lesser and the historical reality that the Founding-era punishments for offenses like Range's necessarily subsumed the lesser punishment of permanent forfeiture of firearms, the majority avers that offenses *less serious than Range's* were punishable by temporary rather than life sentences, enabling those offenders to reacquire arms upon

[161] Maj. Op. at 22 (emphasis added).

their release from custody.[162] To laws that categorically disarmed a wide range of groups "like Loyalists, Native Americans, Quakers, Catholics, and Blacks," the majority dismisses their relevance as directed at those "bearing arms against" the country.[163] To the historical reality that such laws extended beyond those "bearing arms" to well-known pacifists like the Quakers, the majority decries such analogies as inconsistent with modern-day understandings of the First and Fourteenth Amendments.[164] And to the "why" and "how" those laws restricted these particular groups—total disarmament of all members of "groups they distrusted"—the majority answers that those laws "do[] nothing to prove that Range is part of a similar group today."[165]

But the historical analogy is patently obvious: Congress disarmed felons precisely because it determined that such persons "may not be *trusted* to possess a firearm without becoming a threat to society.'" *Dickerson*, 460 U.S. at 112 (emphasis added) (quoting *Lewis*, 445 U.S. at 63). In this way, § 922(g)(1) is simply a modern-day analogue to traditional legislative determinations that "firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Id.* at 119; *see supra* Section I.B. And to that inescapable, historically grounded principle that Congress can categorically disarm felons as a class of persons presenting a special danger of firearms misuse, the majority can only fall back on its bottom line: *any* analogy

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[162] *Id.* at 23–24. *But cf. supra* Section I.B.2.a.
[163] Maj. Op. at 20.
[164] *Id.* at 19–20.
[165] *Id.* at 20.

not precisely matching Range's individual circumstances is "far too broad."[166]

Indeed, the only analogue the majority declares sufficient—a Founding-era statute that imposed the same "particular"[167] restriction for the same length of time on the same group of people as the modern-day law[168]—calls for nothing less than a "historical *twin*."[169] The majority admits as much when, confronting the fact that the First Congress made forging and counterfeiting a public security a capital offense, it asserts that Range's crime of making false statements to steal public funds—though admittedly analogous—could hypothetically be "more analogous" to other fraud offenses that carried a lesser punishment.[170] The majority thus thrusts on the Government the insurmountable burden of finding an identical Founding-era offense that imposes "the particular (and distinct) punishment" of lifetime disarmament for each and every felony covered by § 922(g)(1).[171] Yet the proper inquiry is not offense-by-offense, but "whether the challenged *regulation* is consistent with the *principles* that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898 (emphasis added). Analogical reasoning under *Bruen* and *Rahimi* "demands [that] wider lens." *Id.* at 1925 (Barrett, J., concurring).

At bottom, my colleagues have prescribed a methodology of examining historical practices in isolation and

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[166] *Id.* at 20–21 (quoting *Bruen*, 597 U.S. at 31).
[167] *Id.* at 22.
[168] *See id.*
[169] *Bruen*, 597 U.S. at 30; *Rahimi*, 144 S. Ct. at 1903.
[170] Maj. Op. at 22.
[171] *Id.*

rejecting them if they deviate in any respect from contemporary regulations. But for all the analogues they reject, they decline to adopt any articulable methodology of their own. And not for lack of options. Our sister circuits have taken divergent but principled approaches to adjudicating challenges to § 922(g)(1). *See United States v. Hunt*, No. 22-4525, 2024 WL 5149611, at *7 (4th Cir. Dec. 18, 2024) ("Just as early legislatures retained the discretion to disarm categories of people because they refused to adhere to legal norms in the pre-colonial and colonial era, today's legislatures may disarm people who have been convicted of conduct the legislature considers serious enough to render it a felony."); *United States v. Pierre*, No. 23-11604, 2024 WL 5055533, at *2–4 (11th Cir. Dec. 10, 2024) (concluding that *Bruen* and *Rahimi* did not overrule or abrogate circuit precedent foreclosing facial and as-applied challenges to § 922(g)(1)); *Williams*, 113 F.4th at 661–62 ("History shows that governments may use class-based [laws like § 922(g)(1)] to disarm people it believes are dangerous, so long as members of that class have an opportunity to show they aren't."); *Diaz*, 116 F.4th 469–70 (holding that § 922(g)(1) is constitutional as applied to felons convicted of offenses analogous to ones that "would have led to capital punishment or estate forfeiture" at the Founding); *United States v. Jackson*, 110 F.4th 1120, 1125 (8th Cir. 2024) ("Given these assurances by the Supreme Court [about longstanding prohibitions on the possession of firearms by felons], and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1).").

The closest the majority comes to adopting a coherent methodology is its approving reference to that of the Sixth

Circuit in *Williams*.[172] In several respects, I agree with *Williams*. Much like the approach I proposed in my prior dissent[173] and that I espouse today, the Sixth Circuit derived from historical analogues the "relevant principle" that "when the legislature disarms on a class-wide basis, individuals must have a reasonable opportunity to prove that they don't fit the class-wide generalization," 113 F.4th at 661, and because the government historically could "require individuals in a disarmed class to prove they aren't dangerous in order to regain their right to possess arms," it concluded that "in an as-applied challenge to § 922(g)(1), the burden rests on [the felon] to show he's not dangerous," *id.* at 662. So far, so good.

At that point, however, the Sixth Circuit took a different turn and asserted that a defendant could raise that challenge in an effort to dismiss a § 922(g)(1) indictment "albeit after he violated the law, not before." *Id.* at 663; *see also Diaz*, 116 F.4th at 461, 469–70 & n.4. And that conclusion, I reject. My colleagues in the majority gesture at a purely prospective approach by clarifying that the relief we grant today on Range's as-applied challenge protects him only "from prosecution under § 922(g)(1) for any *future* possession of a firearm."[174] Consistent with that prospective approach, they also clarify that the decision to grant a movant that forward-looking relief turns not solely on the nature of the underlying conviction but on whether the movant currently "poses a

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[172] *See* Maj. Op. at 21.

[173] *Range I*, 69 F.4th at 135–38 (Krause, J., dissenting).

[174] Maj. Op. at 25 (emphasis added).

physical danger to others."[175] And to that extent, I agree with them.

But there should be no ambiguity on that score, and the majority opinion creates more questions than it answers. As I explain below, requiring a pre-enforcement challenge as a condition of protection from prosecution under § 922(g) and prosecuting those who violate § 922(g)'s prohibition without obtaining such declaratory relief not only comports with our regulatory tradition but also provides a framework that is both administrable and comports with due process.

III. The Benefits of Our Prospective Approach Relative to the Sixth Circuit's

Any approach that would apply post hoc determinations about the constitutional application of § 922(g)(1) on a retroactive basis—i.e., to excuse unauthorized violations of the statutory ban and dismiss pending § 922(g)(1) indictments or vacate § 922(g)(1) convictions—would be deeply flawed. While the Sixth Circuit attempted to cabin the harm by drawing a line at "dangerousness," *Williams*, 113 F.4th at 659, its retroactive modality still falls prey to intractable doctrinal and practical problems.

A. Consequences of the Sixth Circuit's Retroactive Approach

A retrospective mode of analysis defies not just logic, but also the Due Process Clause, which guarantees that a "person of ordinary intelligence [must have] a reasonable opportunity to know what is prohibited, so he may act

[175] *Id.*

accordingly."[176] But particularly where (as with the majority here) courts continue to demand a precise historical analogue, offenders cannot possibly know in advance of a court's ex post determination whether possessing a firearm post-indictment will be deemed a constitutional entitlement or a federal felony.

Looking to "dangerousness," as the Sixth Circuit did, still fails to give adequate notice about what § 922(g)(1) permissibly criminalizes. Congress enacted a bright-line rule distinguishing offenders who can possess firearms from those who cannot. By looking to the maximum punishment available for his offense, a felon or state misdemeanant can easily determine whether he can possess a gun.[177] In contrast, a holding that § 922(g)(1) constitutionally applies ab initio only to "physically dangerous" felons or felons who commit "violent" crimes replaces Congress's straightforward test with an opaque one, tantamount to rendering the statute void for vagueness.

After all, previous attempts by federal courts to define "violent felony," e.g., for purposes of the Armed Career Criminal Act, yielded "repeated attempts and repeated failures to craft a principled and objective standard [for that term,] confirm[ing] its hopeless indeterminacy."[178] Those efforts proved so futile that the Supreme Court held in *Johnson v. United States* that the "violent felony" provision "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges," thus violating due process.[179] If § 922(g)(1) is constitutionally applied only to "crimes of violence," are we relegated to the widely disparaged "categorical approach,"

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[176] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[177] *See* 18 U.S.C. § 921(a)(20).
[178] *Johnson v. United States*, 576 U.S. 591, 598 (2015).
[179] *Id.* at 597.

excluding all offenses that lack an element of the "use of force"?[180] What is the relevance of underlying conduct? Are courts limited to considering *Shepard* documents?[181] What about crimes that lack an element of force but are undeniably associated with violence, like drug trafficking, human trafficking, and treason?[182]

Holding § 922(g)(1) unenforceable from the start as to an amorphous sub-class of felons also makes it virtually impossible for the Government to prove the mens rea element of a § 922(g) offense. In *Rehaif v. United States*, the Supreme Court held that to convict a defendant under § 922(g) the Government must prove the defendant not only knew that he possessed a firearm, but also knew that "he had the relevant status when he possessed [the firearm.]" 588 U.S. 225, 227 (2019). The Court then clarified in *Greer v. United States* that a *Rehaif* error is not a basis for relief under the plain-error standard unless the defendant can make a sufficient argument on appeal that, but for the error, he could have established he did not know he was a felon. 593 U.S. 503, 508–10 (2021). That would be a difficult argument to make, the Court observed, because "as common sense suggests, individuals who are

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[180] *United States v. Scott*, 14 F.4th 190, 195 (3d Cir. 2021).

[181] Those documents include the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

[182] Range himself candidly conceded at the original en banc oral argument that, under a "violence" test, offenses like possession of child pornography, money laundering, and drunk driving would not support disarmament. *Range I* Oral Arg. at 19:51–20:20, 24:00–24:26.

convicted felons ordinarily know that they are convicted felons [for purposes of § 922(g)(1).]" *Id.* at 506.

But a test that turns on a court's post hoc determination that § 922(g)(1) was unenforceable from the beginning replaces *Rehaif*'s clear and ascertainable standard with an incoherent one: the Government now must prove that, when he possessed the firearm, the felon knew his particular offense of conviction would later be held to have a historical match. And in lieu of *Greer*'s high threshold for plain-error relief, that reasoning hands defendants a ready-made argument for appeal: that they could not know at the time they possessed a firearm—indeed, at any time before a court made the determination—whether their particular felony offense was subject to or exempt from § 922(g)(1). In short, granting relief on a retroactive basis throws open the floodgates the Supreme Court sought to close on *Rehaif* errors in *Greer* and augurs in a deluge of *Rehaif* challenges.

Additionally, a retroactive approach has sweeping implications for state felon-in-possession restrictions. By making application of felon-in-possession statutes void ab initio, the retroactive approach permits felons to raise the same Second Amendment challenges to state regulations as they can to their federal counterpart, leaving state felon-in-possession statutes susceptible to the same patchwork constitutionality as § 922(g)(1). Those laws differ significantly across the forty-eight states that restrict offenders' firearm rights—including which offenses trigger restrictions as well as their duration—in keeping with each state's local circumstances.[183] Instead of

[183] *See generally Fifty-State Comparison: Loss and Restoration of Civil/Firearms Rights*, Restoration Rts. Project,

ensuring local communities' concerns and values shape when felons may possess firearms under state law, the retroactive approach brushes aside these weighty federalism interests, making applications of local firearm restrictions unconstitutional at the outset where they do not precisely match a historical twin. Congress took great care to respect local interests in § 922(g)(1) by incorporating state law felony equivalents. *See* 18 U.S.C. § 921(a)(20). The retroactive approach displaces this careful balance of federal and state interests in favor of unpredictable, post hoc determinations, unresponsive to the needs of local communities and antithetical to our system of federalism.

Finally, anything short of requiring a pre-enforcement challenge severely undermines law enforcement efforts and makes the FBI's National Instant Criminal Background Check System (NICS) obsolete. Currently, NICS includes over five million felony conviction records,[184] and that number continues to grow as additional agencies contribute records to the NICS database.[185] Prior felony convictions are by far the most common reason individuals fail NICS background checks.[186]

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https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges-2/ (last visited Dec. 23, 2024).

[184] *Active Records in the NICS Indices*, FBI, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view (last updated Nov. 30, 2024).

[185] *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 Cardozo L. Rev. 1573, 1597 (2022).

[186] *See Federal Denials*, FBI, https://www.fbi.gov/file-repository/federal_denials.pdf/view (last updated Nov. 30, 2024).

And the Supreme Court in *Bruen* endorsed the use of background checks, for violent and non-violent offenses alike, to ensure individuals bearing firearms are "law-abiding" citizens. *See* 597 U.S. at 38 n.9.

An indeterminant, post hoc test for which felons fall outside § 922(g)(1) and under what circumstances renders NICS a dead letter. When the police receive a tip that an ex-offender is toting an assault rifle, how do they—or prosecutors for that matter—know if they have probable cause to arrest him for violating the felon-possession ban, or if they instead are bringing liability on themselves for violating the felon's civil rights? Do they look to particular elements of the prior offense to determine that the felon is a "dangerous" or to the conduct underlying that offense? How do they assess that conduct in the case of guilty pleas entered years ago? This approach requires law enforcement in the first instance to undertake the historical research with which even the federal courts have struggled to determine whether there is a precise match and thus probable cause to support an arrest under § 922(g)(1), rendering their jobs, at best, substantially more difficult, and, at worst, nearly impossible.

And, without a functional background check system, how do firearms licensees (FFLs) comply with federal law? Where as-applied challenges can render § 922(g)(1) unenforceable from the outset, FFLs who discover that a potential customer has a felony conviction have no way of knowing whether that offense has a precise historical match or whether the individual will be considered by a court to be "physically

dangerous."[187] Of particular concern, any assessments based on such "vague criteria are vulnerable to biases" along race, class, gender, and other lines, resulting in disparities between which groups retain gun rights and which do not.[188]

B. Requiring a Declaratory Judgment Avoids These Pitfalls

Holding § 922(g)(1) enforceable through at least the successful completion of a felon's sentence and requiring a declaratory judgment as a prerequisite to relief thereafter not only adheres to our regulatory tradition and the Court's precedent but also provides a clear and administrable framework.[189]

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[187] The penalty for incorrectly concluding a felon can purchase a weapon without an exhaustive inspection of the felon's crime, conduct, and personal circumstances will be stiff: a single error will result in the loss of the FFL's license, barring the FFL from the industry. *See Simpson v. Att'y Gen.*, 913 F.3d 110, 114 (3d Cir. 2019).

[188] Ryan T. Sakoda, *The Architecture of Discretion: Implications of the Structure of Sanctions for Racial Disparities, Severity, and Net Widening*, 117 Nw. U. L. Rev. 1213, 1227 (2023); *cf.* Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 Harv. L. Rev. F. 449, 449 (2022) (arguing "racial justice concerns [with firearm laws] should be addressed in democratic politics rather than in the federal courts").

[189] Judge Roth acknowledges that there is a meaningful difference between the proposal that an individual's opportunity to petition for rearmament arises after the sentence has been

First, declaratory judgment proceedings give effect to the Court's oft-repeated instruction that felon-possession bans are "presumptively lawful,"[190] while respecting that the Government bears the initial burden to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[191] Once the Government establishes

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served, and the proposal that it arises after the duration of the maximum sentence available for the conviction has passed. She agrees, however, on the most important point: felons should have a date for when they may petition courts for rearmament, and specific guidance for what they must show for relief. Judge Roth also strongly agrees with the above critiques of the majority opinion.

[190] *Heller*, 554 U.S. at 626–27 & n.26; *see McDonald*, 561 U.S. at 786; *Rahimi*, 144 S. Ct. at 1902; *Bruen*, 597 U.S. at 72 (Alito, J., concurring); *id.* at 81 (Kavanaugh, J., concurring). As the Tenth Circuit has observed, "[b]ecause the 'presumptively lawful regulatory measures' language, first stated in *Heller,* has not been abrogated," and has been restated in *McDonald*, *Bruen*, and *Rahimi*, "it remains good law." *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 119 (10th Cir. 2024); *see also Binderup v. Att'y Gen.*, 836 F.3d 336, 359 n.3 (3d Cir. 2016) (Hardiman, J., concurring in part) (explaining that "*Heller*'s list of 'presumptively lawful' regulations . . . does not qualify as dicta"), *abrogated on other grounds by Bruen*, 597 U.S. 1. Moreover, even if it were dicta, "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement." *Oyebanji v. Gonzales*, 418 F.3d 260, 265 (3d Cir. 2005) (Alito, J.) (cleaned up).

[191] *Bruen*, 597 U.S. at 17.

that an offender committed a felony, it has necessarily satisfied its burden consistent with the historical practice of disarming felons upon conviction. The burden at that point, like the taking of oaths or swearing allegiance, falls on the felon to rebut the ban's presumptive lawfulness by establishing he is currently a "law-abiding citizen" who no longer poses a special risk of danger or misusing firearms.[192]

Second, limiting relief in as-applied § 922(g)(1) challenges to prospective declaratory judgments eliminates an intractable due process problem. Any felon who possessed a firearm before securing a favorable declaratory judgment would remain subject to prosecution under § 922(g)(1), and those granted relief would have their rights restored prospectively. That clear rule would provide felons with constitutionally adequate notice as to whether and when they regained their right to bear arms, allowing § 922(g)(1) to withstand void-for-vagueness challenges. Prospective declaratory judgments likewise avoid opening the floodgates to mens rea challenges to § 922(g)(1) prosecutions, and the high threshold *Greer* set for defendants to overturn § 922(g)(1) convictions would endure.[193]

Third, making a declaratory judgment a prerequisite to avoiding § 922(g)(1) enforcement shows respect for the separation of powers and federalism. Other than for those who

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[192] *Id.* at 26. This approach would not result in repetitive actions because a felon who brings an unsuccessful declaratory judgment suit must provide "newly discovered evidence that, with reasonable diligence, could not have been discovered" to prevail in a subsequent as-applied challenge to § 922(g)(1). Fed. R. Civ. P. 60(b)(2).

[193] *See* 593 U.S. at 508–09.

received favorable declaratory judgments, Congress's decision to disarm felons would remain intact. Also, state statutes restricting felons' firearms rights would be generally enforceable, ensuring local communities' concerns and values continue to shape when felons are permitted to possess firearms under state law.

Finally, a prospective approach avoids the potentially debilitating effect on law enforcement, U.S. Attorney's Offices, and our background check system. Currently, felons can submit documentation to the FBI through a voluntary appeal-file application, including "information regarding an expungement, restoration of firearm rights, pardon, etc."[194] Successful applicants receive a unique personal identification number to prevent future background check denials.[195] Thus, a felon who secures a prospective declaratory judgment can simply submit that judgment to the FBI to prevent false positives on his background check when next purchasing firearms. Then, just as they do today, law enforcement and prosecutors could depend on NICS for data when deciding whom to charge with violating § 922(g)(1); courts could rely on existing jury instructions, the standard conditions of supervised release or parole, and the plain-error test set out in *Greer*; and firearm dealers could

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[194] *Types of Documents Requested Based on Prohibitor*, FBI (Sept. 14, 2018), https://www.fbi.gov/file-repository/nics-appeal-documents-requested.pdf/view.

[195] *Firearm-Related Challenge (Appeal) and Voluntary Appeal File (VAF)*, FBI, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/national-instant-criminal-background-check-system-nics-appeals-vaf (last visited Dec. 23, 2024).

ascertain from a background check whether a felon can purchase weapons.

Without clearly limiting as-applied challenges to prospective relief, we put our citizenry at risk for tragic consequences: a flood of motions to dismiss indictments, appeals, and reversals of § 922(g)(1) convictions; more armed felons on our streets; more gun violence; and less trust in a judiciary mired in formalism and the usurpation of legislative authority. The Supreme Court had the opportunity to take up *Range I* and instead remanded, resurrecting a circuit split and a tower of uncertainty. The sooner it provides clarity, the safer our republic will be.

IV. Conclusion

For the foregoing reasons, I respectfully concur in the judgment.

ROTH, Circuit Judge, concurring in judgment with whom KRAUSE and CHUNG, Circuit Judges join in part.

The Supreme Court has consistently and repeatedly reaffirmed Congress's presumptive power to limit felons' rights to possess firearms.[1] The facial constitutionality of § 922(g)(1) is not up for debate under this presumption—nor is it before us on Range's appeal. But *Rahimi* and *Bruen* have blurred the lines between facial and as-applied challenges under the Second Amendment. Determining whether § 922(g)(1) "comport[s] with the principles underlying the Second Amendment"[2] requires us to articulate broad principles underlying the challenged regulation and their relevant similarity to oft-repeated historical analogues.

I write separately to focus on two aspects of Range's circumstances: the permanent loss of his right to bear firearms, and the necessity of an efficient path to resolve similar

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[1] *See District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008) (describing certain categorical prohibitions, like felon dispossession, as "presumptively lawful"); *accord. United States v. Rahimi*, 144 S. Ct. 1889, 1902 (2024); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 80–81 (2022) (Kavanaugh, J., concurring); *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *see also Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) ("These legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties."); *United States v. Bass*, 404 U.S. 336, 338 (1971) (affirming § 922(g)(1) as a constitutionally valid exercise of Congress' Commerce Clause authority).

[2] *Rahimi*, 144 S. Ct. at 1898.

situations. I am convinced that, in the case of a nonviolent, reformed offender, the loss of the right to possess firearms should not be de facto permanent. Over two decades have passed since Range completed his sentence for obtaining public welfare funds by misrepresentation—two decades during which he has demonstrated law-abiding, peaceful behavior and shown his possession of firearms would not pose any danger to the public. The ban of § 922(g)(1) should no longer apply to him.

The government and our sister circuits have presented an exhaustive survey of statutes that set forth an unmistakable Anglo-American tradition of categorical disarmament.[3] As the sources provided by the government make clear, from English

[3] *See, e.g.*, *United States v. Williams*, 113 F.4th 637, 653 (6th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1126 (8th Cir. 2024); *United States v. Perez-Garcia*, 96 F.4th 1166, 1186 (9th Cir. 2024); *United States v. Duarte*, 101 F.4th 657, 676 (9th Cir. 2024), *opinion vacated*, 108 F.4th 786 (9th Cir. 2024); *see also* Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 Fordham Urb. L.J. 25, 47 (2023); Joseph G. S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 259 (2020); Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 L. & Hist. Rev. 567, 577 (1998); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695 (2009).

kings to the 20th century, governments have disarmed the peaceable and dangerous alike with varied justifications.[4]

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[4] *See generally*, Krause Concurrence at 12–40 (providing an in-depth discussion of categorical disarmament laws from the English Restoration to the American Gilded Age); *see also, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England*, 380–89 (1769) (felons at common law generally forfeited their lands, goods, and chattels); Letter from George Washington to the Pennsylvania Council of Safety (Dec. 15, 1776), National Archives (requesting authorization to disarm individuals remaining neutral in the Revolutionary war, as their arms were needed by the militia); Act of Mar. 7, 1923, ch. 266, § 5, 1923 N.D. Laws 380 (prohibiting the possession of handguns by those convicted of felonies against person or property); Act of Oct. 3, 1961, Pub. L. No. 87-342, § 2, 75 Stat. 757 (forbidding the receipt of a firearm by anyone convicted of a crime punishable by more than a year of imprisonment); Act of July 13, 1892, ch. 159, § 5, 27 Stat. 117 (D.C.) (restricting the sale of firearms to individuals below certain ages); Act of Feb. 4, 1881, ch. 3285, No. 67, § 1, 1881 Fla. Laws 87 (banning the sale of guns to persons of unsound mind); Act of Mar. 27, 1879, ch. 59, § 4, 1879 Conn. Pub. Acts 394 (disarming "tramps" or "vagrants"); Act of Feb. 23, 1867, ch. 12, § 1, 1867 Kan. Sess. Laws 25 (forbidding intoxicated persons from possessing guns); Federal Firearms Act, ch. 850, § 2(d)-(f), 52 Stat. 1251 (1938) (banning violent criminals, fugitives from justice, and persons under felony indictment from possessing firearms); Act of Oct. 3, 1961 (disarming felons in general, drug users and addicts, and persons with mental illnesses); Violent Crime Control and Law Enforcement

If the government's proposed analogues are evidence of a historical tradition underlying the Second Amendment, then the legislature's power to categorically disarm is undeniably broad. In enacting § 922(g)(1), Congress intended to exercise the full breadth of this power, believing that a felony-equivalent conviction was a sufficient indicator that such individuals posed a danger of misuse.[5] Congress imposed categorical disarmament as a preventive and/or reformative measure.[6] Moreover, the government has met its burden of setting forth analogues that are "relevantly similar" to § 922(g)(1) in "*why* … [they] burden[] the Second Amendment right."[7] These analogues establish a historical principle of disarmament to address the danger of the misuse of firearms, and the Supreme Court has repeatedly identified § 922(g)(1) as a "presumptively lawful regulatory measure[]."[8]

Act of 1994 (disarming individuals subject to domestic violence restraining orders).

[5] *See also*, *Huddleston v. United States*, 415 U.S. 814, 824 (1974) ("The principal purpose" of § 922(g) "was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'") (citing 1269 S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968) U.S. Code Cong. & Admin. News 1968, p. 4410).

[6] *Id.*

[7] *See Rahimi*, 144 S. Ct. at 1901 (emphasis added) (quoting *Bruen*, 597 U.S. at 30); *see also, e.g.*, *id.* at 1902; *Heller*, 554 U.S. at 626–27, 627 n.26; *Bruen*, 597 U.S. at 80–81 (Kavanaugh, J., concurring); *McDonald*, 561 U.S. at 786.

[8] *See, e.g.*, *Heller*, 554 U.S. at 626–27, 627 n.26; *Rahimi*, 144 S. Ct. at 1902; *Bruen*, 597 U.S. at 364 (2020) (Alito, J., concurring); *McDonald*, 561 U.S. at 786.

But the government's historical analogues show that Congress has the power only to *suspend* the right to possess firearms—not to de facto permanently remove it.[9] The

[9] The only analogue that the Government identifies for permanent disarmament is capital punishment. Historical punishment of felonies with execution is an imperfect analogue, as § 922(g)(1) is not a punishment but rather a disability imposed because of a prior conviction. *See Beecham v. United States*, 511 U.S. 368, 371 (1994) ("Section 922(g) imposes a disability on people who "ha[ve] been convicted."); *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010) (listing "ineligibility to possess firearms" as a consequence of conviction). Treating § 922(g)(1) as a form of punishment would raise serious constitutional questions when the plaintiff, like Range, was convicted only in state court. This is because Congress lacks authority to impose a punishment for a state crime. *See United States v. Lanza*, 260 U.S. 377, 382 (1922) ("[E]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. For it to do so would crumble the foundations of our system of dual sovereigns, not to mention flout our constitutional prohibition on punishing the same offense twice."). This distinction is important. Historical analogues presented in this context disarmed within the bounds of a criminal sentence—but a § 922(g)(1) disability is a de facto permanent disarmament in most states. *See 50-State Comparison: Loss & Restoraiton of Civil / Firearms Rights*, RESTORATION OF RTS. PROJ. (available at https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-ofcivil-rights-and-firearms-privileges/) (last accessed Nov. 21, 2024). Because Founding-era felons regained their rights when (or if) they completed their sentence,

government offers two types of historical analogues to support the duration of 922(g)(1)'s disarmament: 1) statutes that disarmed categories of people believed to pose a danger of firearm misuse; and 2) statutes punishing—and incidentally disarming—those convicted of committing historical-equivalents to modern felonies. For the first category, once the government's justification for disarmament no longer applied to an individual—whether at the end of a criminal sentence, upon an individualized determination of a judge or other authority, or as part of a broader reinstatement of civil rights—the right to possess firearms always had the potential of being restored.[10] Thus, while these proposed historical analogues do

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these analogues do not in and of themselves support the necessity of disarmament once a perceived threat to society has passed. *See Kanter v. Barr*, 919 F.3d 437, 461 (7th Cir. 2019) (Barrett, J., dissenting) (describing the general pitfalls of analogies to capital punishment, and noting that felons serving a term of years had their rights "suspended but not destroyed.") (*abrogated by Bruen*, 597 U.S. at 1). This conclusion is supported by our general understanding that individuals possess limited civil rights while serving their sentence, but that those rights may be restored once they have served their time. The only permanent loss of a fundamental constitutional right that may continue as a collateral consequence of criminal conviction— the loss of the right to vote—required an express sanction in the Constitution. *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) ("The exclusion of felons from the vote has an affirmative sanction in [§] 2 of the Fourteenth Amendment.").

[10] For example, the nineteenth century statutes disarming children, the mentally ill, "vagrants", and intoxicated persons were necessarily temporary in nature as a child could age out

support a principle of temporary categorical bans, they are not wholly "relevantly similar" to § 922(g)(1) in "*how* [they] burden the Second Amendment right" because the disability imposed by § 922(g)(1) is de facto permanent.[11]

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of the ban, a mentally ill person could receive treatment, a "vagrant" could be housed, and an intoxicated person could become sober. *See*, *supra* n.4; *see also*, Resolution of Mar. 13, 1776, in Journal of the Provincial Congress of South Carolina, 1776, at 77–78 (1776) (permitting restoration of arms to "any person who . . . shall convince the Committee aforesaid, that he sincerely desires to join in support to the American cause"); Mass. Gen. Laws 484 (1776) (permitting disarmed loyalists to restore their right to possess arms upon a committee or court order); *Duarte*, 101 F.4th at 683 (describing Revolution-era statutes permitting Loyalists to keep weapons "once they showed 'satisfactory reasons' for needing weapons or 'by the order of" colonial committees'"). Many statutes included an internal safety valve permitting individuals to contemporaneously restore their right to possess firearms, including by swearing loyalty oaths, *e.g.*, The Acts of the General Assembly of the Commonwealth of Pennsylvania 193 (1782) (A 1779 Act amending a 1778 law disarming Loyalists, to permit those who had taken an oath of allegiance to rearm themselves.), or putting their use of firearms at surety. *See Rahimi*, 144 S. Ct. at 1899 (discussing history of surety laws as a form of "preventative justice"). Meanwhile, felonies at common law that were punishable by forfeiture of property did not preclude offenders from purchasing new firearms after they had forfeited their old arms. *E.g.*, *id.* at 1901; *United States v. Moore*, 111 F.4th 266, 269 (3rd Cir. 2024).

[11] *See Rahimi*, 144 S. Ct. at 1901 (emphasis added) (quoting *Bruen*, 597 U.S. at 30).

The government identifies a second set of historical analogues to support the de facto permanence of § 922(g)(1) disarmament—historic punishments for serious offenses. For convicted offenders, disarmament was often limited to the duration of their actual imprisonment. In practice then, the maximum possible period of disarmament contemplated by legislatures was frequently the maximum possible period of imprisonment. While that may have been equivalent to permanent disarmament for some offenses, it was not for all and thus would not support permanent disarmament.

In short, the government's two strands of analogues establish a historic principle of imprisoning (and thereby disarming) in response to a felony conviction for a period of time that depended on the offense committed, as well as temporarily disarming categories of people that a legislature deemed to pose a danger of firearm misuse. Together, these two principles reflect that felons can be disarmed under § 922(g)(1) because, as a function of their conviction, Congress has found them to pose a danger of misuse. The remaining question is how long felons' Second Amendment rights may constitutionally be burdened pursuant to these principles.[12]

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[12] This is the only point of disagreement between the views set forth here and those set forth by Judge Krause in her concurrence. We agree that § 922(g)(1) is constitutional as applied to all offenders that meet its statutory criteria, that those offenders must have an opportunity at some point to show that they should no longer be disarmed, and that they will remain disarmed, up to and including permanently, unless and until they make that showing. In Judge Krause's view, history supports allowing the offender to seek that opportunity as early as the conclusion of his actual sentence, whereas I would not

I conclude that when disarmament is purely based on felon *status* (not an individualized assessment of danger to others), an indicator of the power to regulate is the maximum penalty for the offense of conviction. This conclusion is consistent with the historic tradition of disarmaments that are limited in duration.[13] Because it is based upon legislatures' assessments of the danger posed to society by an offense,[14] it is

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allow it until after the duration of the maximum sentence available for the conviction had passed. Thus, Judge Krause does not join in the durational limit I adopt in the next paragraph above the line or in notes 17 and 20.

[13] I note that we should not assume "that founding-era legislatures maximally exercised their power to regulate." *Id.* at 1925 (Barrett, J., concurring); *Antonyuk v. James*, 120 F.4th 941, 969 (2d Cir. 2024) ("Legislatures past and present have not generally legislated to their constitutional limits."). Here, however, Congress's de facto permanent ban reflects an intent to maximally exercise the power to regulate and disarm all felons for the full period constitutionally permitted. Further, while I have noted above that sentencing alone is an imperfect analogue for disarmament, *Rahimi* indicates that when historic analogues establish a regulatory tradition of responding to a particular threat of firearm misuse (the "why") with disarmament (the "how"), the imposition of imprisonment can inform our understanding of the scope of the historic principle asserted by the government. *See Rahimi*, 144 S. Ct. at 1902 (counseling that sentencing is relevant in analyzing the contours of Congress's power to disarm because the greater penalty of imprisonment can be interpreted to include the lesser penalty of disarmament.)

[14] While this period is not a constitutional limit that has previously been spelled out, I consider it to be a reasonable

also consistent with the Second Amendment's protections against unfettered legislative discretion in disarming "the people."[15] This approach also aligns with the Supreme Court's repeated statements that felon bans are presumptively lawful.[16]

Range's success will likely open the floodgates for similar pre-enforcement challenges. These *Bruen* challenges are a costly, time-consuming solution for the fact-specific determination of whether an individual still presents a threat of public injury. Cabining the timeframe during which felons may be disarmed will allow courts and individuals alike to readily assess when rearmament is permitted,[17] obviating a need for

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estimation of the period during which an offender might be disarmed based solely on his status as a felon. The duration would of course also depend on the offender being able to demonstrate that he did not present a risk of danger to the public. In computing the period in a situation where there were multiple offenses, the duration would depend on whether the sentences for the offenses were imposed concurrently or consecutively.

[15] *Id.* at 1946 (Thomas, J. dissenting) (discriminatory disarmaments "warn that when majoritarian interests alone dictate who is 'dangerous,' and thus can be disarmed, disfavored groups become easy prey.").

[16] *See supra*, n.8.

[17] For example, while an offender convicted of a death-eligible crime may be permanently disarmed, an offender, like Range, who is convicted of an offense punishable by a maximum term of imprisonment of five years, may be disarmed for five years from the date his sentence is imposed before he has the opportunity to show that he does not pose a danger to the public and should have his rights restored.

assessing each modern offense individually and comparing it against Founding-era analogues on a case-by-case basis.[18]

Range long ago completed the punishment that Pennsylvania deemed appropriate for his crime: three years of probation, a $100 fine, $288.29 in costs and $2,458 in restitution. The statutory maximum punishment for his offense—five years—has long passed, and he has shown, through years of good behavior, that he does not present a threat to the public. Congress's justification for suspending his ability to possess a firearm no longer applies. The Second Amendment requires restoration of his rights. He should be permitted to petition for restoration upon a showing that his maximum sentence has expired and that he would not present

[18] Indeed, the establishment of fixed criteria for the reinstatement of Second Amendment rights may induce Congress to reverse its position on funding § 925(c). It may also enable the Department of Justice to establish a procedure for reviewing petitions for restoration of rights, as well as providing a possible path to restoration prior to the expiration of a convicted offender's maximum sentence if that maximum sentence is unduly extended. On the other hand, once an offender's maximum sentence expires, that individual would still need to comply with state permitting schemes to rearm, thereby preserving states' ability to address situations where restoration may be inappropriate.

a risk of danger to the public if his gun rights were restored.[19] For these reasons, I respectfully concur in the judgment.[20]

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[19] We do not share our dissenting colleagues' concerns that our proposal here conflicts with Congress's pre-identified method of rearmament, through § 925(c). *See* Dissent at 8 n.7. Our proposal provides a method for the district courts to determine the constitutionality of §922(g)(1), as applied to individual offenders. Determining the limits of statutes' constitutionality has long been the province of the courts, and we do not encroach on Congress's power by doing so here. *See Marbury v. Madison*, 5 U.S. 137, 180 (1803).

[20] Judge Chung concurs because she does not believe Judge Roth's opinion is inconsistent with the majority approach and because, in her view, the constitutional outer limit under *Bruen* of the power to disarm felons like Range (e.g., those falling into the third category identified in *Williams*, 113 F.4th at 659) is coextensive with the maximum penalty for the offense of conviction. This is because, in her view, it is historically the longest period an individual could have been disarmed based on felon status alone. While Founding-era legislatures did not maximally exercise that authority to disarm in this manner, Judge Chung agrees with Judge Roth that the § 922(g)(1) statutory scheme demonstrates that Congress was taking a maximalist approach towards disarmament in enacting it. As a practical matter, Judge Chung's view would mean that the disability is removed automatically and rearmament would be subject to state permitting schemes. Thus, she does not join those portions of Judge Roth's opinion concluding otherwise.

SHWARTZ, Circuit Judge, dissenting, with whom RESTREPO, Circuit Judge, joins.

Today, the Majority of our Court has again decided that an individual convicted of fraud cannot be barred from possessing a firearm. While the Majority states that its opinion is narrow, the analytical framework it applies to reach its conclusion could be read to render most, if not all, felon bans unconstitutional. However, the Supreme Court has reiterated that such bans are presumptively lawful, see United States v. Rahimi, 144 S. Ct. 1889, 1902 (2024), and because there is a historical basis for them, I respectfully dissent.

In New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022), the Supreme Court set forth a history-based framework for deciding whether a firearm regulation is constitutional under the Second Amendment. Courts must now examine whether the "regulation [being reviewed] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Id. at 19. To make this determination, a court must decide whether the challenger or conduct at issue is protected by the Second Amendment and, if so, whether the Government has presented "relevantly similar" historical analogues to justify the restriction. See id. at 24, 29; see also Rahimi, 144 S. Ct. at 1898 (same).

The Majority's analysis is inconsistent with the Supreme Court's jurisprudence and has far-reaching consequences. First, the Majority downplays the Supreme Court's consistent admonishment that felon bans are "longstanding" and "presumptively lawful." District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010). In

Heller and McDonald, the Supreme Court stated that felon bans are consistent with our historical tradition. Heller, 554 U.S. at 626-27; McDonald, 561 U.S. at 786. More recently, majorities of the Court have reiterated that felon bans are presumptively lawful, and notably did so, respectively, in (1) the very case (Bruen) that explicitly requires courts to find historical support for every firearm regulation, see Bruen, 597 U.S. at 17; and (2) in a case (Rahimi) that upheld a firearm restriction after applying Bruen's history and tradition test, see Rahimi, 144 S. Ct. at 1902; see also Bruen, 597 U.S. at 72 (Alito, J., concurring) (explaining that Bruen did not "disturb[] anything" the Court said in Heller or McDonald); id. at 81 (Kavanaugh, J., concurring, joined by Roberts, C.J.) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]" (first alteration in original) (quoting Heller, 554 U.S. at 626)); id. at 129 (Breyer, J., dissenting, joined by Sotomayor, J., & Kagan, J.) ("I understand the Court's opinion today to cast no doubt on . . . Heller's holding [regarding longstanding prohibitions.]"); Rahimi, 144 S. Ct. at 1902-03 (reiterating Heller's holding that felon bans are presumptively lawful and assigning error to the Court of Appeals for the Fifth Circuit for "requir[ing] a 'historical twin' rather than a 'historical analogue'"); id. at 1923 (Kavanaugh, J., concurring) (noting Heller identified felon bans as a "categor[y] of traditional exceptions to the [Second Amendment] right").[1]

[1] Other circuit courts have recognized the import of these statements. E.g., United States v. Hunt, No. 22-4525, 2024 WL 5149611, at *4 (4th Cir. Dec. 18, 2024) ("Far from abandoning Heller's language about 'longstanding' and 'presumptively lawful' restrictions on felons possessing

These statements show that felon bans have historical roots.[2] See United States v. Jackson, 110 F.4th 1120, 1125-26 (8th Cir. 2024) (upholding the constitutionality of the federal felon ban as applied to a non-violent drug offender based, in part, on the Supreme Court's statements); see also Vincent v. Garland, 80 F.4th 1197, 1202 (10th Cir. 2023) (giving effect to the Supreme Court's prior holdings implying "that it was constitutional to deny firearm licenses to individuals with felony convictions"), cert granted, judgment vacated and remanded, 144 S. Ct. 2708 (Mem) (2024); cf. United States v. Dubois, 94 F.4th 1284,

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firearms, the Supreme Court has repeatedly reaffirmed its applicability."); United States v. Langston, 110 F.4th 408, 420 (1st Cir. 2024) ("[T]he Supreme Court has stated repeatedly over sixteen years, from Heller to Rahimi, that felon-in-possession laws are presumptively lawful."); United States v. Rambo, No. 23-13772, 2024 WL 3534730, at *2 (11th Cir. July 25, 2024) (per curiam) (unpublished) (relying on the Supreme Court's repeated statements, including in Rahimi, about § 922(g)(1)'s presumptive validity to reject constitutional challenges to the law); United States v. Young, No. 23-10464, 2024 WL 3466607, at *8-9 (11th Cir. July 19, 2024) (per curiam) (unpublished) (same); United States v. Johnson, No. 23-11885, 2024 WL 3371414, at *3 (11th Cir. July 11, 2024) (per curiam) (unpublished) (same).

[2] The Supreme Court also recognized that other firearm regulations are "longstanding" and "presumptively lawful." Heller, 554 U.S. at 626-27, 627 n.26. Thus, the Majority's willingness to devalue the Supreme Court's observations may have consequences on regulations beyond the status-based ban at issue here.

1293 (11th Cir. 2024) (noting the Supreme Court has not doubted the constitutionality of felon restrictions).

Second, the Majority incorrectly discounts the importance of the Supreme Court's emphasis on law-abidingness as a limitation on the Second Amendment right. While the Majority dismisses this language as "dicta," Maj. Op. at 12, the Bruen Court's use of the phrase fourteen times in the majority opinion alone highlights the significance that this criterion played in its decision, see Bruen, 597 U.S. at 9, 15, 26, 29-31, 33 n.8, 38, 38 & n.9, 60, 70-71; see also Jackson, 110 F.4th at 1126 (noting Bruen's repeated statements about a law-abider's right to possess arms).[3] Indeed, the Bruen Court approved of certain gun regulations that included criminal background checks. Bruen, 597 U.S. at 38 n.9. While the Majority suggests we are "overread[ing]" the phrase "law abiding," Maj. Op. at 9, 12, there is no question that one who has a felony or felony-equivalent conviction could not be characterized as law abiding. Thus, the Supreme Court's jurisprudence tells us that the right to bear arms is limited to law abiders, and that felon bans are presumptively lawful.

Third, the Majority acknowledges but then disregards important aspects of Bruen. The Bruen Court emphasized that its test should not be a "regulatory straightjacket" and that

[3] Although the Supreme Court recently concluded that an individual may not be disarmed "simply because he is not 'responsible[,]'" Rahimi, 144 S. Ct. at 1903 (quoting the term "responsible" as used in Heller, 554 U.S. at 635, and Bruen, 597 U.S. at 70), it is notable that the Court did not foreclose disarmament based on Heller and Bruen's "law-abiding" requirement.

courts should look for a "historical analogue" to the challenged regulation, not a "historical twin." 597 U.S. at 30 (emphasis omitted).[4] Rahimi underscored this point, as it specifically reversed the Fifth Circuit for requiring the latter. 144 S. Ct. at 1897-98, 1903 (holding that "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791" and that the Court's recent Second Amendment precedents "were not meant to suggest a law trapped in amber"). Despite these instructions, the Majority demands a historical twin by requiring the Government to identify a historical crime, including its punishment, that mirrors Bryan Range's conviction. At the founding, a fraud-based crime of the type Range committed was considered a capital offense, which obviously carries with it the loss of all possessory rights.[5] Folajtar v. Att'y Gen., 980 F.3d 897, 904-05 (3d Cir. 2020) (collecting authorities). As a result, history demonstrates that fraudsters could lose their life, and hence their firearms rights. Rahimi specifically blessed this type of comparative reasoning. See Rahimi, 144 S. Ct. at 1902 (finding "permissible" "the lesser restriction of temporary disarmament"). Therefore, if fraud was punishable by capital punishment at the founding (i.e., de facto permanent disarmament), then under Rahimi it is appropriate to draw a

[4] Judge Krause's comprehensive historical review is consistent with our understanding and supports our discussion of the history relevant to felon disarmament.

[5] Even some noncapital offenses resulted in life imprisonment and the forfeiture of the offender's entire estate, which contemplates the loss of all property, including firearms. Act of Apr. 18, 1786, 2 Laws of the State of New York 253, 260–61 (1886); Act of Nov. 27, 1700, 2 Statutes at Large of Pennsylvania 12 (Wm. Stanley Ray ed., 1904).

historical analogue to the lesser consequence of permanent disarmament absent the death penalty. See United States v. Diaz, 116 F.4th 458, 469 (5th Cir. 2024) ("[I]f capital punishment was permissible to respond to theft, then the lesser restriction of permanent disarmament that § 922(g)(1) imposes is also permissible."); see also id. at 472 ("At the time of the Second Amendment's ratification, those . . . guilty of certain crimes . . . were punished permanently and severely. And permanent disarmament was part of our country's arsenal of available punishments at that time.").[6]

The Majority also rejects the analogy to now unconstitutional status-based bans on Native Americans, Blacks, Catholics, Quakers, loyalists, and others because Range is not "part of a similar group today." Maj. Op. at 20. Whether Range is a member of one of these groups is irrelevant. Rather, under Bruen, the relevant inquiry is why a given regulation, such as a ban based on one's status, was enacted and how that regulation was implemented. Bruen, 597 U.S. at 29; see also Rahimi, 144 S. Ct. at 1898 (focusing the inquiry on the historical "reasons" for disarmament); id. at 1925 (Barrett, J., concurring) ("'Analogical reasoning' under Bruen demands a wide[] lens: Historical regulations reveal a principle, not a mold."). No matter how repugnant and unlawful those bans are under contemporary standards, the founders categorically disarmed the members of those groups because they were viewed as disloyal to the sovereign. Range v. Att'y Gen., 53 F.4th 262, 273-82 (3d Cir. 2022) (per curiam) (collecting authorities), vacated, 56 F.4th 992 (3d Cir. 2023),

[6] Notably, Diaz's "underlying convictions d[id] not inherently involve a threat of violence." Diaz, 116 F.4th at 471 n.5.

cert. granted, judgment vacated and remanded, 144 S. Ct. 2706 (Mem) (2024); see also Jackson, 110 F.4th at 1127 (observing that the founding-era categorical prohibitions are relevant "in determining the historical understanding of the right to keep and bear arms"). The felon designation similarly serves as a proxy for disloyalty and disrespect for the sovereign and its laws. Such categorization is especially applicable here, where Range's felony involved stealing from the government, a crime that directly undermines the sovereign.[7] Therefore, the trust

[7] The Majority also gives no weight to various founding-era statutory violations that led to disarmament. See, e.g., Act of Dec. 21, 1771, ch. 540, N.J. Laws 343–344; Act of Apr. 20, 1745, ch. 3, N.C. Laws 69–70; see also Range, 53 F.4th at 281 (collecting additional authorities); cf. Rahimi, 144 S. Ct. at 1913, 1917-19 (Kavanaugh, J., concurring) (giving weight to both pre- and post-ratification history). The Majority ignores that history and tradition by contending that offenders were only disarmed of the firearm they possessed at the time of the violation and not barred from possessing firearms in the future. See Maj. Op. at 23; but see Rahimi, 144 S. Ct. at 1897 (noting founding-era firearm restrictions that included both restrictions on firearm use and bans of certain types of weapons). From this, the Majority asserts crime-based bans were not permanent (although in doing so, the Majority notably ignores the permanent nature of capital punishment). Maj. Op. at 22-23. Whether true or not, the federal felon ban under 18 U.S.C. § 922(g)(1) is not permanent. Congress specifically identified ways to avoid the ban, such as by securing an expungement, pardon, or having one's civil rights restored. 18 U.S.C. § 921(a)(20). Additionally, although it is currently unfunded, Congress enacted 18 U.S.C. § 925(c), which allows

and loyalty reasons underlying the status-based bans imposed at the founding show that the bans are a relevant historical analogue for the present-day prohibition on felon possession.[8]

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the Bureau of Alcohol, Tobacco, and Firearms to restore an individual's right to possess a firearm upon consideration of the individual's personal circumstances. See Logan v. United States, 552 U.S. 23, 28 n.1 (2007).

Judge Krause thoughtfully proposes a proceeding at which a felon may seek to be rearmed and Judge Roth creatively suggests a durational limit to disarmament based on the maximum penalty a felon faced. Their suggestions, however, face at least one challenge. As stated above, Congress has identified the ways a felon may be rearmed and hence has already set the disarmament's duration based on whether the felon successfully invokes one of those identified avenues for rearming. See generally Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, our starting point must be the language employed by Congress," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." (internal quotation marks omitted)). Bound by these clearly articulated congressional remedies, federal courts lack the authority to create the remedy that my colleagues each propose.

[8] To the extent the Majority relies on the Supreme Court's statement in Rahimi that "our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not[,]" 144 S. Ct. at 1902, that statement was clearly cabined by the Court's acknowledgement that its analysis "start[ed] and stop[ped]" with the notion that there is

Finally, the Majority's approach will have far-reaching consequences. Although the Majority states that its holding is "narrow" because it is limited to Range's individual circumstances, Maj. Op. at 24, the only individual circumstance the Majority identifies is that the penalty Range faced differs from the penalty imposed for a similar crime at

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"ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others[,]" id. at 1898. Therefore, Rahimi is best read as conclusively establishing that history and tradition support disarming violent individuals, but not reaching whether history and tradition likewise permit disarmament of nonviolent offenders as that issue was undisputedly not before the Court. Indeed, the Court went out of its way to state that it was "not suggest[ing] that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse[,]" id. at 1901, which today includes fraudsters, see 18 U.S.C. § 921(a)(20)(A) (excluding from the disarmament law those convicted of "offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices," but not persons convicted of the type of fraud at issue in this case). This reading of Rahimi and our history and tradition accord with the Court of Appeals for the Eighth Circuit's recent post-Rahimi § 922(g)(1) precedent. See Jackson, 110 F.4th at 1121-22, 1127 (noting that "Rahimi does not change" its previous ruling, and that the "historical record suggests that legislatures traditionally possessed discretion to disqualify . . . those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence"); accord Hunt, 2024 WL 5149611, at *6-7.

the founding. As discussed above, Rahimi bolsters the view that such fact is irrelevant under Bruen. Thus, the Majority's ruling is not cabined in any way and, in fact, rejects all historical support for disarming non-violent felons. As a result, the Majority's analytical framework leads to only one conclusion: there will be no, or virtually no, non-violent felony or felony-equivalent crime that will bar an individual from possessing a firearm.[9] Rahimi counsels that cannot be so, which is why the Majority's broad ruling is contrary to both the sentiments of the Supreme Court and our history.

I therefore respectfully dissent.

[9] Additionally, and significantly, the Majority provides no way for a felon to know whether his crime of conviction prevents him from possessing a firearm. It also provides little guidance to the district courts, and it will lead to confusion and disuniformity as to how courts deal with factually similar challenges to § 922(g)(1). Cf. Rahimi, 144 S. Ct. at 1926 (Jackson, J., concurring) (observing that "lower courts are struggling" with Bruen's "history-and-tradition test").

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 21-2835

_____

BRYAN DAVID RANGE,
Appellant

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA;
REGINA LOMBARDO, Acting Director, Bureau of Alcohol,
Tobacco, Firearms and Explosives

_____

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5:20-CV-03488)
District Judge: Honorable Gene E.K. Pratter

_____

Argued before Merits Panel on September 19, 2022
Argued En Banc on February 15, 2023

_____

Before: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO,

BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, ROTH,* and AMBRO,**
Circuit Judges.

(Filed: June 6, 2023)

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* Judge Roth is participating as a member of the en banc court pursuant to 3d Cir. I.O.P. 9.6.4.

** Judge Ambro assumed senior status on February 6, 2023 and elected to continue participating as a member of the en banc court pursuant to 3d Cir. I.O.P. 9.6.4.

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OPINION OF THE COURT

HARDIMAN, *Circuit Judge*, with whom CHAGARES, *Chief Judge*, and JORDAN, GREENAWAY, JR., BIBAS, PORTER, MATEY, PHIPPS, and FREEMAN, *Circuit Judges*, join.

Bryan Range appeals the District Court's summary judgment rejecting his claim that the federal "felon-in-possession" law—18 U.S.C. § 922(g)(1)—violates his Second Amendment right to keep and bear arms. We agree with Range that, despite his false statement conviction, he remains among "the people" protected by the Second Amendment. And because the Government did not carry its burden of showing that our Nation's history and tradition of firearm regulation support disarming Range, we will reverse and remand.

I

A

The material facts are undisputed. In 1995, Range pleaded guilty in the Court of Common Pleas of Lancaster County to one count of making a false statement to obtain food stamps in violation of Pennsylvania law. *See* 62 Pa. Stat. Ann. § 481(a). In those days, Range was earning between $9.00 and $9.50 an hour as he and his wife struggled to raise three young children on $300 per week. Range's wife prepared an application for food stamps that understated Range's income, which she and Range signed. Though he did not recall reviewing the application, Range accepted full responsibility for the misrepresentation.

Range was sentenced to three years' probation, which he completed without incident. He also paid $2,458 in restitution, $288.29 in costs, and a $100 fine. Other than his 1995 conviction, Range's criminal history is limited to minor traffic and parking infractions and a summary offense for fishing without a license.

When Range pleaded guilty in 1995, his conviction was classified as a Pennsylvania misdemeanor punishable by up to five years' imprisonment. That conviction precludes Range from possessing a firearm because federal law generally makes it "unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(1). Although state misdemeanors are excluded from that prohibition if they are "punishable by a term of imprisonment of two years or less,"

18 U.S.C. § 921(a)(20)(B), that safe harbor provided no refuge for Range because he faced up to five years' imprisonment.

In 1998, Range tried to buy a firearm but was rejected by Pennsylvania's instant background check system. Range's wife, thinking the rejection a mistake, gifted him a deer-hunting rifle. Years later, Range tried to buy a firearm and was rejected again. After researching the reason for the denial, Range learned he was barred from buying a firearm because of his 1995 conviction. Range then sold his deer-hunting rifle to a firearms dealer.

B

Range sued in the United States District Court for the Eastern District of Pennsylvania, seeking a declaration that § 922(g)(1) violates the Second Amendment as applied to him. He also requested an injunction prohibiting the law's enforcement against him. Range asserts that but for § 922(g)(1), he would "for sure" purchase another deer-hunting rifle and "maybe a shotgun" for self-defense at home. App. 197–98. Range and the Government cross-moved for summary judgment.

The District Court granted the Government's motion. *Range v. Lombardo*, 557 F. Supp. 3d 609, 611 (E.D. Pa. 2021). Faithfully applying our then-controlling precedents, the Court held that Range's crime was "serious" enough to deprive him of his Second Amendment rights. *Id.* In doing so, the Court noted the two-step framework we established in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). *Range*, 557 F. Supp. 3d at 613. The Court began—and ended—its analysis at the first step. It considered five factors to determine whether Range's conviction made him an "unvirtuous citizen" of the

kind historically barred from possessing a firearm: (1) whether the conviction was classified as a misdemeanor or a felony; (2) whether the elements of the offense involve violence; (3) the sentence imposed; (4) whether there was a cross-jurisdictional consensus as to the seriousness of the crime, *Binderup v. Att'y Gen.*, 836 F.3d 336, 351–52 (3d Cir. 2016) (en banc) (plurality); and (5) the potential for physical harm to others created by the offense, *Holloway v. Att'y Gen.*, 948 F.3d 164, 173 (3d Cir. 2020). *Range*, 557 F. Supp. 3d at 613–14.

The Government conceded that four of the five factors favored Range because he was convicted of a nonviolent, non-dangerous misdemeanor and had not been incarcerated. *Id.* at 614. But the District Court held the "cross-jurisdictional consensus" factor favored the Government because about 40 jurisdictions would have classified his crime as a felony. *Id.* at 614–15. Noting that our decisions in *Holloway*, 948 F.3d at 177, and *Folajtar v. Att'y Gen.*, 980 F.3d 897, 900 (3d Cir. 2020), had rejected as-applied challenges to § 922(g)(1) despite only one of the relevant factors weighing in the Government's favor, the District Court held that the cross-jurisdictional consensus alone sufficed to disarm Range. *Range*, 557 F. Supp. 3d at 615–16. Range timely appealed.

While Range's appeal was pending, the Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The parties then submitted supplemental briefing on *Bruen*'s impact. A panel of this Court affirmed the District Court's summary judgment, holding that the Government had met its burden to show that § 922(g)(1) reflects the Nation's historical tradition of firearm regulation such that Range's conviction "places him outside the class of people traditionally entitled to Second Amendment rights."

Range v. Att'y Gen., 53 F.4th 262, 266 (3d Cir. 2022) (per curiam).

Range petitioned for rehearing en banc. We granted the petition and vacated the panel opinion. *Range v. Att'y Gen.*, 56 F.4th 992 (3d Cir. 2022).

II

The District Court had jurisdiction under 28 U.S.C. § 1331 because Range's complaint raised a federal question: whether the federal felon-in-possession law, 18 U.S.C. § 922(g)(1), violates the Second Amendment as applied to Range. We have jurisdiction under 28 U.S.C. § 1291.

III

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment guarantees an individual right to keep and bear arms unconnected with militia service. 554 U.S. 570, 583–84 (2008). In view of that right, the Court held unconstitutional a District of Columbia law that banned handguns and required other "firearms in the home be rendered and kept inoperable at all times." *Id.* at 630. It reached that conclusion after scrutinizing the text of the Second Amendment and deducing that it "codified a *pre-existing* right." *Id*. at 592. The *Heller* opinion did not apply intermediate or strict scrutiny. In fact, it did not apply means-end scrutiny at all. But in response to Justice Breyer's dissent, the Court noted in passing that the challenged law would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628–29.

Many courts around the country, including this one, overread that passing comment to require a two-step approach in Second Amendment cases, utilizing means-end scrutiny at the second step. We did so for the first time in *Marzzarella*, 614 F.3d at 97, and we continued down that road for over a decade. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 429, 434–40 (3d Cir. 2013); *Binderup*, 836 F.3d at 344–47, 353–56; *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 117 (3d Cir. 2018); *Beers v. Att'y Gen.*, 927 F.3d 150, 154–55 (3d Cir. 2019), *vacated sub nom. as moot*, *Beers v. Barr*, 140 S. Ct. 2758 (2020); *Holloway*, 948 F.3d at 169–172; *Folajtar*, 980 F.3d at 901.

Bruen rejected the two-step approach as "one step too many." 142 S. Ct. at 2127. The Supreme Court declared: "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." *Id*. Instead, those cases teach "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. And "[o]nly if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Applying that standard, *Bruen* held "that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 2122. But the "where" question decided in *Bruen* is not at issue here. Range's appeal instead requires us to examine *who* is among "the people" protected by the Second Amendment. U.S. Const. amend. II; *see Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully

possess a firearm . . . .”); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443 (2009) (distinguishing among “who,” “what,” “where,” “when,” and “how” restrictions). Range claims he is one of “the people” entitled to keep and bear arms and that our Nation has no historical tradition of disarming people like him. The Government responds that Range has not been one of “the people” since 1995, when he pleaded guilty in Pennsylvania state court to making a false statement on his food stamp application, and that his disarmament is historically supported.

IV

Having explained how *Bruen* abrogated our Second Amendment jurisprudence, we now apply the Supreme Court’s established method to the facts of Range’s case. Both sides agree that we no longer conduct means-end scrutiny. And as the panel wrote: “*Bruen*’s focus on history and tradition,” means that “*Binderup*’s multifactored seriousness inquiry no longer applies.” *Range*, 53 F.4th at 270 n.9.

After *Bruen*, we must first decide whether the text of the Second Amendment applies to a person and his proposed conduct. 142 S. Ct. at 2134–35. If it does, the government now bears the burden of proof: it “must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.” *Id.* at 2127.

A

We begin with the threshold question: whether Range is one of "the people" who have Second Amendment rights. The Government contends that the Second Amendment does not apply to Range at all because "[t]he right to bear arms has historically extended to the political community of law-abiding, responsible citizens." Gov't En Banc Br. at 2. So Range's 1995 conviction, the Government insists, removed him from "the people" protected by the Second Amendment.

The Supreme Court referred to "law-abiding citizens" in *Heller*. In response to Justice Stevens's dissent, which relied on *United States v. Miller*, 307 U.S. 174 (1939), the Court reasoned that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. In isolation, this language seems to support the Government's argument. But *Heller* said more; it explained that "the people" as used throughout the Constitution "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580. So the Second Amendment right, *Heller* said, presumptively "belongs to all Americans." *Id*. at 581. Range cites these statements to argue that "law-abiding citizens" should not be read "as rejecting *Heller*'s interpretation of 'the people.'" Range Pet. for Reh'g at 8. We agree with Range for four reasons.

First, the criminal histories of the plaintiffs in *Heller*, *McDonald*, and *Bruen* were not at issue in those cases. So their references to "law-abiding, responsible citizens" were dicta. And while we heed that phrase, we are careful not to overread it as we and other circuits did with *Heller*'s statement that the District of Columbia firearm law would fail under any form of

heightened scrutiny. Second, other Constitutional provisions reference "the people."[1] It mentions "the people" twice with respect to voting for Congress,[2] and "the people" are recognized as having rights to assemble peaceably, to petition the government for redress,[3] and to be protected against unreasonable searches and seizures.[4] Unless the meaning of the phrase "the people" varies from provision to provision—and the Supreme Court in *Heller* suggested it does not—to conclude that Range is not among "the people" for Second Amendment purposes would exclude him from those rights as

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[1] *See, e.g.*, U.S. Const. pmbl. ("We *the People* of the United States . . . ." (emphasis added)); *id*. amend. IX (recognizing rights "retained by the people"); *id*. amend. X (acknowledging the powers reserved "to the people").

[2] U.S. Const. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States . . . ." (emphasis added)); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by *the people* thereof . . . ." (emphasis added)).

[3] U.S. Const. amend. I ("Congress shall make no law respecting . . . the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances." (emphasis added)).

[4] U.S. Const. amend. IV ("The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." (emphasis added)).

well. *See* 554 U.S. at 580. And we see no reason to adopt an inconsistent reading of "the people."

Third, as the plurality stated in *Binderup*: "That individuals with Second Amendment rights may nonetheless be denied possession of a firearm is hardly illogical." 836 F.3d at 344 (Ambro, J.). That statement tracks then-Judge Barrett's dissenting opinion in *Kanter v. Barr*, in which she persuasively explained that "all people have the right to keep and bear arms," though the legislature may constitutionally "strip certain groups of that right." 919 F.3d 437, 452 (7th Cir. 2019). We agree with that statement in *Binderup* and then-Judge Barrett's reasoning.

Fourth, the phrase "law-abiding, responsible citizens" is as expansive as it is vague. Who are "law-abiding" citizens in this context? Does it exclude those who have committed summary offenses or petty misdemeanors, which typically result in a ticket and a small fine? No. We are confident that the Supreme Court's references to "law-abiding, responsible citizens" do not mean that every American who gets a traffic ticket is no longer among "the people" protected by the Second Amendment. Perhaps, then, the category refers only to those who commit "real crimes" like felonies or felony-equivalents? At English common law, felonies were so serious they were punishable by estate forfeiture and even death. 4 William Blackstone, Commentaries on the Laws of England 54 (1769). But today, felonies include a wide swath of crimes, some of

which seem minor.[5] And some misdemeanors seem serious.[6] As the Supreme Court noted recently: "a felon is not always more dangerous than a misdemeanant." *Lange v. California*, 141 S. Ct. 2011, 2020 (2021) (cleaned up). As for the modifier "responsible," it serves only to undermine the Government's argument because it renders the category hopelessly vague. In our Republic of over 330 million people, Americans have widely divergent ideas about what is required for one to be considered a "responsible" citizen.

At root, the Government's claim that only "law-abiding, responsible citizens" are protected by the Second Amendment devolves authority to legislators to decide whom to exclude from "the people." We reject that approach because such "extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting). And that deference would contravene *Heller*'s reasoning that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." 554 U.S. at 636; *see also Bruen*,

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[5] *See, e.g.*, 18 U.S.C. § 1464 (uttering "any obscene, indecent, or profane language by means of radio communication"); Mich. Comp. Laws Ann. § 445.574a(2)(d) (returning out-of-state bottles or cans); 18 Pa. Cons. Stat. Ann. § 3929.1 (third offense of library theft of more than $150); *id.* § 7613 (reading another's email without permission).

[6] *See, e.g.*, 18 Pa. Cons. Stat. Ann. § 2504 (involuntary manslaughter); *id.* § 2707 (propulsion of missiles into an occupied vehicle or onto a roadway); 11 Del. Code § 881 (bribery).

142 S. Ct. at 2131 (warning against "judicial deference to legislative interest balancing").

In sum, we reject the Government's contention that only "law-abiding, responsible citizens" are counted among "the people" protected by the Second Amendment. *Heller* and its progeny lead us to conclude that Bryan Range remains among "the people" despite his 1995 false statement conviction.

Having determined that Range is one of "the people," we turn to the easy question: whether § 922(g)(1) regulates Second Amendment conduct. It does. Range's request—to possess a rifle to hunt and a shotgun to defend himself at home—tracks the constitutional right as defined by *Heller*. 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."). So "the Second Amendment's plain text covers [Range's] conduct," and "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126.

B

Because Range and his proposed conduct are protected by the Second Amendment, we now ask whether the Government can strip him of his right to keep and bear arms. To answer that question, we must determine whether the Government has justified applying § 922(g)(1) to Range "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. We hold that the Government has not carried its burden.

To preclude Range from possessing firearms, the Government must show that § 922(g)(1), as applied to him, "is

part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. Historical tradition can be established by analogical reasoning, which "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133. To be compatible with the Second Amendment, regulations targeting longstanding problems must be "distinctly similar" to a historical analogue. *Id.* at 2131. But "modern regulations that were unimaginable at the founding" need only be "relevantly similar" to one. *Id.* at 2132. *Bruen* offers two metrics that make historical and modern firearms regulations similar enough: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133.

In attempting to carry its burden, the Government relies on the Supreme Court's statement in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." 554 U.S. at 626. A plurality of the Court reiterated that point in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). And in his concurring opinion in *Bruen*, Justice Kavanaugh, joined by the Chief Justice, wrote that felon-possession prohibitions are "presumptively lawful" under *Heller* and *McDonald*. 142 S. Ct. at 2162 (quoting *Heller*, 554 U.S. at 626–27 & n.26).[7] Section 922(g)(1) is a straightforward "prohibition[] on the possession of firearms by felons." *Heller*, 554 U.S. at 626. And since 1961 "federal law has generally prohibited individuals convicted of crimes punishable by more than one year of

[7] The *Heller*, *McDonald*, and *Bruen* Courts cited no such "longstanding prohibitions," presumably because they did "not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Heller*, 554 U.S. at 626.

imprisonment from possessing firearms." Gov't En Banc Br. at 1; *see* An Act To Strengthen The Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961). But the earliest version of that statute, the Federal Firearms Act of 1938, applied only to *violent* criminals. Pub. L. No. 75-785, §§ 1(6), 2(f), 52 Stat. 1250, 1250–51 (1938). As the First Circuit explained: "the current federal felony firearm ban differs considerably from the [original] version . . . . [T]he law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011); *see also United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

Even if the 1938 Act were "longstanding" enough to warrant *Heller*'s assurance—a dubious proposition given the *Bruen* Court's emphasis on Founding- and Reconstruction-era sources, 142 S. Ct. at 2136, 2150—Range would not have been a prohibited person under that law. Whatever timeframe the Supreme Court might establish in a future case, we are confident that a law passed in 1961—some 170 years after the Second Amendment's ratification and nearly a century after the Fourteenth Amendment's ratification—falls well short of "longstanding" for purposes of demarcating the scope of a constitutional right. So the 1961 iteration of § 922(g)(1) does not satisfy the Government's burden.[8]

[8] Nor are we convinced by the slightly older state and local felon-in-possession laws cited by the amicus brief in support of the Government filed by Everytown for Gun Safety. Amicus cites a series of state statutes banning firearm possession by

The Government's attempt to identify older historical analogues also fails.[9] The Government argues that "legislatures traditionally used status-based restrictions" to disarm certain groups of people. Gov't En Banc Br. at 4 (quoting *Range*, 53 F.4th at 282). Apart from the fact that those restrictions based

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felons passed in the 1920s. But this is still too late: "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154 n.28. And the 19th-century local laws cited by Amicus are inapposite because they involved prohibitions on concealed carry, a lesser restriction than the total ban on firearm possession that § 922(g)(1) imposes.

[9] Range argues that because "there is no historical tradition of disarming nonviolent felons," dangerousness is the "touchstone." Range Pet. for Reh'g at 10. In support of that view, Range quotes a concurring opinion of five judges in *Binderup* that focused on dangerousness. 836 F.3d at 369 (Hardiman, J., concurring in part). He also cites Judge Bibas's dissent in *Folajtar*, 980 F.3d at 913–20, and then-Judge Barrett's dissent in *Kanter*: "The historical evidence . . . [shows] that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety." 919 F.3d at 454. The Government replies that 10 of the 15 judges in *Binderup* and the Court in *Holloway* and *Folajtar* rejected dangerousness or violence as the touchstone. We need not decide this dispute today because the Government did not carry its burden to provide a historical analogue to permanently disarm someone like Range, whether grounded in dangerousness or not.

on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to Range and his individual circumstances. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today. And any such analogy would be "far too broad[ ]." *See Bruen*, 142 S. Ct. at 2134 (noting that historical restrictions on firearms in "sensitive places" do not empower legislatures to designate any place "sensitive" and then ban firearms there).

The Government also points out that "founding-era felons were exposed to far more severe consequences than disarmament." Gov't En Banc Br. at 4. It is true that "founding-era practice" was to punish some "felony offenses with death." *Id*. at 9. For example, the First Congress made forging or counterfeiting a public security punishable by death. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, 115 (1790). States in the early Republic likewise treated nonviolent crimes "such as forgery and horse theft" as capital offenses. *See Folajtar*, 980 F.3d at 904 (citations omitted). Such severe treatment reflects the founding generation's judgment about the gravity of those offenses and the need to expose offenders to the harshest of punishments.

Yet the Government's attempts to analogize those early laws to Range's situation fall short. That Founding-era governments punished some nonviolent crimes with death does not suggest that the *particular* (and distinct) punishment at issue—lifetime disarmament—is rooted in our Nation's history and tradition. The greater does not necessarily include the lesser: founding-era governments' execution of some

individuals convicted of certain offenses does not mean the State, then or now, could constitutionally strip a felon of his right to possess arms if he was not executed. As one of our dissenting colleagues notes, a felon could "repurchase arms" after successfully completing his sentence and reintegrating into society. Krause Dissent at 28–29. That aptly describes Range's situation. So the Government's attempt to disarm Range is not "relevantly similar" to earlier statutes allowing for execution and forfeiture. *See Bruen*, 142 S. Ct. at 2132.

Founding-era laws often prescribed the forfeiture of the weapon used to commit a firearms-related offense without affecting the perpetrator's right to keep and bear arms generally. *See, e.g.*, Act of Dec. 21, 1771, ch. 540, N.J. Laws 343–344 ("An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns"); Act of Apr. 20, 1745, ch. 3, N.C. Laws 69–70 ("An Act to prevent killing deer at unseasonable times, and for putting a stop to many abuses committed by white persons, under pretence of hunting"). Range's crime, however—making a false statement on an application for food stamps—did not involve a firearm, so there was no criminal instrument to forfeit. And even if there were, government confiscation of the instruments of crime (or a convicted criminal's entire estate) differs from a status-based lifetime ban on firearm possession. The Government has not cited a single statute or case that precludes a convict who has served his sentence from purchasing the same type of object that he used to commit a crime. Nor has the Government cited forfeiture cases in which the convict was prevented from regaining his possessions, including firearms (except where forfeiture preceded execution). That's true whether the object forfeited to the government was a firearm used to hunt out of season, a car used to transport cocaine, or a mobile home used

as a methamphetamine lab. And of those three, only firearms are mentioned in the Bill of Rights.[10]

Finally, the Government makes an argument from authority. It points to a decision from a sister circuit court that "look[ed] to tradition and history" in deciding that "those convicted of felonies are not among those entitled to possess arms." Gov't En Banc Br. at 4 (quoting *Medina v. Whitaker*, 913 F.3d 152, 157–61 (D.C. Cir. 2019)). The Government also cites appellate decisions that "have categorically upheld felon-possession prohibitions without relying on means-end scrutiny." *Id*. (citing *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009)). And it cites the more than 80 district court decisions that have addressed § 922(g)(1) and have ruled in favor of the Government. *Id.* at 5 (citing Brief for Fed. Gov't at 17 n.5, *Vincent v. Garland*, No. 21-4121 (10th Cir. Jan. 17, 2023)).

As impressive as these authorities may seem at first blush, they fail to persuade. First, the circuit court opinions were all decided before *Bruen*. Second, the district courts are bound to follow their circuits' precedent. Third, the Government's

[10] Even arms used to commit crimes bordering on treason were sometimes returned to the perpetrators during the Founding era. After the Massachusetts militia quelled Shays's Rebellion in 1787, the state required the rebels and those who supported them to "deliver up their arms." 1 Private and Special Statutes of the Commonwealth of Massachusetts from 1780–1805, 145–47 (1805). But those arms were to be returned after three years upon satisfaction of certain conditions. *Id.* at 146–47.

contention that "*Bruen* does not meaningfully affect this Court's precedent," Gov't Supp. Br. at 9, is mistaken for the reasons we explained in Section III, *supra*.

For the reasons stated, we hold that the Government has not shown that the Nation's historical tradition of firearms regulation supports depriving Range of his Second Amendment right to possess a firearm. *See Bruen*, 142 S. Ct. at 2126.

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Our decision today is a narrow one. Bryan Range challenged the constitutionality of 18 U.S.C. § 922(g)(1) only as applied to him given his violation of 62 Pa. Stat. Ann. § 481(a). Range remains one of "the people" protected by the Second Amendment, and his eligibility to lawfully purchase a rifle and a shotgun is protected by his right to keep and bear arms. Because the Government has not shown that our Republic has a longstanding history and tradition of depriving people like Range of their firearms, § 922(g)(1) cannot constitutionally strip him of his Second Amendment rights. We will reverse the judgment of the District Court and remand so the Court can enter a declaratory judgment in favor of Range, enjoin enforcement of § 922(g)(1) against him, and conduct any further proceedings consistent with this opinion.

PORTER, *Circuit Judge*, concurring.

I join the majority opinion in full. I write separately to highlight one reason why there are no examples of founding, antebellum, or Reconstruction-era federal laws like 18 U.S.C. § 922(g)(1) permanently disarming non-capital criminals.

Until well into the twentieth century, it was settled that Congress lacked the power to abridge anyone's right to keep and bear arms. The *right* declared in the Second Amendment was important, but cumulative. The people's first line of defense was the reservation of a *power* from the national government.[1] As James Wilson explained, "A bill of rights annexed to a constitution is *an enumeration of the powers* reserved." James Wilson, *Remarks in the Pennsylvania Convention to Ratify the Constitution of the United States* (Nov. 28, 1787), reprinted in 1 *Collected Works of James Wilson* 195 (Liberty Fund ed., 2007).

Even without the Second Amendment, the combination of enumerated powers and the Ninth and Tenth Amendments ensured that Congress could not permanently disarm anyone.

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[1] "The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state." The Federalist No. 45, at 241 (Madison) (Liberty Fund ed. 2001).

See Kurt T. Lash, *The Lost History of the Ninth Amendment* 72–93 (2009) (discussing how the Ninth and Tenth Amendments work in tandem to serve federalist purposes). The adoption of substantive protections in the Bill of Rights, such as the right to keep and bear arms, was another layer of protection reinforcing dual sovereignty.

A founding-era source is illustrative. In his influential constitutional law treatise, William Rawle, a Federalist, grounded the people's right to keep and bear arms in Congress's lack of delegated power. He described the Second Amendment as a backstop to prevent the pursuit of "inordinate power."

> The prohibition is general. No clause in the Constitution could by any rule of construction be conceived to give congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.

William Rawle, *A View of the Constitution of the United States of America* 125–26 (2d ed. 1829).

At oral argument, counsel for the government hypothesized that the paucity of early American criminal laws resulting in disarmament may be explained by a lack of political demand. That's implausible. As Judge Krause's dissenting opinion shows, states were free to, and did, regulate

gun ownership and use, indicating political demand. The most obvious explanation for a century and a half of congressional inaction is not lack of political will but dual sovereignty and respect for state police power.

A New Deal Era attempt at federal gun control is revealing. In 1934, the Roosevelt Administration proposed the National Firearms Act to address the gangster-style violence of the Prohibition Era by reducing the sale of automatic weapons and machine guns. Stymied by the federal government's lack of police power, Attorney General Homer Cummings urged Congress to regulate guns indirectly through its enumerated taxing power. Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle Over the Legitimacy of the Individual Right to Arms*, 70 Hastings L. J. 717, 750–58 (2019). Congress accepted that suggestion, avoiding the acknowledged constitutional problem by imposing a tax—rather than a direct prohibition—on the making and transfer of particular firearms. *See* National Firearms Act, ch. 757, Pub. L. No. 73–474, 48 Stat. 1236 (1934) (current version at 26 U.S.C. § 5801 et seq.).

The landscape changed in 1937, when the Supreme Court adopted an expansive conception of the Commerce Clause. *See NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937). Newly empowered, Congress promptly enacted the Federal Firearms Act of 1938. For the first time, that law disarmed felons convicted of a "crime of violence," which the Act defined as "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by more than one year." Federal Firearms Act, Pub. L. No. 75–785, 52

Stat. 1250 (1938). In 1961, Congress extended the firearms disqualification to all felons, violent or otherwise. *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961); *see also* 18 U.S.C. § 922(g)(1).

As the majority opinion makes plain, these modern laws have no longstanding analogue in our national history and tradition of firearm regulation.[2] Maj. Op. 15–22. That's unsurprising because before the New Deal Revolution, Congress was powerless to regulate gun possession and use. *See United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (Congress lacks power to infringe the right declared by the Second Amendment); *Presser v. People of State of Ill*. 116 U.S. 252, 265 (1886) (same).

Lacking any relevant historical federal data, we may look to state statutes and cases for contemporaneous clues about the people's right to keep and bear arms.[3] By 1803, seven of the seventeen states protected gun possession and use in their own declarations of rights. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Tex. Rev. L. & Pol. 191, 208–11 (2006). And by 1868, twenty-two of thirty-seven states protected the right in their state constitutions. *Id.* The history and tradition of firearm regulation in those states

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[2] *Bruen* defines relevant history for these purposes as the period between approximately 1791 and 1868. *New York State Rifle & Pistol Ass'n., Inc. v. Bruen*, 597 U.S. ----, 142 S. Ct. 2111, 2137–50 (2022) (summarizing "antebellum" historical evidence).

[3] *Pace* Judge Shwartz, I do not understand the Supreme Court to require that firearm regulations can be supported only "by a federally enacted analog in existence at the founding[.]" Shwartz Dissent at n.5.

may shed light on the scope of the federal constitutional right, depending on how similar each state's constitutional protection was to the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 600–03 (2008) (founding-era state constitutions corroborate individual-right interpretation of Second Amendment). After all, state constitutions and their respective bills of rights were "the immediate source from which Madison derived what became the U.S. Bill of Rights." Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 Publius 19, 29 (1992).

But precisely because the states—unlike the national government—retained sweeping police powers and weren't originally constrained by the Bill of Rights, they were free to regulate the possession and use of weapons in whatever ways they thought appropriate (subject to state constitutional restrictions that were not uniform). *See Barron ex rel. Tiernan v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Because of that important difference, it's unclear what many early state laws prove about the contours of the *Second Amendment* right.

For example, Judge Krause's dissent cites founding or antebellum-era disarmament laws from Delaware, Maryland, New Jersey, New York, and Virginia. Krause Dissent at 15-21, 26-28 & nn. 94-96, 98. But Maryland, New Jersey, and New York have never enumerated a Second Amendment analogue. Volokh, *supra*, at 205. Delaware and Virginia did not do so until 1987 and 1971, respectively. *Id*. at 194, 204. So those states' laws provide little insight about the scope of the Second Amendment right.

After *McDonald v. City of Chicago*, 561 U.S. 742 (2010), state gun laws are subject to the Second Amendment because it is incorporated through the Fourteenth Amendment.

The Supreme Court has said that "if a Bill of Rights protection is incorporated, there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indiana,* 586 U.S. ----, 139 S. Ct. 682, 687 (2019); *see also Bruen*, 142 S. Ct. at 2137. But unlike *McDonald*, *Timbs*, and *Bruen*, this case doesn't involve application of an incorporated right against a state law; it's a challenge to the constitutionality of a relatively recent federal statute that has no historical analogue in antebellum federal law.

Using state laws indiscriminately to determine the scope of the constitutional right seems incongruous in this context. It seeks effectively to reverse incorporate state law into federal constitutional law. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that Fourteenth Amendment equal-protection principles applicable to the states also bind the federal government through the Fifth Amendment's Due Process Clause because the alternative would be "unthinkable." *Id*. at 500; *but see United States v. Vaello Madero*, 142 S. Ct. 1539, 1544–47 (2022) (Thomas, J., concurring) (criticizing *Bolling*'s rationale). Here, there is no textual basis plausibly supporting reverse incorporation. And *Bolling*'s rule appears to be cabined to equal-protection claims; the Court has only invoked reverse incorporation to redress invidious discrimination. Without an equal-protection or due-process hook, using state law to define a federal constitutional amendment that was fashioned to protect individual rights *and* a reserved power poses a doctrinal conundrum.

A conception of the Second Amendment right that retcons modern commerce power into early American state law is anachronistic and flunks *Bruen*'s history-and-tradition test. Setting the federal floor through a combination of antebellum state police power and Congress's post-New Deal commerce

authority, as the dissents propose, would underprotect the constitutional right to keep and bear arms.

AMBRO, *Circuit Judge*, concurring, joined by GREENAWAY, JR. and MONTGOMERY-REEVES, *Circuit Judges*.

Bryan Range decades ago made a false statement to obtain food stamps to feed his family. That untrue statement, however, was a misdemeanor in violation of Pennsylvania law. *See* 62 Pa. Stat. Ann. § 481(a). And his conviction barred him from possessing a firearm per 18 U.S.C. § 922(g)(1).

I agree with the well-crafted majority opinion of Judge Hardiman that Range is among "the people" protected by the Second Amendment and that the law is unconstitutional as applied to him. I write separately, however, to explain why the Government's failure to carry its burden in this case does not spell doom for § 922(g)(1). It remains "presumptively lawful." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)). This is so because it fits within our Nation's history and tradition of disarming those persons who legislatures believed would, if armed, pose a threat to the orderly functioning of society. That Range does not conceivably pose such a threat says nothing about those who do. And I join the majority opinion with the understanding that it speaks only to his situation, and not to those of murderers, thieves, sex offenders, domestic abusers, and the like.

Section 922(g)(1) is the federal "felon-in-possession" law. It makes it "unlawful for any person . . . who has been convicted in any court . . . of a crime punishable by imprisonment for a term exceeding one year" to possess firearms or ammunition. 18 U.S.C. § 922(g)(1). Although

those convicted of state misdemeanors "punishable by a term of imprisonment of two years or less" are excluded from the prohibition, Range is subject to it because his crime carried a maximum penalty of five years' imprisonment even though he received no prison sentence. 18 U.S.C. § 921(a)(20)(B).

Congress may disarm felons because, as Justice Scalia explained in *Heller*, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. He demonstrated this is so by listing "presumptively lawful" regulations that the ruling should not "be taken to cast doubt on." *Id.* at 626–27 & n.26. That list included "longstanding prohibitions on the possession of firearms by felons." *Id.* at 626–27. Just two years later, in *McDonald v. City of Chicago*, the Supreme Court incorporated the Second Amendment against the states. 561 U.S. 742, 767–68 (2010). In doing so, it assured the public that "incorporation does not imperil every law regulating firearms." *Id.* at 786. Thus, it stood by its statement "in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" *Id.* (quoting *Heller*, 554 U.S. at 626–27). *See also United States v. Jackson*, No. 22-2870, --- F.4th ----, 2023 WL 3769242, at *4 (8th Cir. June 2, 2023) (observing the Supreme Court has provided assurances that felon-in-possession laws are constitutional).

In *United States v. Barton*, we held that "*Heller*'s list of 'presumptively lawful' regulations is not dicta." 633 F.3d 168, 171 (3d Cir. 2011). That aligned us with the Ninth and Eleventh Circuits. *Id.* (citing *United States v. Vogxay*, 594 F.3d 1111, 1115 (9th Cir. 2010), and *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010)). And every other circuit

court has looked to the Supreme Court's treatment of "presumptively lawful" prohibitions for guidance.[1]

New York State Rifle & Pistol Ass'n v. Bruen reaffirms that felon-in-possession laws are presumed to be lawful. 142 S. Ct. 2111 (2022). Although that case had nothing to do with those laws, three of the six Justices in the majority went out of their way to signal that view. Justice Kavanaugh's concurrence, joined by Chief Justice Roberts, explained that, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations" before quoting the *Heller* excerpt that casts prohibitions on the possession of firearms by felons as presumptively lawful. *Id*. at 2162 (quoting *Heller*, 554 U.S. at 626–27 & n.26). Justice Alito's concurrence also explained that the Court's opinion has not "disturbed anything that we said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns." *Id*. at 2157 (citation omitted).

Of course, we are here for a reason. *Bruen* abrogated the circuit courts' use of means-end analysis and replaced it with a history-driven test:

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[1] *See United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011); *United States v. Jimenez*, 895 F.3d 228, 233 (2d Cir. 2018); *United States v. Chester*, 628 F.3d 673, 679–80 (4th Cir. 2010); *Hollis v. Lynch*, 827 F.3d 436, 446–47 (5th Cir. 2016); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686–87 (6th Cir. 2016) (en banc); *United States v. Skoien*, 614 F.3d 638, 639–40 (7th Cir. 2010); *United States v. Bena*, 664 F.3d 1180, 1182–83 (8th Cir. 2011); *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1124 (10th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. at 2126. In the wake of *Bruen*, assessing a gun restriction by balancing a government's interest (safety of citizens) with the burden imposed on an individual's right to bear arms is out. Instead, laws that burden Second Amendment rights must have "a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133 (emphases in original). So we must use "analogical reasoning" to determine whether § 922(g)(1) is "relevantly similar" to a law from a period of history that sheds light on the Second Amendment's meaning. *Id.* at 2132.

Given that three Justices in *Bruen*'s majority opinion reminded us that felon-in-possession laws remain presumptively lawful, and the three dissenting Justices echoed that view, *id.* at 2189 (Breyer, J., dissenting) ("Like Justice Kavanaugh, I understand the Court's opinion today to cast no doubt on that aspect of *Heller*'s holding."), a sound basis exists for § 922(g)(1)'s constitutional application in a substantial amount of cases. Any historical inquiry that reaches a contrary

result must be wrong in view of the answer the Supreme Court has already supplied. *See Jackson*, 2023 WL 3769242, at *4.

We begin with a look to firearm regulation in the era of the Second Amendment's ratification. In England, non-Anglican Protestants and Catholics were disarmed during times of tumult. *See Range v. Att'y Gen.*, 53 F.4th 262, 274–76 (3d Cir. 2022), *reh'g en banc granted, opinion vacated*, 56 F.4th 992 (3d Cir. 2023). The American colonies also disarmed religious dissenters. See *id.* at 276–77. And in the Revolutionary War period, British loyalists and those who refused to take loyalty oaths were disarmed by several colonies. *See id.* at 277–79. *See also Jackson*, 2023 WL 3769242, at *5.

True, those laws are, by today's standards, unconstitutional on non-Second Amendment grounds. But at our Founding they were measures driven by the fear of those who, the political majority believed, would threaten the orderly functioning of society if they were armed. From this perspective, it makes sense that § 922(g)(1) is presumptively lawful. Society is protecting itself by disarming, *inter alia*, those who murder, rob, possess child porn, and leak classified national security information. *See id.* at *7. Most felons have broken laws deemed to underpin society's orderly functioning, be their crimes violent or not. Section 922(g)(1) thus disarms them for the same reason we prohibited British loyalists from being armed.

Of course, the relevant period may extend beyond the Founding era. Indeed, the Supreme Court has not yet decided whether individual rights are defined by their public understanding at the time of the ratification of the Bill of Rights

in 1791 or the Fourteenth Amendment in 1868. *See Bruen*, 142 S. Ct. at 2162–63 (Barrett., J., concurring). If the latter, as the Eleventh Circuit held in *National Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1322–24 (11th Cir. 2023), then Founding-era regulations remain instructive unless contradicted by something specific in the Reconstruction-era. In any event, the more longstanding a prohibition, the more likely it is to be constitutional.[2]

Certain regulations contemporaneous with the Fourteenth Amendment's ratification reaffirm the familiar desire to keep arms from those perceived to threaten the orderly functioning of society. A slew of states prohibited "tramps" from carrying firearms or dangerous weapons.[3] Kansas barred those "not engaged in any legitimate business, any person under the influence of intoxicating drink, and any person who has ever borne arms against the government of the United

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[2] The Supreme Court did not specify how long it takes for a law to become "longstanding."

[3] *See, e.g.,* 1878 N.H. Laws 612, ch. 270 § 2; 1878 Vt. Laws 30, ch. 14 § 3; 1879 R.I. Laws 110, ch. 806 § 3; 1880 Ohio Rev. St. 1654, ch. 8 § 6995; 1880 Mass. Laws 232, ch. 257, § 4; 1987 Iowa Laws 1981, ch. 5 § 5135.

Tramps were typically defined along the lines of the following Pennsylvania statute: "Any person going about from place to place begging, asking or subsisting upon charity, and for the purpose of acquiring money or living, and who shall have no fixed place of residence, or lawful occupation in the county or city in which he shall be arrested, shall be taken and deemed to be a tramp." 1 A DIGEST OF THE STATUTE LAW OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 TO 1894, 541 (Frank F. Brightly, 12th ed. 1894).

States" from carrying "a pistol, bowie-knife, dirk or other deadly weapon." 2 General Statutes of the State of Kansas 353 (1897) (passed in 1868). And Wisconsin prohibited "any person in a state of intoxication to go armed with any pistol or revolver." 1883 Wis. Sess. Laws 290, ch. 329, § 3. Although these regulations are not felon-in-possession laws, they echo the impetus of the Founding-era laws—a desire to stop firearms from being possessed or carried by those who cannot be trusted with them.

But presumptions aren't rules—they can be rebutted. And so it may be that an individual subject to § 922(g)(1) would not, if armed, plausibly pose a threat to the orderly functioning of society. Here, the Government has not carried its burden of proving that Range poses such a threat. Hence, he may not be constitutionally disarmed on the record presented.

Range committed a small-time offense. He did so with a pen to receive food stamps for his family. There is nothing that suggests he is a threat to society. He therefore stands apart from most other individuals subject to § 922(g)(1) whom we fear much like early Americans feared loyalists or Reconstruction-era citizens feared armed tramps. I therefore concur because there is no historical basis for disarming him.

I close with the observation that the Supreme Court will have to square its history-driven test with its concurrent view that felon gun restrictions are presumptively lawful. Scholars have scrambled to find historical roots for that presumption. *See, e.g.*, Carlton F.W. Larson, *Four Exceptions in Search of a Theory:* District of Columbia v. Heller *and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1386 (2008) (originalist analysis

"yield[s] partial and incomplete answers" for why the measures *Heller* cited as presumptively lawful enjoy that status). Others conclude that a historical basis only exists for disarming violent felons, *see, e.g.*, Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249 (2020), who represent but a small fraction of the felon population, thus leaving out, for example, those who leak national security information, disrupt markets with their fraud, and possess child porn. *See* Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, State Violent Felons in Large Urban Counties, at 1 (2006) ("From 1990 to 2002, 18% of felony convictions in the 75 largest counties were for violent offenses.").

This opinion is one attempt to offer a historical justification for § 922(g)(1), recognizing that history offers no precise analogue. And if that proves unsatisfying to the Court, it may do away with the presumption that disarming felons is lawful. I hope it does not do so. Not just because arming those who pose a threat to the orderly functioning of society will lead to more deaths, but because it would be a dangerous precedent. It is incongruous to believe history displaces means-ends balancing for the Second Amendment only. The Court's approach here will affect our ability to pass any rights-burdening law—whether the right be protected by the First, Second, Fourth, or Sixth Amendment—that lacks a neat historical basis. I trust it will fulfill its promise that *Bruen* imposes no "regulatory straightjacket," 142 S. Ct. at 2133, and permit § 922(g)(1) to apply to those who threaten the orderly functioning of civil society.

SHWARTZ, *Circuit Judge*, dissenting, joined by RESTREPO, *Circuit Judge*.

Today, the Majority of our Court has decided that an individual convicted of fraud cannot be barred from possessing a firearm. While my colleagues state that their opinion is narrow, the analytical framework they have applied to reach their conclusion renders most, if not all, felon bans unconstitutional. Because the Supreme Court has made clear that such bans are presumptively lawful, and there is a historical basis for such bans, I respectfully dissent.[1]

In New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), the Supreme Court set forth a history-based framework for deciding whether a firearm regulation is constitutional under the Second Amendment. Courts must now examine whether the "regulation [being reviewed] is part of the historical tradition that delimits the outer boundaries of the right to keep and bear arms." Id. at 2127. To make this determination, a court must decide whether the challenger or conduct at issue is protected by the Second Amendment and, if so, whether the Government has presented sufficient historical analogues to justify the restriction. See id. at 2129-30.

[1] While I agree with Judge Krause's excellent and comprehensive review of the history as well as her incisive critique of the Majority opinion, I write separately to emphasize both that the history supports banning felons from possessing firearms and that the Majority opinion is far from narrow.

The Majority's analysis is inconsistent with the Supreme Court's jurisprudence and has far-reaching consequences. First, the Majority downplays the Supreme Court's consistent admonishment that felon bans are "longstanding" and "presumptively lawful." District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010). In Heller and McDonald, the Supreme Court stated that felon bans are consistent with our historical tradition. Heller, 554 U.S. at 626-27; McDonald, 561 U.S. at 786. More recently, a majority of the Bruen Court reiterated that felon bans are presumptively lawful, and notably did so in the very case that explicitly requires courts to find historical support for every firearm regulation. Bruen, 142 S. Ct. at 2157 (Alito, J., concurring) (explaining that Bruen did not "disturb" anything the Court said in Heller or McDonald); id. at 2162 (Kavanaugh, J., concurring, joined by Roberts, J.) ("Nothing in our opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons." (quoting Heller, 554 U.S. at 626)); id. at 2189 (Breyer, J., dissenting, joined by Sotomayor, J., & Kagan, J.) ("I understand the Court's opinion today to cast no doubt on . . . Heller's holding [regarding longstanding prohibitions.]"). These statements show that felon bans have historical roots.[2] See United States v. Jackson, No. 22-2870, 2023 WL 3769242, --- F. 4th ----, at *4, *7 n.3 (8th Cir. June 2, 2023) (upholding the constitutionality of the

[2] The Supreme Court also recognized that other firearm regulations are "longstanding" and "presumptively lawful." Heller, 554 U.S. at 626-27. Thus, the Majority's willingness to devalue the Supreme Court's observations may have consequences on regulations beyond the status-based ban at issue here.

federal felon ban as applied to a non-violent drug offender based, in part, on the Supreme Court's statements).

Second, the Majority incorrectly discounts the importance of the Supreme Court's emphasis on law-abidingness as a limitation on the Second Amendment right. While the Majority dismisses this language as "dicta," Maj. Op. at 11, the Bruen Court's use of the phrase fourteen times highlights the significance that this criterion played in its decision, Bruen, 142 S. Ct. at 2122, 2125, 2131, 2133-34, 2135 n.8, 2138 n.9, 2150, 2156; see also Jackson, 2023 WL 3769242, at *6 (noting Bruen's repeated statements about a law-abider's right to possess arms). Indeed, the Bruen court approved of certain gun regulations that included criminal background checks. Bruen, 142 S. Ct. at 2138 n. 9. While the Majority says that the phrase "law abiding" is "expansive" and "vague," Maj. Op. at 13, there is no question that one who has a felony or felony-equivalent conviction is not law abiding. Thus, the Supreme Court's jurisprudence tells us that the right to bear arms is limited to law abiders, and that felon bans are presumptively lawful.

Third, the Majority acknowledges but then disregards important aspects of Bruen. The Bruen Court emphasized that its test should not be a "regulatory straightjacket [sic]" and that courts should look for a "historical analogue" to the challenged regulation, not a "historical twin." 142 S. Ct. at 2133. Despite these instructions, the Majority demands a historical twin by requiring the Government to identify a historical crime, including its punishment, that mirrors Bryan Range's conviction. At the founding, the fraud-based crime of the type Range committed was considered a capital offense, which

obviously carries with it the loss of all possessory rights.[3] Folajtar v. Att'y Gen., 980 F.3d 897, 904-05 (3d Cir. 2020) (collecting authorities). The Majority recognizes that this severe punishment "reflects the founding generation's judgment about the gravity of those offenses" and the need for harsh punishment. Maj. Op. at 19. It then, however, rejects this historical data by stressing that today, a far less severe punishment results, thereby rendering Range's offense not "relevantly similar" to founding-era fraud offenses. Id. at 19-20 (quoting Bruen, 142 S. Ct. at 2132). The problem with this analysis is that it focuses on present-day punishments to determine whether a founding-era crime is a historical analogue. Like it or not, Bruen mandates that we look at the law as it existed at the founding, and so the fact that the law has changed, or in this case, the punishment has changed, is irrelevant. Put differently, Bruen requires us to don blinders and look at only whether there is a historical analogue for the firearm regulation at issue. When we do so, history demonstrates that fraudsters could lose their life, and hence their firearms rights.

The Majority also rejects the Government's analogy to now unconstitutional status-based bans on Native Americans, Blacks, Catholics, Quakers, loyalists, and others because Range is not "part of a similar group today." Maj. Op. at 19. Whether Range is a member of one of these groups is

[3] Even some noncapital offenses resulted in life imprisonment and the forfeiture of the offender's entire estate, which contemplates the loss of all property, including firearms. Act of Apr. 18, 1786, 2 Laws of the State of New York 253, 260–61 (1886); Act of Nov. 27, 1700, 2 Statutes at Large of Pennsylvania 12 (Wm. Stanley Ray ed., 1904).

irrelevant. Rather, under Bruen, the relevant inquiry is why a given regulation, such as a ban based on one's status, was enacted and how that regulation was implemented. Bruen, 142 S. Ct. at 2133. No matter how repugnant and unlawful these bans are under contemporary standards, the founders categorically disarmed the members of these groups because the founders viewed them as disloyal to the sovereign. Range v. Att'y Gen., 53 F.4th 262, 273-82 (3d Cir. 2022) (per curiam) (collecting authorities), vacated by 56 F.4th 992 (3d Cir. 2023); see also Jackson, 2023 WL 3769242, at *5 (observing that the founding-era categorical prohibitions are relevant "in determining the historical understanding of the right to keep and bear arms"). The felon designation similarly serves as a proxy for disloyalty and disrespect for the sovereign and its laws. Such categorization is especially applicable here, where Range's felony involved stealing from the government, a crime that directly undermines the sovereign. Therefore, the trust and loyalty reasons underlying the status-based bans imposed at the founding show that the bans are an appropriate historical analogue for the present-day prohibition on felon possession.[4]

[4] The Majority also gives no weight to various founding-era statutory violations that led to disarmament, see, e.g., Act of Dec. 21, 1771, ch. 540, N.J. Laws 343–344; Act of Apr. 20, 1745, ch. 3, N.C. Laws 69–70; see also Range, 53 F.4th at 281 (collecting additional authorities), because it contends that offenders were only disarmed of the firearm they possessed at the time of the violation and not barred from possessing firearms in the future, Maj. Op. at 19-20. From this, the Majority asserts crime-based bans were not permanent. Id. Whether true or not, the federal felon ban under 18 U.S.C. § 922(g) is not permanent. Congress specifically identified

Finally, the Majority's approach will have far-reaching consequences. Although the Majority states that its holding is "narrow" because it is limited to Range's individual circumstances, Maj. Op. at 22, the only individual circumstance the Majority identifies is that the penalty Range faced differs from the penalty imposed at the founding. As discussed above, that fact is irrelevant under Bruen. Thus, the ruling is not cabined in any way and, in fact, rejects all historical support for disarming any felon.[5] As a result, the Majority's analytical framework leads to only one conclusion:

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ways to avoid the ban, such as by securing an expungement, pardon, or having one's civil rights restored. 18 U.S.C. § 921(a)(20). Additionally, although it is currently unfunded, Congress enacted 18 U.S.C. § 925(c), which allows the Bureau of Alcohol, Tobacco, and Firearms to restore an individual's right to possess a firearm upon consideration of the individual's personal circumstances. See Logan v. United States, 552 U.S. 23, 28 n.1 (2007).

[5] The Majority also says that it need not decide whether disarmament of violent criminals is supported by the historical evidence, Maj. Op. at 18 n.9, but its view of the history, its requirement of a historical twin, and its explanation that federal felon prohibitions enacted in 1938 and 1961 are too recent to be longstanding, necessarily mean that the Majority would conclude that bans on violent felons cannot be justified.

Moreover, the framework outlined in Judge Porter's concurrence would mean that the federal government would be prohibited from enacting any gun regulation. In fact, Judge Porter's requirement that a current federal regulation be supported by a federally enacted analog in existence at the founding would call into question the federal government's ability to regulate activities that did not then exist.

there will be no, or virtually no, felony or felony-equivalent crime that will bar an individual from possessing a firearm.[6] This is a broad ruling and, to me, is contrary to both the sentiments of the Supreme Court and our history.

I therefore respectfully dissent.

[6] Moreover, and significantly, the Majority provides no way for a felon to know whether his crime of conviction prevents him from possessing a firearm. This, however, is not entirely the Majority's fault. Bruen requires a review of our nation's history during a finite time period to determine whether a felon's particular crime of conviction constitutionally permits disarmament—an inquiry that, under the Majority's test, will vary from crime to crime. Thus, the concerns about due process and notice discussed in Judge Fuentes's dissent in Binderup v. Attorney General, 836 F.3d 336, 409-11 (3d Cir. 2016) (Fuentes, J., dissenting in part and concurring in part), are even more pronounced after Bruen.

KRAUSE, *Circuit Judge*, dissenting.

As Americans, we hold dear the values of individual liberty and freedom from tyranny that galvanized our Founders and are enshrined in the Constitution. So it is not surprising that we often look to history and tradition to inform our constitutional interpretation.[1] But as Alexis de Tocqueville rightly observed of "the philosophical method of the Americans," we "accept tradition only as a means of information, and existing facts only as a lesson to be used in . . . doing better."[2] Thus, when we draw on parallels with the past to assess what is permissible in the present, we typically look to match history in principle, not with precision.

When it comes to permissible regulation of the right to bear arms, it might make good sense to hew precisely to history and tradition in a world where "arms" still meant muskets and

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[1] In the past few years, the Supreme Court has adopted a "history and tradition" test in a variety of constitutional contexts, breaking from its own history where its precedent diverged from that interpretive method. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (interpreting the Due Process Clause and overruling *Roe v. Wade*, 410 U.S. 113 (1973)); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (interpreting the Free Exercise Clause and overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (explaining Article III standing); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (interpreting the Establishment Clause).

[2] 2 Alexis de Tocqueville, *Democracy in America* 1 (Francis Bowen ed., Henry Reeve trans., 3d ed. 1863).

flintlock pistols,[3] and where communities were still so small and "close-knit" that "[e]veryone knew everyone else," "word-of-mouth spread quickly," and the population "knew and agreed on what acts were right and wrong, which ones were permitted and forbidden."[4] But that is not the America of today. In modern times, arms include assault rifles,[5] high-capacity magazines, and semi-automatic handguns; our population of more than 330 million is mobile, diverse, and, as to social mores, deeply divided; and, tragically, brutal gun deaths and horrific mass shootings—exceeding 260 in just the past five months—are a daily occurrence in our schools, our

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[3] *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. (forthcoming 2023) (manuscript at 47), https://ssrn.com/abstract=4408228 ("Americans in 1791 generally owned muzzle-loading flintlocks, liable to misfire and incapable of firing multiple shots. Guns, thus, generally were not kept or carried loaded in 1791[.]" (quotation omitted)); Akhil Reed Amar, *Second Thoughts*, 65 Law & Contemp. Probs. 103, 107 (2002) ("At the Founding . . . [a] person often had to get close to you to kill you, and, in getting close, he typically rendered himself vulnerable to counterattack. Reloading took time, and thus one person could not ordinarily kill dozens in seconds.").

[4] Stephanos Bibas, *The Machinery of Criminal Justice* 2 (2012).

[5] *See* Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 Law & Contemp. Probs. 231, 240 (2020) ("[A]ssault weapons play a disproportionately large role in three types of criminal activity: mass shootings, police killings, and gang activity.").

streets, and our places of worship.[6] In today's world, the responsibilities that should accompany gun ownership are flouted by those who lack respect for the law.

As debates rage on about the causes of this crisis and the solutions, the people's elected representatives bear the heavy responsibility of enacting legislation that preserves the right to armed self-defense while ensuring public safety. Although they face evolving challenges in pursuing those twin aims, striking that delicate balance has long been a core function of the legislature in our system of separated powers,[7]

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[6] *See Statement from President Joe Biden on the Shooting in Allen, Texas*, White House (May 7, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/07/statement-from-president-joe-biden-on-the-shooting-in-allen-texas/; *A Partial List of U.S. Mass Shootings in 2023*, N.Y. Times (May 30, 2023), https://www.nytimes.com/article/mass-shootings-2023.html; *Gun Violence in America*, Everytown for Gun Safety (Feb. 13, 2023), https://everytownresearch.org/report/gun-violence-in-america/.

[7] *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 715 (2007) ("Achievement of that balance requires highly complex socio-economic calculations regarding what kinds of weapons ought to be possessed by individuals and how to limit access to them by those deemed untrustworthy or dangerous. Such complicated multi-factor judgments require trade-offs that courts are not institutionally equipped to make. Legislatures, by contrast, are structured to make precisely those kinds of determinations."); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L.

and legislatures' authority to disarm those who cannot be trusted to follow the laws has long been crucial to that endeavor.

Section 922(g)(1) of the U.S. Code, Title 18, embodies this delicate equilibrium and comports with traditional principles that have guided centuries of legislative judgments as to who can possess firearms. As Justice Alito has observed, § 922(g) "is no minor provision. It probably does more to combat gun violence than any other federal law."[8] And as a "longstanding"[9] and widely accepted aspect of our national gun culture,[10] the federal felon-possession ban—carefully crafted to respect the laws of the states—is the keystone of our national background check system,[11] and has repeatedly been characterized by the Supreme Court as "presumptively

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Rev. 353, 371 (1978) (noting the "relative incapacity of adjudication to solve 'polycentric' problems").

[8] *Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting).

[9] *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

[10] *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 Cardozo L. Rev. 1573, 1574 (2022) (explaining § 922(g)(1) is "the centerpiece of gun laws in the United States" and "the center of the gun-regulation universe").

[11] *See id.* at 1575 ("The felon prohibitor functions as the cornerstone of the federal background check system for firearm purchases[.]").

lawful."[12] Where, as here, the legislature has made a reasonable and considered judgment to disarm those who show disrespect for the law, it is not the place of unelected judges to substitute that judgment with their own.

Yet today's majority brushes aside these realities and the seismic effect of its ruling. It is telling that, although it describes itself as limited "to Range's situation,"[13] today's opinion is not designated non-precedential as appropriate for a unique individual case, but has precedential status, necessarily reaching beyond the particular facts presented. It is also telling that it tracks precisely the Fifth Circuit's deeply disturbing opinion in *United States v. Rahimi*, which, finding no precise historical analogue, struck down as unconstitutional the ban on gun possession by domestic abusers.[14] And in the process, the majority creates a circuit split with the Eighth Circuit's recent opinion in *United States v. Jackson*, which rejected the notion of "felony-by-felony litigation" and recognized that "Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons."[15]

In short, for all its assurances to the contrary and its lulling simplicity, the majority opinion commits our Court to a

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[12] *E.g.*, *Heller*, 554 U.S. at 627 n.26.

[13] Maj. Op. at 19.

[14] 61 F.4th 443 (5th Cir. 2023), *petition for cert. filed* (U.S. Mar. 21, 2023) (No. 22-915).

[15] No. 22-2870, 2023 WL 3769242, at *4, *7 (8th Cir. June 2, 2023).

framework so indefinite as to be void for vagueness and with dire consequences for our case law and citizenry. I therefore respectfully dissent.

I write here to clarify three points[16]: First, the historical record demonstrates that, contrary to the majority opinion, legislatures have historically possessed the authority to disarm entire groups, like felons, whose conduct evinces disrespect for the rule of law. Second, the doctrinal and practical ramifications of the majority's approach, which my colleagues do not even acknowledge, let alone address, are profound and pernicious. Third, in order to hold § 922(g)(1) inapplicable to Range in a truly narrow opinion, my colleagues did not need to throw out the baby with the bath water; instead, they could have issued a declaratory judgment holding § 922(g)(1) unconstitutional as applied to the petitioner *currently* before the Court—in effect, prospectively restoring his firearm rights. At least that approach would have been more faithful to history and consistent with the rule of law than the majority's sweeping, retroactive pronouncement and the calamity it portends.

I. The Historical Validity of § 922(g)(1)

We begin our historical inquiry with the benefit of more than a decade of Supreme Court precedent that illuminates the Court's understanding of traditional firearm regulations. In *Bruen*, the majority characterized the holders of Second

[16] I also share the doctrinal and historical concerns raised in Judge Shwartz's cogent dissent, with which I agree in full.

Amendment rights as "law-abiding" citizens fourteen times.[17] Delimiting the "unqualified command" of the Second Amendment to "law-abiding" individuals was not novel.[18] In holding "the right of the people"[19] protected by the Second Amendment was an "individual right,"[20] Justice Scalia's seminal opinion in *Heller* specified this meant "the right of law-abiding,

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[17] *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122, 2125, 2131, 2133–34, 2135 n.8, 2138 & n.9, 2150, 2156 (2022).

[18] *Id.* at 2130–31 (quotation omitted).

[19] *Heller*, 554 U.S. at 579. In the first part of its analysis, the majority defends its belief that convicted felons remain part of "the people," so their firearm possession is presumptively protected and the Government must prove its disarmament regulation comports with historical tradition. Maj. Op. at 11–15. Other jurists believe that historical tradition permits the disarmament of felons precisely because "the people" historically meant "law-abiding, responsible citizens." *Bruen*, 142 S. Ct. at 2131 (quotation omitted). But that debate—unlike the test for what constitutes an adequate "historical analogue," *id.* at 2133 (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021))—is largely academic. As then-Judge Barrett recognized, the "same body of evidence" can be used to illuminate who is part of the people or "the scope of the legislature's power," and either approach "yield[s] the same result." *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

[20] *Heller*, 554 U.S. at 592.

responsible citizens" to keep and bear arms,[21] and therefore characterized "prohibitions on the possession of firearms by felons" as both "longstanding" and "presumptively lawful."[22]

In *Bruen*, the Supreme Court clarified who qualifies as a "law-abiding" citizen when it explained that, despite the infirmity of New York's may-issue open-carry licensing regime, "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes . . . [,] which often require applicants to undergo a [criminal] background check" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[23]

Thus, time and again, the Supreme Court has acknowledged that the deep roots of felon-possession bans in American history impart a presumption of lawfulness to 18 U.S.C. § 922(g)(1). Yet my colleagues persist in disputing it. They

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[21] *Id.* at 635.

[22] *Id.* at 626–27 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality) ("repeat[ing] those assurances"); *Bruen* 142 S. Ct. at 2157 (Alito, J., concurring) (same), 2162 (Kavanaugh, J., concurring) (same).

[23] 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). Those background checks screen for both violent and non-violent offenses. *See, e.g.*, Wash. Rev. Code Ann. § 9.41.070(1)(a); Colo. Rev. Stat. Ann. § 18-12-203(1)(c); Kan. Stat. Ann. § 75-7c04(a)(2); Miss. Code. Ann. § 45-9-101(2)(d); N.H. Rev. Stat. Ann. § 159:6(I)(a); N.C. Gen. Stat. Ann. § 14-415.12(b)(1).

contend that, as a twentieth-century enactment, § 922(g)(1) "falls well short of 'longstanding' for purposes of demarcating the scope of a constitutional right."[24] But "longstanding" can mean decades, not centuries,[25] when a practice has become an accepted part of "our Nation's public traditions,"[26] as the felon-possession ban has,[27] and, by virtue of that acceptance, it is entitled to a "strong presumption of constitutionality."[28] Moreover, *Bruen* observed that historical analogies must be more flexible when a contemporary regulation implicates "unprecedented societal concerns or dramatic technological changes[.]"[29] Section 922(g)(1) is such a regulation, as the lethality of today's weaponry, the ubiquity of gun violence, the

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[24] Maj. Op. at 17.

[25] *Am. Legion*, 139 S. Ct. at 2082.

[26] *Freedom from Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 283 (3d Cir. 2019).

[27] *See* Stevenson, *supra* note 10, at 1574.

[28] *Am. Legion*, 139 S. Ct. at 2085.

[29] 142 S. Ct. at 2132 (quotation omitted). The Eighth Circuit likewise observed that common sense and flexibility are indispensable in assessing historical analogues because "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Jackson*, No. 22-2870, 2023 WL 3769242, at *6 (quoting *Bruen*, 142 S. Ct. at 2132).

size and anonymity of the population, and the extent of interstate travel were unknown at the Founding.[30]

As the Supreme Court has not performed an "exhaustive historical analysis" of the felon-possession ban, much less "the full scope of the Second Amendment,"[31] we must conduct that review to determine whether § 922(g)(1)'s application to felons, including Range, finds support in our national tradition. That analysis confirms it does.

For purposes of this inquiry, "not all history is created equal."[32] As the right to keep and bear arms was a "*pre-existing* right," we must consider "English history dating from the late 1600s, along with American colonial views leading up to the founding."[33] Post-ratification practices from the late eighteenth and early nineteenth centuries are also highly relevant, while later nineteenth century history is less informative.[34] If we heed the Supreme Court's admonition to analogize to historical regulations, but not to require a "historical twin,"[35] these

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[30] Even aside from these modern-day developments, however, the tradition of categorically disarming entire groups whom legislatures did not trust to obey the law dates back to at least the seventeenth century. *See infra* Section I.A.

[31] *Bruen*, 142 S. Ct. at 2128 (quotation omitted).

[32] *Id.* at 2136.

[33] *Id.* at 2127 (citing *Heller*, 554 U.S. at 595).

[34] *See id.* at 2136–37.

[35] *Id.* at 2133.

sources demonstrate the validity of § 922(g)(1) as applied in this case.

A. England's Restoration and Glorious Revolution

During the late seventeenth century, the English government repeatedly disarmed individuals whose conduct indicated that they could not be trusted to abide by the sovereign and its dictates.

Following the tumult of the English Civil War, the restored Stuart monarchs disarmed nonconformist (*i.e.*, non-Anglican) Protestants.[36] Of course, not all nonconformists were dangerous; to the contrary, many belonged to pacificist denominations like the Quakers.[37] However, they refused to participate in the Church of England, an institution headed by the King as a matter of English law.[38] And nonconformists

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[36] *See* Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 45 (1994) (describing how Charles II "totally disarmed . . . religious dissenters").

[37] *See* Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285, 304 n.117 (1983) ("Persons judged to be suspicious by the royal administration were those . . . who belonged to the Protestant sects that refused to remain within the Church of England. The Quakers were prominent sufferers.").

[38] *See Church of England*, BBC (June 30, 2011), https://www.bbc.co.uk/religion/religions/christianity/cofe/cofe_1.shtml (describing "the Act of Supremacy" enacted during the reign of Henry VIII).

often refused to take mandatory oaths acknowledging the King's sovereign authority over matters of religion.[39] As a result, Anglicans accused nonconformists of believing their faith exempted them from obedience to the law.[40]

Protestants had their rights restored after the Glorious Revolution of 1688 replaced the Catholic King James II with William of Orange and Mary, James's Protestant daughter.[41] But even then, Parliament enacted the English Bill of Rights, which declared: "Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and *as allowed by Law*."[42] This "predecessor to our Second Amendment"[43] reveals that the legislature—Parliament—was

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[39] *See* Frederick B. Jonassen, "*So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 Cardozo Pub. L., Pol'y & Ethics J. 303, 322 (2014) (describing Charles II's reinstation of the Oath of Supremacy); Caroline Robbins, *Selden's Pills: State Oaths in England, 1558–1714*, 35 Huntington Lib. Q. 303, 314–15 (1972) (discussing nonconformists' refusal to take such oaths).

[40] *See* Christopher Haigh, *'Theological Wars': 'Socinians' v. 'Antinomians' in Restoration England*, 67 J. Ecclesiastical Hist. 325, 326, 334 (2016).

[41] *See* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 Nw. U. L. Rev. 203, 228 (2021).

[42] 1 W. & M., Sess. 2, ch. 2, § 7 (Eng. 1689) (emphasis added).

[43] *Bruen*, 142 S. Ct. at 2141 (quoting *Heller*, 554 U.S. at 593).

understood to have the authority and discretion to decide who was sufficiently law-abiding to keep and bear arms.[44]

In 1689, the pendulum of distrust swung the other way. Parliament enacted a statute prohibiting Catholics who refused to take an oath renouncing the tenets of their faith from owning firearms, except as necessary for self-defense.[45] As with nonconformists, this prohibition was not based on the notion that every single Catholic was dangerous. Rather, the categorical argument English Protestants made against Catholicism at the time was that Catholics' faith put the dictates of a "foreign power," namely the Vatican, before English law.[46] Official Anglican doctrine—regularly preached throughout England—warned that the Pope taught "that they that are under him are free from all burdens and charges of the commonwealth, and obedience toward their prince[.]"[47]

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[44] *Cf.* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 47–48 (2000) (explaining how the English Bill of Rights preserved Parliament's authority to limit who could bear arms).

[45] An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M., Sess. 1, ch. 15 (Eng. 1688); *see* Malcolm, *supra* note 36, at 123.

[46] *See* Diego Lucci, *John Locke on Atheism, Catholicism, Antinomianism, and Deism*, 20 Etica & Politica/Ethics & Pol. 201, 228–29 (2018).

[47] *An Exhortation Concerning Good Order, and Obedience to Rulers and Magistrates*, *in* Sermons or Homilies Appointed to

Accordingly, the disarmament of Catholics in 1689 reflects Protestant fears that Catholics could not be trusted to obey the law.

That restriction could be lifted only prospectively and on an individual basis. That is, Parliament permitted Catholics who "repeated and subscribed" to the necessary oath before "any two or more Justices of the Peace" to resume keeping arms.[48] Disavowal of religious tenets hardly demonstrated that the swearing individual no longer had the capacity to commit violence; rather, the oath was a gesture of allegiance to the English government and an assurance of conformity to its laws. The status-based disarmament of Catholics thus again evinces the "historical understanding"[49] that legislatures could categorically disarm a group they viewed as unwilling to obey the law.

B. Colonial America

The English notion that the government could disarm those not considered law-abiding traveled to the American colonies. Although some of the earliest firearm laws in colonial America forbid Native Americans and Black persons

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Be Read in Churches in the Time of Queen Elizabeth of Famous Memory 114, 125 (new ed., Gilbert & Rivington 1839).

[48] 1 W. & M., Sess. 1, ch. 15 (Eng. 1688).

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

from owning guns,[50] the colonies also repeatedly disarmed full-fledged members of the political community as it then existed—*i.e.*, free, Christian, white men—whom the authorities believed could not be trusted to obey the law. Those restrictions are telling because they were imposed at a time when, before the advent of the English Bill of Rights, the charters of Virginia and Massachusetts provided unprecedented protections for colonists' firearm rights.[51]

The Virginia Company carried out one of the earliest recorded disarmaments in the American colonies in 1624. For his "opprobrious" and "base and detracting speeches concerning the Governor," the Virginia Council ordered Richard Barnes "disarmed" and "banished" from Jamestown.[52]

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[50] *See* Clayton E. Cramer, *Armed America: The Remarkable Story of How and Why Guns Became as American as Apple Pie* 31, 43 (2006). Today, we emphatically reject these bigoted and unconstitutional laws, as well as their premise that one's race or religion correlates with disrespect for the law. I cite them here only to demonstrate the tradition of categorical, status-based disarmaments. *See* Blocher & Ruben, *supra* note 3, at 63 (urging courts examining historical disarmament laws that would violate the Constitution today to "ask[] *why* earlier generations regulated gun possession more generally, rather than just *who* they disarmed").

[51] *See* Nicholas J. Johnson et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 174 (3d ed. 2022).

[52] David Thomas Konig, *"Dale's Laws" and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 Am. J. Legal Hist. 354, 371 (1982).

By disrespecting the colonial authorities, Barnes demonstrated that he could no longer be trusted as a law-abiding member of the community and thus forfeited his ability to keep arms.

During the late 1630s, a Boston preacher named Anne Hutchinson challenged the Massachusetts Bay government's authority over spiritual matters by advocating for direct, personal relationships with the divine.[53] Governor John Winthrop accused Hutchinson and her followers of being Antinomians—those who viewed their salvation as exempting them from the law—and banished her.[54] The colonial government also disarmed at least fifty-eight of Hutchinson's supporters, not because those supporters had demonstrated a propensity for violence, but rather "to embarrass the offenders" who were forced to personally deliver their arms to the authorities in an act of public submission.[55] The Massachusetts authorities therefore disarmed Hutchinson's supporters to shame those colonists because the authorities concluded their conduct evinced a willingness to disobey the law.[56] Again,

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[53] *See* Edmund S. Morgan, *The Case Against Anne Hutchinson*, 10 New Eng. Q. 635, 637–38, 644 (1937).

[54] *Id.* at 648; Ann Fairfax Withington & Jack Schwartz, *The Political Trial of Anne Hutchinson*, 51 New Eng. Q. 226, 226 (1978).

[55] James F. Cooper, Jr., *Anne Hutchinson and the "Lay Rebellion" Against the Clergy*, 61 New Eng. Q. 381, 391 (1988).

[56] *Cf.* John Felipe Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and the Massachusetts Bay Colony*, 92 Chi.-Kent L. Rev. 743, 761 (2017) (describing

restoration of that right was available, but only prospectively, for individuals who affirmatively sought relief: Hutchinson's followers who renounced her teachings and confessed their sins to the authorities "were welcomed back into the community and able to retain their arms," as they had shown that they could once again be trusted to abide by the law.[57]

Like the Stuart monarchs in England, the Anglican colony of Virginia disarmed nonconformist Protestants in the 1640s due to their rejection of the King's sovereign power over religion. When a group of nonconformist Puritans from Massachusetts resettled in southeastern Virginia,[58] Virginia Governor William Berkeley "acted quickly to silence the Puritan[s]."[59] His concern with any "[o]pposition to the

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other shaming punishments used at the time, including scarlet letters).

[57] Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 263 (2020).

[58] Charles Campbell, *History of the Colony and Ancient Dominion of Virginia* 211 (1860).

[59] Kevin Butterfield, The Puritan Experiment in Virginia, 1607–1650, at 21 (June 1999) (M.A. thesis, College of William and Mary) (on file with William and Mary Libraries).

king"[60] led Governor Berkeley to disarm the Puritans before banishing them from the colony.[61]

After the Glorious Revolution, the American colonies also followed England in disarming their Catholic residents. Just three years after designating Anglicanism as the colony's official religion,[62] Governor Benjamin Fletcher of New York disarmed Catholic colonists in 1696.[63] The colonies redoubled their disarmament of Catholics during the Seven Years' War of 1756–1763.[64] Maryland, for example, though founded as a haven for persecuted English Catholics,[65] confiscated firearms from its Catholic residents during the war.[66] Notably, that decision was not in response to violence; indeed, the colony's

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[60] *Id.*

[61] Campbell, *supra* note 58, at 212.

[62] *See* George J. Lankevich, *New York City: A Short History* 30 (2002).

[63] *See* Shona Helen Johnston, Papists in a Protestant World: The Catholic Anglo-Atlantic in the Seventeenth Century 219–20 (May 11, 2011) (Ph.D. dissertation, Georgetown University) (on file with the Georgetown University Library).

[64] *See* Greenlee, *supra* note 57, at 263.

[65] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1424 (1990).

[66] *See* Greenlee, *supra* note 57, at 263; Johnson et al., *supra* note 51, at 197.

governor at the time, Horatio Sharpe, observed that "the Papists behave themselves peaceably and as good subjects."[67] Neighboring Virginia likewise disarmed Catholics, but allowed those who demonstrated their willingness to obey the law by swearing an oath of loyalty to the King to retain their weapons.[68] The colonies therefore continued the English practice of disarming Catholics based on their perceived unwillingness to adhere to the King's sovereign dictates.

Catholics were not the only group of colonists disarmed during the Seven Years' War. New Jersey confiscated firearms from Moravians, a group of nonconformist Protestants from modern-day Germany.[69] Like the Quakers, Moravians were—as they are today—committed pacifists who owned weapons for hunting instead of fighting.[70] Regardless, New Jersey Governor Jonathan Belcher deemed their nonconformist views sufficient evidence that they could not be trusted to obey royal authority, so he ordered their disarmament.[71]

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[67] Elihu S. Riley, *A History of the General Assembly of Maryland* 224 (1912) (quoting a July 9, 1755 letter from Governor Sharpe).

[68] *See* Johnson et al., *supra* note 51, at 198.

[69] *See id.*

[70] *See id.*

[71] *See id.* (discussing Governor Belcher's view that the Moravians were "Snakes in the Grass and Enemies of King George").

C. Revolutionary War

As the colonies became independent states, legislatures continued to disarm individuals whose status indicated that they could not be trusted to obey the law. John Locke—a philosopher who profoundly influenced the American revolutionaries[72]—argued that the replacement of individual judgments of what behavior is acceptable with communal norms is an essential characteristic of the social contract.[73] Members of a social compact, he explained, therefore have a civic obligation to comply with communal judgments regarding proper behavior.[74]

Drawing on Locke, state legislatures conditioned their citizens' ability to keep arms on compliance with that civic

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[72] *See* Thad W. Tate, *The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument*, 22 Wm. & Mary Q. 375, 376 (1965); *see also Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (observing "John Locke [was] one of the thinkers who most influenced the framers").

[73] *See* John Locke, *Two Treatises of Government* § 163 (Thomas I. Cook ed., Hafner Press 1947) (reasoning "there only is political society where every one of the members hath quitted his natural power [to judge transgressions and] resigned it up into the hands of the community").

[74] Locke grounded that duty in the consent of those within a political society; however, he argued that mere presence in a territory constitutes tacit consent to the laws of the reigning sovereign. *See id.* § 119.

obligation, and several states enacted statutes disarming all those who refused to recognize the sovereignty of the new nation.[75] In Connecticut, for instance, as tensions with England rose, colonists denounced loyalists' dereliction of their duty to the civic community. The inhabitants of Coventry passed a resolution in 1774 stating loyalists were "unworthy of that friendship and esteem which constitutes the bond of social happiness, and ought to be treated with contempt and total neglect."[76] "Committees of Inspection" formed across Connecticut and published the names and addresses of suspected loyalists in local newspapers as "persons held up to the public view as enemies to their country."[77] Concerns that loyalists could not be trusted to uphold their civic duties as members of a new state culminated in a 1775 statute that forbid anyone who defamed resolutions of the Continental Congress from keeping arms, voting, or serving as a public official.[78]

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[75] *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 158 (2007).

[76] G.A. Gilbert, *The Connecticut Loyalists*, 4 Am. Hist. Rev. 273, 280 (1899) (describing this resolution as "a fair sample of most of the others passed at this time").

[77] *Id.* at 280–81.

[78] *See id.* at 282.

Virginia disarmed those viewed as unwilling to abide by the newly sovereign state's legal norms.[79] Virginia's loyalty oath statute disarmed "all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service" who refused to swear their "allegiance and fidelity" to the state.[80] And conversely, it allowed for prospective restoration of rights upon the taking of that oath.[81]

Pennsylvania also disarmed entire groups whose status suggested they could not be trusted to abide by the law. In 1777, the legislature enacted a statute requiring all white male inhabitants above the age of eighteen to swear to "be faithful and bear true allegiance to the commonwealth of Pennsylvania as a free and independent state,"[82] and providing that those who failed to take the oath "shall be disarmed" by the local

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[79] An Act to Oblige the Free Male Inhabitants of this State Above a Certain Age to Give Assurance of Allegiances to the Same, and for Other Purposes ch. III (1777), 9 Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619 281, 281 (William W. Hening ed., 1821).

[80] *Id.*

[81] *Id.*

[82] Act of June 13, 1777, § 1 (1777), 9 The Statutes at Large of Pennsylvania from 1652–1801 110, 111 (William Stanley Ray ed., 1903).

authorities.[83] That statute is especially illuminating because Pennsylvania's 1776 constitution protected the people's right to bear arms.[84] Yet the disarmament law deprived sizable numbers of pacifists of that right because oath-taking violated the religious convictions of Quakers, Moravians, Mennonites, and other groups.[85] Those groups were not disarmed because they were dangerous,[86] but rather because their refusal to swear allegiance demonstrated that they would not submit to communal judgments embodied in law when it conflicted with

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[83] *Id.* § 3, at 112–13.

[84] *See* Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 670–71 (2002).

[85] *See* Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, 2 N.Y.U. J.L. & Liberty 28, 51 (2006); *see also* Thomas C. McHugh, Moravian Opposition to the Pennsylvania Test Acts, 1777 to 1789, at 49–50 (Sept. 7, 1965) (M.A. thesis, Lehigh University) (on file with the Lehigh Preserve Institutional Repository).

[86] *See Heller*, 554 U.S. at 590 ("Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever . . . ."); Johnson et al., *supra* note 51, at 301 (noting that states disarmed "Quakers and other pacifists; although they were not fighters, they did own guns for hunting").

personal conviction.[87] Only those presumptively untrustworthy individuals who came forward and established that they were indeed law-abiding by swearing the loyalty oath before state authorities had their firearm rights restored.[88]

D. Ratification Debates

The Founding generation reiterated the longstanding principle that legislatures could disarm non-law-abiding citizens during the deliberations over whether to ratify the Constitution.

Debates between the Federalists and Anti-Federalists in Pennsylvania "were among the most influential and widely distributed of any essays published during ratification."[89] Those essays included "The Dissent of the Minority," a statement of the Anti-Federalist delegates' views[90] that proved

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[87] *See* Wedeking, *supra* note 85, at 51–52 (describing how Quakers were "penal[ized] for allegiance to their religious scruples over the new government").

[88] Act of June 13, 1777, § 3 (1777), 9 The Statutes at Large of Pennsylvania from 1652–1801 110, 112 (William Stanley Ray ed., 1903).

[89] Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 227 (1999).

[90] *See id.* at 232–33.

"highly influential" for the Second Amendment.[91] The Dissent of the Minority proposed an amendment stating:

> [T]he people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them *unless for crimes committed*, or real danger of public injury from individuals.[92]

While this amendment was not adopted, it is important because, read in the context of traditional Anglo-American firearm laws, it reflects the understanding of the Founding generation—particularly among those who favored enshrining

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[91] *Heller*, 554 U.S. at 604; *see also* Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 Yale L.J. 774, 797 (2020) ("Although one might question why we should listen to the debate's 'losers,' the Anti-Federalist Papers are relevant for the same reason that the Federalist Papers are: to quote Justice Scalia, 'their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.' Plus, the Anti-Federalists did not exactly 'lose,' in the same way in which a party who settles a case but gets important concessions does not 'lose' the case." (quoting Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Amy Gutmann ed., 1997))).

[92] 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971) (emphasis added).

the right to armed self-defense in the Constitution—that "crimes committed," whether dangerous or not, justified disarmament.

E. Criminal Punishment

The penalties meted out for a variety of offenses between the seventeenth and nineteenth centuries also demonstrate the widespread acceptance of legislatures' authority to disarm felons.

At the Founding, a conviction for a serious crime resulted in the permanent loss of the offender's ability to keep and bear arms. Those who committed grave felonies—both violent and non-violent—were executed.[93] *A fortiori*, the ubiquity of the death penalty[94] suggests that the Founding generation would have had no objection to imposing on felons the comparatively lenient penalty of disarmament. Indeed, under English law, executed felons traditionally forfeited all their firearms, as well as the rest of their estate, to the government.[95] That practice persisted in the American colonies and the Early Republic.[96] Even some non-capital

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[93] *See Folajtar v. Att'y Gen.*, 980 F.3d 897, 904–05 (3d Cir. 2020).

[94] *See Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring).

[95] *See* 4 William Blackstone, *Commentaries* *97–98.

[96] *See Respublica v. Doan*, 1 U.S. 86, 91 (Pa. 1784) ("Doan, besides the forfeiture of his estate, has forfeited his life."). At

offenses triggered the permanent loss of an offender's estate, including any firearms. For example, a 1786 New York statute punished those who counterfeited state bills of credit with life imprisonment and the forfeiture of their entire estate.[97] Again, this drastic punishment indicates that the Founding generation would not have considered the lesser punishment of disarmament beyond a legislature's authority.

Individuals who committed less serious crimes also lost their firearms on a temporary, if not permanent, basis. Where state legislatures stipulated that certain offenses were not

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common law, forfeiture also resulted in "corruption of the blood," which prevented the felon's heirs from inheriting or transmitting the offender's property. Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment: The Role of the Jury at Common Law*, 35 Cardozo L. Rev. 1, 27 (2013). In the Early Republic, several states limited the loss of one's property to the lifetime of the offender. *See* 2 James Kent, *Commentaries on American Law* *387 (1826); *cf.* U.S. Const. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture *except during the Life of the Person attainted*." (emphasis added)). Estate forfeiture ultimately fell into disuse in the 1820s. *See Com. v. Pennock*, 1817 WL 1789, at *1–2 (Pa. 1817); Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 Clev. St. L. Rev. 461, 473 (2009).

[97] Act of Apr. 18, 1786, 2 Laws of the State of New York 253, 260–61 (1886); *see also* Act of Nov. 27, 1700, 2 Statutes at Large of Pennsylvania 12 (Wm. Stanley Ray ed., 1904) (punishing arson with life imprisonment and estate forfeiture).

punishable by death or life imprisonment, but rather resulted in forfeiture,[98] the offender was stripped of his then-existing estate, including any firearms,[99] and only upon successfully

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[98] *See, e.g.*, Act of Apr. 5, 1790, § 2 (1790), 13 Statutes at Large of Pennsylvania 511, 511–12 (Wm. Stanley Ray ed., 1908) (robbery, burglary, sodomy, buggery); Act of Jan. 4, 1787, § 9 (1787), 24 Colonial Records of North Carolina 787, 788 (Walter Clark ed., 1905) (filing a false inventory of property in connection with a procurement fraud investigation); An Act to Prevent Routs, Riots, and Tumultuous Assemblies, § 4 (1786), 3 Compendium and Digest of the Laws of Massachusetts 1132, 1134 (Thomas B. Wait ed., 1810) (rioting); Act of Nov. 26, 1779, § 2 (1779), 10 Statutes at Large of Pennsylvania 12, 15–16 (Wm. Stanley Ray ed., 1904) (counterfeiting); An Act for the Regulation of the Markets in the City of Philadelphia, and for Other Purposes Therein Mentioned, § 1 (1779), 9 Statutes at Large of Pennsylvania 387, 388–89 (Wm. Stanley Ray ed., 1904) (diverting food en route to Philadelphia or attempting to raise the price of food at the city's market three times); An Act for Establishing an Office for the Purpose of Borrowing Money for the Use of the Commonwealth, § 4 (1777), 9 Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619, at 286, 287 (William W. Hening ed., 1821) (counterfeiting).

[99] *See, e.g.*, Act of Apr. 5, 1790, § 2 (1790), 13 Statutes at Large of Pennsylvania 511, 511–12 (Wm. Stanley Ray ed., 1908) (providing that the offender "shall forfeit to the commonwealth all . . . goods and chattels whereof he or she was seized or possessed at the time the crime was committed and at any time afterwards until conviction").

serving of his sentence and reintegrating into society could he presumably repurchase arms.

Finally, colonial and state legislatures punished minor infractions with partial disarmaments by seizing firearms involved in those offenses. For example, individuals who hunted in certain prohibited areas had to forfeit any weapons used in the course of that violation.[100]

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As this survey reflects, and as the Supreme Court observed in *Heller*, restrictions on the ability of felons to possess firearms are indeed "longstanding[.]"[101] Four centuries of Anglo-American history demonstrate that legislatures repeatedly exercised their discretion to impose "status-based restrictions" disarming entire "categories of persons," who were presumed, based on past conduct,

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[100] *See* 1652 N.Y. Laws 138; Act of Apr. 20, ch. III (1745), 23 Acts of the North Carolina General Assembly 218, 219 (1805); 1771 N.J. Laws 19–20; An Act for the Protection and Security of the Sheep and Other Stock on Tarpaulin Cove Island, Otherwise Called Naushon Island, and on Nennemessett Island, and Several Small Islands Contiguous, Situated in the County of Dukes County § 2 (1790), 1 Private and Special Statutes of the Commonwealth of Massachusetts 258, 259 (Manning & Loring ed., 1805); 1832 Va. Acts 70; 1838 Md. Laws 291–92; 12 Del. Laws 365 (1863).

[101] 554 U.S. at 626.

unwilling to obey the law.[102] Legislatures did so not because the individuals in these groups were considered dangerous, but because, based on their status, they were deemed non-law-abiding subjects.[103] The particular groups varied dramatically over time, but the Founding generation understood that felons were one such group.

The length of disarmaments varied too, but the Founding generation recognized that legislatures—in their discretion—could impose permanent, temporary, or indefinite bans that lasted until the individual affirmatively sought relief and made a showing of commitment to abide by the law. In that case, the showing was not viewed as voiding the ban retroactively, from its inception; rather, it operated prospectively. Only after the individual had made the requisite showing to a government official—and thus rebutted the presumption that those with his status were not law-abiding—was the individual's right to possess firearms restored.

That is precisely how § 922(g)(1) functions, disarming a group that has demonstrated disregard for the law[104] and allowing for restoration of the right to keep arms upon the

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[102] *Jackson*, No. 22-2870, 2023 WL 3769242, at *7.

[103] Even if dangerousness were "the traditional *sine qua non* for dispossession, then history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons." *Id.* at *6.

[104] *See* 18 U.S.C. § 922(g)(1).

requisite showing.[105] Because that statutory scheme is "consistent with this Nation's historical tradition of firearm regulation,"[106] it comports with the Second Amendment.

II. Consequences of the Majority Opinion

Instead of respecting legislatures' longstanding authority to disarm groups who pose a threat to the rule of law, the majority usurps that function and enacts its own policy. And instead of heeding the Supreme Court's instruction to take § 922(g)(1) as "longstanding" and "lawful,"[107] the majority nullifies it with an insurmountably rigid view of historical analogues and an approach so standardless as to render it void for vagueness in any application.

My colleagues have adopted and prescribed a methodology by which courts must examine each historical practice in isolation and reject it if it deviates in any respect from the contemporary regulation: Confronted with legislatures' regular practice at the Founding of imposing the far more severe penalty of death for even non-violent felonies, the majority responds that the permanent loss of *all* rights is not analogous to "the *particular* . . . punishment at issue—lifetime disarmament[.]"[108] To the longstanding practice of forfeiture, which resulted in a permanent loss of firearms for those felons convicted of capital offenses or sentenced to life

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[105] *See* 18 U.S.C. § 921(a)(20).

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

[107] *Heller*, 554 U.S. at 626–27 & n.26.

[108] Maj. Op. at 19.

imprisonment, the majority avers that forfeiture is entirely distinguishable because other felons—those who committed lesser offenses and thus served temporary rather than life sentences—could repurchase arms upon their release.[109] To evidence that legislatures repeatedly disarmed entire groups of people based on their distrusted status, the majority dismisses those laws as inconsistent with contemporary understandings of the First and Fourteenth Amendments.[110] To the historical reality that disarmament was not limited to those considered violent and indeed extended to well-known pacifists like the Quakers, the majority decrees without elaboration that any analogy between § 922(g)(1) and those laws would be "far too broad."[111] Finally, to the notion that Congress can categorically disarm felons today, just as legislatures once disarmed loyalists, Catholics, and other groups, the majority falls back on its bottom line: *any* analogy will be unlike "Range and his individual circumstances."[112]

The Supreme Court in *Bruen* specifically admonished the judiciary not to place "a regulatory straightjacket" on our

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[109] *Id.* at 19–20.

[110] *Id.* at 18–19. Strikingly, several of my colleagues once asserted that these same laws justified disarming dangerous felons. *See Binderup v. Att'y Gen.*, 836 F.3d 336, 368–69 (3d Cir. 2016) (en banc) (Hardiman, J., concurring in part); *Folajtar*, 980 F.3d at 914–15 (Bibas, J., dissenting). Today's majority provides no such assurance. Maj. Op. at 18 n.9.

[111] *Id.* at 19 (quoting *Bruen*, 142 S. Ct. at 2134).

[112] *Id.*

Government by requiring a "historical *twin*," and explained that "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[113] Yet, how else would one describe the kind of analogue the majority demands—a Founding-era statute that imposed the "*particular*"[114] restriction for the same length of time on the same group of people as a modern law[115]—if not as a contemporary regulation's "dead ringer" and "historical twin"?[116]

While the majority opinion spurns this instruction from *Bruen* and the Eighth Circuit's conclusion that § 922(g)(1) is constitutional as applied to *any* felon,[117] it fully embraces the Fifth Circuit's reasoning in *United States v. Rahimi*.[118] In that case, the Fifth Circuit held that 18 U.S.C. § 922(g)(8), which prohibits individuals subject to domestic abuse civil protective orders from possessing firearms, violates the Second Amendment.[119] After rejecting the Supreme Court's repeated references to "law-abiding citizens" as devolving too much

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

[114] Maj. Op. at 19.

[115] *See id.*

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

[117] *Jackson*, No. 22-2870, 2023 WL 3769242, at *4.

[118] 61 F.4th at 443.

[119] *Id.* at 461.

discretion to the Government,[120] the Fifth Circuit addressed each of the Government's historical analogues in isolation and, paving the way for today's majority, concluded every one was distinguishable from § 922(g)(8): Statutes disarming distrusted groups were inapt because legislatures believed those groups threatened social and political order generally, whereas domestic abusers threaten identifiable individuals;[121] criminal forfeiture laws seizing arms from those who terrorized the public were insufficient because domestic abuse protective orders derive from civil proceedings.[122] Like my colleagues, the *Rahimi* Court concluded that *any* difference between a historical law and contemporary regulation defeats an otherwise-compelling analogy.

For all their quibbling, though, neither today's majority nor the Fifth Circuit explain why those differences suggest the Founding generation would have considered § 922(g) beyond the authority of a legislature. Furthermore, the methodology the majority adopts from *Rahimi* creates a one-way ratchet: My colleagues offer a detailed roadmap for rejecting historical analogues yet refuse to state when, if ever, a historical practice will justify a contemporary regulation.

By confining permissible firearm regulations to the precise measures employed at the Founding, the majority displaces a complex array of interlocking statutes that embody the considered judgments of elected representatives at the federal

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[120] *Id.* at 453.

[121] *Id.* at 457.

[122] *Id.* at 458–59.

and state level. For example, in § 922(g)(1), Congress disarmed those who commit felonies or felony-equivalent misdemeanors, but specifically excluded particular offenses it deemed not sufficiently serious: "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices[.]"[123] The majority ignores that judgment and rewrites the statute with its own expansive view of excludable offenses.

Section 922(g)(1) also disarms those who commit state felonies out of respect for the historic power of state legislatures to designate which offenses were considered sufficiently serious by the people of that state to be punished as felonies. Underlying the majority's decision to exempt a felon-equivalent "like Range" from § 922(g)(1), however, is an unspoken premise antithetical to federalism and the separation of powers: that federal judges know better than the people's elected representatives what offenses should qualify as serious to the people of that state.

In addition to eviscerating the federal disarmament statute, the vague test adopted by the majority impugns the constitutional application of every state statute that prohibits felons from possessing guns. Those laws differ significantly across the forty-eight states that restrict offenders' firearm rights—including which offenses trigger restrictions as well as their duration—in keeping with each state's local circumstances and values.[124] But, under the Supremacy Clause, the majority's

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[123] 18 U.S.C. § 921(a)(20)(A).

[124] *See generally Fifty-State Comparison: Loss and Restoration of Civil/Firearms Rights*, Restoration Rts. Project (Nov.

test, indeterminant as it is, necessarily supplants those laws no less than it does § 922(g)(1).

Similarly, out of respect for federalism, Congress exempted from the federal felon-possession ban any offender whose conviction "has been expunged," who "has been pardoned," or who has had his "civil rights restored."[125] In every single state, the governor or pardon board is authorized to issue a pardon, automatically restoring an offender's firearm rights.[126] Thirty-six states also offer additional gun rights restoration mechanisms[127]—from automatic restoration after a set term of years,[128] to individualized judicial expungement proceedings.[129] The divergent "state policy judgments" codified

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2022), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges-2/. None of these statutes appears to disarm individuals who commit pretextual offenses. I note, however, that history suggests any pretextual disarmament law would violate the Second Amendment. *See* 1 William Blackstone, *Commentaries* app. *300 (St. George Tucker ed., Birch & Small 1803) (decrying how "[i]n England, the people have been disarmed, generally, under the specious pretext of preserving the game").

[125] 18 U.S.C. § 921(a)(20).

[126] *See Fifty-State Comparison: Loss and Restoration of Civil/Firearms Rights*, *supra* note 124.

[127] *See id.*

[128] *See, e.g.*, Mich. Comp. Laws § 750.224f.

[129] *See, e.g.*, Tenn. Code Ann. § 39-17-1307(c)(1)(C).

in these statutes promote "the benefits of federalism: experimentation, localism, and to some extent, decentralization"[130]—so much so that the Supreme Court itself has acknowledged the significance of Congress's decision "to defer to a State's dispensation relieving an offender from disabling effects of a conviction."[131] Yet the majority annuls these mechanisms for the restoration of gun rights by declaring that offenders like Range can never be disarmed in the first place.

In place of legislatures' measured judgments, the majority imposes a constitutional framework so standardless as to thwart the lawful application of 18 U.S.C. § 922(g)(1) to *any* offender. Congress enacted a bright-line rule distinguishing offenders who can possess firearms from those who cannot. By looking to the maximum punishment available for his offense, a felon or state misdemeanant can easily determine if he can possess a gun.[132] The majority, however, replaces that straightforward test with an opaque inquiry—whether the offender is "like Range."[133]

So what exactly is this new test? What specifically is it about Range that exempts him—and going forward, those "like [him]"—from § 922(g)(1)'s enforcement? Regrettably, that is

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[130] D. Bowie Duncan, Note, *Dynamic Incorporation, Rights Restoration, and 18 U.S.C. § 922(g)(1)*, 15 N.Y.U. J.L. & Liberty 233, 274 (2021).

[131] *Logan v. United States*, 552 U.S. 23, 37 (2007).

[132] *See* 18 U.S.C. § 921(a)(20).

[133] Maj. Op. at 22.

left to conjecture. My colleagues describe Range's individual circumstances in minute detail, appearing to attach significance to such specifics as his hourly wage, his marital status, the number of children he raised, his purported justification for his fraud, the amount he stole, his culpability relative to his wife who was not charged, his employment history, his largely law-abiding life post-conviction, his explanations for his post-conviction attempts to purchase a gun, the circumstances in which his wife then purchased it for him, his intended use of firearms to hunt deer in his spare time, and the timing of his discovery that he was subject to § 922(g)(1).[134] The particulars are plentiful, but the majority never specifies, among these and other descriptors of Range's life pre- and post-conviction, the respects in which an offender must be "like Range" to preclude the application of § 922(g)(1).

If it is that Range's offense was not "violent," that standard is unworkable and leads to perverse results. Federal courts' prior attempts to define "violent felony," *e.g.*, for purposes of the Armed Career Criminal Act, yielded "repeated attempts and repeated failures to craft a principled and objective standard [for that term,] confirm[ing] its hopeless indeterminacy."[135] Accordingly, the Supreme Court in *Johnson v. United States* held that the "violent felony" provision "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges," thus violating due process.[136] So does the "like Range" test relegate us to the widely disparaged "categorical

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[134] *Id.* at 5–6.

[135] *Johnson v. United States*, 576 U.S. 591, 598 (2015).

[136] *Id.* at 597.

approach," excluding all offenses that lack an element of the "use of force"?[137] Of what relevance is the conduct underlying a given crime? Will courts be limited to considering *Shepard* documents?[138] What about crimes that lack an element of force but are undeniably associated with violence, like drug trafficking, human trafficking, drunk driving, and treason?[139]

If it is Range's largely law-abiding life in the nearly 30 years since his conviction, that standard is even more confounding. My colleagues hold that Range's disarmament was invalid *ab initio*, meaning he could have prevailed on a Second Amendment challenge to § 922(g)(1) had he raised one at the time of his conviction (as will myriad felons after today's decision).[140] Yet judges are not soothsayers. Post-conviction conduct would be relevant if my colleagues were holding

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[137] *United States v. Scott*, 14 F.4th 190, 195 (3d Cir. 2021).

[138] Those documents include the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005).

[139] As Range's counsel candidly conceded at argument, under a "violence" test, offenses like possession of child pornography, money laundering, and drunk driving would not support disarmament. Oral Arg. at 19:51–20:20, 24:00–24:26.

[140] *See* Maj. Op. at 4 ("[Range] remains among 'the people' protected by the Second Amendment. And . . . the Government did not carry its burden of showing that our Nation's history and tradition of firearm regulation support disarming Range[.]").

narrowly that Range's firearm rights should be restored going forward. But how can they possibly hold that he should not have lost them upon conviction, *based on post-conviction conduct*?

This retrospective mode of analysis defies not just logic, but also the Due Process Clause. Due process guarantees that a "person of ordinary intelligence [must have] a reasonable opportunity to know what is prohibited, so he may act accordingly."[141] Under the majority's "like Range" test, however, offenders cannot possibly know in advance of a court's retroactive declaration whether possessing a firearm post-conviction is a constitutional entitlement or a federal felony. As interpreted today by the majority, § 922(g)(1) is rendered so vague as to be facially unconstitutional.

On the enforcement side, the majority opinion makes the statute's *mens rea* impossible to establish. In *Rehaif*, the Supreme Court held that to convict a defendant under § 922(g) the Government must prove the defendant not only knew that he possessed a firearm, but also knew that "he had the relevant status when he possessed [the firearm.]"[142] The Court then clarified in *Greer* that a *Rehaif* error is not a basis for relief under the plain-error standard unless the defendant can make a sufficient argument on appeal that, but for the error, he could have established he did not know he was a felon.[143] That would be a difficult argument to make, the Court observed, because

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[141] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[142] *Rehaif*, 139 S. Ct. at 2194.

[143] *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021).

"as common sense suggests, individuals who are convicted felons ordinarily know that they are convicted felons [for purposes of § 922(g)(1).]"[144]

But, today, the majority displaces *Rehaif*'s clear and ascertainable standard with an incoherent one: the Government must prove the defendant knew he was not "like Range" when he possessed firearms. And in lieu of *Greer*'s high threshold for plain-error relief, the majority hands defendants a ready-made argument for appeal: that they could not know at the time they possessed a firearm—indeed, at any time before a court made a "like Range" determination—whether their status was subject to or exempt from § 922(g)(1). In short, the floodgates the Supreme Court attempted to close on *Rehaif* errors in *Greer*, my colleagues throw wide open: Today's opinion will strain the federal courts with a deluge of *Rehaif* challenges,[145] compelling us to vacate countless § 922(g)(1) convictions on

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[144] *Id.* at 2095.

[145] As explained above, courts will struggle to apply the majority's "like Range" test, which apparently extends to offenders' post-conviction conduct. For example, how should a court rule when a felon committed a murder thirty years ago, but has since become deeply religious and a model prisoner? What about someone with Range's employment history and family ties who has amassed a lengthy rap sheet of nonviolent misdemeanors in the decades since his welfare fraud conviction? Or someone otherwise like Range who knew he was subject to § 922(g)(1) as understood before today, yet deliberately engaged his spouse as a straw purchaser to circumvent that statute? There is no reason for the federal judiciary to hurl itself into this morass.

direct appeal and compelling our district court colleagues to dismiss countless indictments.

Today's decision will also undermine law enforcement in three critical respects. First, it will cripple the FBI's National Instant Criminal Background Check System (NICS). Currently, NICS includes over five million felony conviction records,[146] and that number continues to grow as additional agencies contribute records to the NICS database.[147] Prior felony convictions are by far the most common reason individuals fail NICS background checks[148]—the very background checks the Supreme Court endorsed in *Bruen* as ensuring individuals bearing firearms are "law-abiding" citizens.[149] Yet the majority's indeterminant and post-hoc test for which felons fall outside § 922(g)(1) and under what circumstances renders NICS a dead letter.

If the police receive a tip that an ex-offender is toting an assault rifle, it is no longer sufficient for probable cause to simply confirm a prior felony conviction in NICS. How will officers—or prosecutors for that matter—know whether that felon is sufficiently "like Range" to justify his arrest as a felon-

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[146] *Active Records in the NICS Indices*, FBI (Jan. 31, 2023), https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view.

[147] *See* Stevenson, *supra* note 10, at 1597.

[148] *Federal Denials*, FBI (Jan. 31, 2023), https://www.fbi.gov/file-repository/federal_denials.pdf/view.

[149] *See* 142 S. Ct. at 2138 n.9.

in-possession, or whether they are instead bringing liability on themselves for violating the felon's civil rights? Must they research the suspect's post-conviction conduct? Should they consider relevant conduct underlying the original violation? How could they possibly determine that conduct in the case of guilty pleas entered decades earlier?

Second, without a functional background check system, how will federal firearms licensees (FFLs) comply with federal law? FFLs who discover that a potential customer was convicted of a felony will have no way of knowing whether the individual's crime and post-conviction conduct are sufficiently similar to Range's to preclude the application of § 922(g)(1).[150] Of particular concern, any assessments based on the majority opinion's "vague criteria are vulnerable to biases" along race, class, gender, and other lines, resulting in disparities between which groups retain gun rights and which do not.[151]

Third, until today, the prohibition on possessing a firearm was a well-accepted "standard condition" of bail,

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[150] The penalty for incorrectly concluding a felon can purchase a weapon without an exhaustive inspection of the felon's crime, conduct, and personal circumstances will be stiff: a single error will result in the loss of the FFL's license, barring the FFL from the industry. *See Simpson v. Att'y Gen.*, 913 F.3d 110, 114 (3d Cir. 2019) (holding a single violation in which "the licensee knew of his legal obligation and purposefully disregarded or was plainly indifferent to the requirements" is grounds for revocation).

[151] Ryan T. Sakoda, *The Architecture of Discretion: Implications of the Structure of Sanctions for Racial Disparities,*

supervised release, probation, and parole.[152] But under my colleagues' reasoning, the inclusion of that condition among state or federal conditions of release now appears to be unconstitutional as to any number of defendants, depending on whether the judge at the bail or sentencing hearing views them as "like Range." That means disarmament on release will be anything but "standard," leaving scores of non-incarcerated criminal defendants armed and subjecting not just the public, but also probation and parole officers to significant risk of harm.

In sum, the majority opinion casts aside the admonitions that § 922(g)(1) is "longstanding,"[153] "presumptively lawful,"[154] and "does more to combat gun violence than any other federal law."[155] Instead, it abandons judicial restraint, jettisons principles of federalism, unsettles countless indictments and convictions, debilitates law enforcement, and vitiates our background check system—all in the name of re-

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Severity, and Net Widening, 117 Nw. U. L. Rev. 1213, 1227 (2023); *cf.* Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 Harv. L. Rev. F. 449, 449 (2022) (arguing "racial justice concerns [with firearm laws] should be addressed in democratic politics rather than in the federal courts").

[152] U.S.S.G. § 5D1.3(c)(10).

[153] *Heller*, 554 U.S. at 626.

[154] *Id.* at 627 n.26.

[155] *Rehaif*, 139 S. Ct. at 2201 (Alito, J., dissenting).

arming convicted felons. There is a narrower and less hazardous path they could have chosen.

III. The Narrow Road Not Taken

My colleagues object that § 922(g)(1) can impose a "permanent[]," [156] "lifetime ban on firearm possession," [157] but their retroactive holding—that the Government could not constitutionally disarm Range when he was convicted—is far broader than necessary to address their concern. Had they heeded judicial restraint when granting Range relief, the majority would have issued a purely prospective declaratory judgment, restoring Range's gun rights going forward. That approach would have prevented the most grievous consequences of the majority's decision today. And should the Supreme Court agree with my colleagues that the statutory exclusions to § 922(g)(1) are constitutionally inadequate, that approach also offers an administrable alternative worthy of consideration. How could the majority have resolved this case narrowly?

First, the only question the Court had to answer is whether § 922(g)(1) is unconstitutional as applied to the individual petitioning the Court *today*, accounting for his present circumstances and potentially entitling him to bear arms on a forward-looking basis. After all, Range did not challenge the loss of his firearm rights at the time of his conviction or at any time until he initiated the underlying suit here, and all he now seeks is declaratory relief enabling him to

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[156] Maj. Op. at 18 n.9.

[157] *Id.* at 20.

purchase and possess firearms *in the future*. The majority, however, reaches out to answer a different question: whether Range's disarmament was *ever* consistent with the Second Amendment.[158] Needlessly invalidating Range's initial disarmament violates "the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[159]

Second, providing prospective declaratory relief in this case and similar as-applied challenges would resolve my colleagues' permanency concern. I appreciate that their opposition to imposing a permanent ban or putting the onus on the offender to seek relief finds some historical support for certain lesser offenses. That is, the subset of felons who were not sentenced to death or lifetime imprisonment only forfeited their firearms temporarily and did not need to petition to regain their firearm rights; they could simply repurchase arms after completing their sentences. But times have changed. Gone are the days of "close-knit" communities in which "everyone knew everyone else,"[160] and with the extreme mobility and relative

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[158] *See* Maj. Op. at 19 (asserting that the "punishment at issue—lifetime disarmament—is [not] rooted in our Nation's history and tradition"); *id.* at 22 (framing the issue presented as "the constitutionality of 18 U.S.C. § 922(g)(1) [] as applied to [Range] given his violation of 62 Pa. Stat. Ann. § 481(a)").

[159] *Wash. St. Grange v. Wash. St. Republican Party*, 552 U.S. 442, 450 (2008) (quotations omitted).

[160] Bibas, *supra* note 4, at 1.

anonymity of today's society and the magnitude of harm that can be inflicted by a single assault rifle,[161] automatic restoration of the right to bear arms upon completion of a sentence would jeopardize public safety and the utility of background checks. In any event, it is not the case that legislatures historically imposed only bans that expired of their own accord: They sometimes exercised their authority—just as Congress did in § 922(g)(1)—to categorically disarm a group presumed, based on status, to be non-law-abiding and to place the burden on individuals in that group to petition for relief and prove, through oaths or similar gestures of allegiance, that they could be trusted to obey the law.[162]

Section 922(g)(1) is sufficiently analogous to that model to meet the history-and-tradition test, as it already allows felons to petition for relief by seeking an expungement, pardon, or restoration of rights under state law. True, Congress provided another avenue for relief in § 925(c) that it has not

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[161] *See* Terry Spencer, *Florida School Shooter's AR-15 Shown to His Jurors*, AP (July 25, 2022), https://apnews.com/article/education-florida-fort-lauderdale-parkland-school-shooting-60791bdf38785f494400c43b90a97c39 (describing the AR-15 rifle "used to murder 17 students and staff members . . . at Parkland's Marjory Stoneman Douglas High School").

[162] Historical examples include Parliament's disarmament of Catholics in 1689, Massachusetts's disarmament of Anne Hutchinson's followers, Virginia's disarmament of Catholics during the Seven Years' War, and the loyalty oath laws of Pennsylvania and Virginia during the Revolution. *See supra* notes 45–49, 53–57, 68, 82–88 and accompanying text.

funded in recent years,[163] but § 921(a)(20) ensures the felon-possession ban fits comfortably in the history of our nation's traditional firearm regulations. And if those avenues are deemed inadequate, that purported infirmity would be cured by a prospective declaratory judgment finding that a convicted felon no longer poses a threat to the rule of law and therefore can once again possess firearms.

Third, such declaratory judgment proceedings would give effect to the purportedly rebuttable presumption to which the Supreme Court referred in describing felon-possession bans as "presumptively lawful,"[164] as well as its admonition that the Government bears the burden at the outset to "demonstrate that the regulation is consistent with this

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[163] Section 925(c) permitted the Bureau of Alcohol, Tobacco, Firearms and Explosives to conduct individualized reviews and make an administrative determination that the applicant could keep arms prospectively, but that mechanism proved so costly for the country that it was disbanded and has not been funded since 1992. *See Logan*, 552 U.S. at 28 n.1; S. Rep. No. 102-353 (1992).

[164] *Heller*, 554 U.S. at 626–27 & n.26; *see McDonald*, 561 U.S. at 786; *see also Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *id.* at 2157 (Alito, J., concurring). Like the Eighth Circuit, I believe the premise that the Supreme Court used the phrase "presumptively lawful" to establish "a presumption of constitutionality that could be rebutted on a case-by-case basis" is dubious. *Jackson*, No. 22-2870, 2023 WL 3769242, at *7 n.2. Rather, the Court most likely "termed the conclusion presumptive because the specific regulations were not at issue in *Heller*." *Id.*

Nation's historical tradition of firearm regulation[.]"[165] That is because once the Government establishes that an offender committed a felony, it has necessarily satisfied its burden consistent with the historical practice of disarming felons upon conviction. The burden at that point, like the taking of oaths or swearing of allegiance, would fall on the felon to rebut the ban's presumptive lawfulness by establishing he is presently a "law-abiding, responsible" citizen.[166]

Fourth, limiting relief in as-applied § 922(g)(1) challenges to prospective declaratory judgments would eliminate the intractable due process problems with the majority's approach. Any felon who possessed a firearm without first securing a favorable declaratory judgment would remain subject to prosecution pursuant to § 922(g)(1), and those granted relief would have their rights restored prospectively. In contrast to the "like Range" test, that clear rule would provide felons with constitutionally adequate notice as to whether and when they regained their right to bear arms and thus would allow § 922(g)(1) to withstand void-for-vagueness challenges. Prospective declaratory judgments likewise would avoid opening the floodgates to *mens rea* challenges to § 922(g)(1)

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

[166] *Id.* at 2131. This approach would not result in repetitive actions because a felon who brings an unsuccessful declaratory judgment suit must provide "newly discovered evidence that, with reasonable diligence, could not have been discovered" to prevail in a subsequent as-applied challenge to § 922(g)(1). Fed. R. Civ. P. 60(b)(2).

prosecutions, and the high threshold *Greer* set for defendants to overturn § 922(g)(1) convictions would endure.[167]

Fifth, this use of declaratory judgments would respect both the separation of powers and federalism. Other than for felons who received favorable declaratory judgments, Congress's decision to disarm those who commit felonies or comparable state misdemeanors would remain intact. Likewise, state statutes restricting the ability of felons to possess firearms would be generally enforceable, ensuring local communities' priorities continue to shape when felons are permitted to possess firearms under state law. The states' rights-restoration regimes would also continue to perform an important function, serving as alternatives to federal declaratory judgments.

Finally, prospective relief would avoid the debilitating effect of today's decision on law enforcement, U.S. Attorney's Offices, and our background check system. Currently, those previously convicted of a felony can submit documentation to the FBI through a voluntary appeal file application, including "information regarding an expungement, restoration of firearm rights, pardon, etc."[168] Successful applicants receive a unique personal identification number to prevent future background check denials.[169] A felon who secures a prospective

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[167] *See* 141 S. Ct. at 2097.

[168] *Types of Documents Requested Based on Prohibitor*, FBI (Sept. 14, 2018), https://www.fbi.gov/file-repository/nics-appeal-documents-requested.pdf/view.

[169] *Firearm-Related Challenge (Appeal) and Voluntary Appeal File (VAF)*, FBI (last accessed Mar. 3, 2023),

declaratory judgment could simply submit that judgment to the FBI to prevent false positives on his background check when next purchasing firearms. Thus, just as they do today, law enforcement and prosecutors could depend on NICS for data when deciding whom to charge with violating § 922(g)(1); courts could rely on existing jury instructions, the standard conditions of supervised release or parole, and the plain-error test set out in *Greer*; and firearm dealers could ascertain from a background check whether a convicted felon is entitled to purchase weapons.

The majority has taken a far more radical approach, creating a stark circuit split and holding § 922(g)(1) is unconstitutional *ab initio* based on a seemingly random sampling of observations about the pre- and post-conviction conduct of this Appellant. Our district courts are left without any intelligible standard, and our citizenry will be left reeling from the consequences: a flood of motions to dismiss indictments, appeals, and reversals of § 922(g)(1) convictions; more armed felons and gun violence on our streets; less faith in elected representatives stymied in their efforts to protect the public; and less trust in a judiciary mired in formalism and the usurpation of legislative function. The sooner the Supreme Court takes up this issue, the safer our republic will be.

IV. Conclusion

For the foregoing reasons, I respectfully dissent.

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https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/national-instant-criminal-background-check-system-nics-appeals-vaf.

ROTH, *Circuit Judge*, dissenting

I agree with the Majority's well-reasoned conclusions that (1) *New York State Rifle & Pistol Association, Inc. v. Bruen*[1] abrogated the use of means-end scrutiny to assess Second Amendment challenges and (2) Bryan Range is among "the people" protected by the Second Amendment. I part with my colleagues, however, over their determination that the government failed to show that 18 U.S.C. § 922(g)(1), as applied to Range, is consistent with our nation's historical tradition of firearms regulation.

In *Bruen*, the Supreme Court considered whether a regulation issued by a *state* government was a facially constitutional exercise of its traditional police power. Range presents a distinguishable question: Whether a *federal* statute, which the Supreme Court has upheld as a valid exercise of Congress's authority under the Commerce Clause,[2] is constitutional as applied to him. The parties and the Majority conflate these spheres of authority and fail to address binding precedents affirming Congress's power to regulate the possession of firearms in interstate commerce. Because Range lacks standing under the applicable Commerce Clause jurisprudence, I respectfully dissent.

I.

As the Majority explains, the Supreme Court in *Bruen* invalidated the means-end component test that we have, in

[1] 142 S. Ct. 2111 (2022).

[2] U.S. Const. art. 1, § 8, cl. 3 (authorizing Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes").

recent years, applied to Second Amendment challenges.[3] The Supreme Court held: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[4]

While I agree with the Majority's assessment of the government's burden, I read *Bruen* to articulate a structured framework for the government's comparative analysis. This framework is useful because it clarifies both what the government must compare and how close the match must be.

As I read *Bruen*, the government must begin by identifying the societal problem addressed by the challenged regulation.[5] The government must demonstrate whether the problem is (1) persistent ("has persisted since the 18th century") or (2) modern (involves "unprecedented societal concerns or dramatic technological changes").[6]

If the problem is persistent, the government must demonstrate that its modern regulation is "distinctly similar" to a historical forebear, showing that early and recent legislatures approached the problem in basically the same way.[7] Here, "lack of a distinctly similar historical regulation addressing that problem" or evidence that "earlier generations addressed

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[3] *Bruen*, 142 S. Ct. at 2127.
[4] *Id*. at 2126.
[5] *Id.* at 2131–32.
[6] *Id.* at 2131.
[7] *Id.* at 2132.

the societal problem . . . through materially different means" are "relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[8]

In contrast, for modern problems that early legislatures did not confront, *Bruen* allows for a more extended comparison. Here, the government must show by analogical reasoning that its regulation is "relevantly similar" to a historical firearm regulation.[9] Under this prong, the government must show that the "modern and historical regulations impose a comparable burden on the right of armed self-defense and . . . that the burden is comparably justified."[10] In other words, the government need not identify a "historical twin," but only show that the regulations are aligned as to "*how* and *why* [they] burden a law-abiding citizen's right to armed self-defense."[11]

II.

This framework helps to illuminate my substantive disagreement with the Majority opinion, which begins with its characterization of the societal problem addressed by § 922(g)(1). The Majority asserts that "§ 922(g)(1) is a straightforward 'prohibition[] on the possession of firearms by felons.'"[12] This is overbroad.

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[8] *Id*.
[9] *Id*.
[10] *Id*. at 2133.
[11] *Id*. (emphasis added).
[12] Op. 16 (quoting *Heller*, 554 U.S. at 626).

To identify the problem Congress intended to address, "we look to the text, structure, and purpose of the statute and the surrounding statutory framework."[13] Section 922(g)(1) makes it unlawful for a person "convicted in any court, of a crime punishable by imprisonment for a term exceeding one year" to "possess *in or affecting commerce*, any firearm or ammunition."[14] This jurisdictional language is essential. In other contexts, such as for the purposes of categorical analysis or meeting the requirement of scienter, the Supreme Court has distinguished "substantive" from "jurisdictional" elements.[15] In § 922(g)(1), however, "far from being token, [the] 'conventional jurisdictional element[]' serve[s] to narrow the kinds of crimes that can be prosecuted."[16] Here, the jurisdictional element constrains Congress's reach "to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[17]

The Supreme Court reached this exact conclusion in analyzing § 922(g)(1)'s predecessor, "conclud[ing] that the commerce requirement . . . must be read as part of the 'possesses' and 'receives' offenses."[18] Otherwise, the Court concluded, the statute would "dramatically intrude[] upon

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[13] *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 419 (3d Cir. 2016) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)).

[14] 18 U.S.C. § 922(g)(1) (emphasis added).

[15] *See Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019); *Torres v. Lynch*, 578 U.S. 452, 457 (2016).

[16] *Torres*, 578 U.S. at 486 (dissent, J. Sotomayor, with Thomas, J. and Breyer, J.).

[17] *United States v. Lopez*, 514 U.S. 549, 562 (1995).

[18] *United States v. Bass*, 404 U.S. 336, 350 (1971).

traditional state criminal jurisdiction."[19] The line of Supreme Court decisions concerning § 922(g)(1) and its predecessor statute[20] deal squarely with the Commerce Clause,[21] considering Congress's authority to regulate firearms in interstate commerce in light of those "modern-era precedents" that, within strict limits, expanded Congress's authority to address "great changes that had occurred in the way business was carried on in this country."[22] Our Court, with our sisters, expressly upheld the constitutionality of § 922(g)(1) because "by its very terms, [it] only regulates those weapons affecting interstate commerce *by being the subject of interstate trade*. It addresses items sent in interstate commerce and the channels of commerce themselves, delineating that the latter be kept clear of firearms."[23] Accordingly, the societal problem

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[19] *Id.*

[20] Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.App. § 1202(a).

[21] *Lopez*, 514 U.S. at 556 (favorably contrasting § 922(g)(1) with § 922(q), which the Court deemed unconstitutional for lack of a nexus to interstate commerce); *Scarborough v. United States*, 431 U.S. 563 (1977) (holding § 922(g)(1)'s predecessor statute constitutional); *Bass*, 404 U.S. 336 (same).

[22] *Lopez*, 514 at 556.

[23] *United States v. Singletary*, 268 F.3d 196, 204 (2001); *United States v. Gateward*, 84 F.3d 670, 672 (3d Cir. 1996) ("Congress drafted § 922(g) to include a jurisdictional element, one which requires a defendant felon to have possessed a firearm 'in or affecting commerce.'"); *accord U.S. v. Wallace*, 889 F.2d 580 (5th Cir. 1989) ("[S]ection 922(g) reaches only those firearms that traveled in interstate or foreign commerce and is thus constitutional); *United States v. Dupree*, 258 F.3d 1258, 1259 (2001); *United States v. Stuckey*, 255 F.3d 528,

addressed by § 922(g)(1) is the possession of firearms *in interstate commerce* by particular "channels of commerce"—those channels under the language of § 922(g)(1) being individuals with certain criminal convictions.[24]

The Majority concludes, and I agree, that *Bruen* "abrogated our Second Amendment jurisprudence,"[25] meaning the line of cases from *Marzzarella*,[26] through *Binderup*,[27] to *Holloway* and *Folajtar*.[28] Yet the Majority does not assert that *Bruen* abrogated our Commerce Clause jurisprudence or that of the Supreme Court.[29] Rightly so. We must "leave to the

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529-30 (8th Cir. 2001); *United States v. Gallimore*, 247 F.3d 134, 137–38 (4th Cir. 2001); *United States v. Davis*, 242 F.3d 1162, 1162–63 (9th Cir. 2001); *United States v. Santiago*, 238 F.3d 213, 216-17 (2d Cir. 2001); *United States v. Dorris*, 236 F.3d 582, 584–86 (10th Cir. 2000); *United States v. Napier*, 233 F.3d 394, 399–402 (6th Cir. 2000); *United States v. Wesela*, 223 F.3d 656, 659–60 (7th Cir. 2000).

[24] Notably, § 921(a)(20)(A) makes clear that § 922(g)(1) does not apply uniformly to individuals convicted of any felony offense, expressly excluding individuals convicted of serious "Federal and State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses." Accordingly, to describe the statute as a ban on possession by "felons" overstates its reach.

[25] Op. 10.

[26] *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

[27] *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc) (plurality).

[28] *Holloway v. Att'y Gen.*, 948 F.3d 164 (3d Cir. 2020); *Folajtar v. Att'y Gen.*, 980 F.3d (1)

[29] *Lopez*, 514 U.S. at 556; *Scarborough*, 431 U.S. at 566–67 (holding proof the firearm petitioner possessed had previously

[Supreme] Court itself 'the prerogative of overruling its own decision[s].'"[30] The Court did not, in *Bruen*, overrule its decisions upholding Congress's power to regulate the possession of firearms in interstate commerce.[31] These decisions remain good law.

Under the constitutionally mandated Commerce Clause jurisprudence that continues to bind us, Range lacks standing. "It is well established that plaintiffs bear the burden of demonstrating that they have standing in the action that they

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traveled in interstate commerce sufficient to meet the nexus requirement); *Bass*, 404 U.S. at 350 (holding § 922(g)(1)'s predecessor constitutional in light of the jurisdictional element); *accord Greer v. United States*, 141 S. Ct. 2090, 2095 (2021) (citing *Rehaif*, 139 S. Ct. at 2194 (clarifying the mens rea requirement under § 922(g)(1)); *Logan v. United States*, 552 U.S. 23, 37 (2007) (clarifying the scope of § 921(a)(20)). *See also Small v. United States*, 544 U.S. 385, 394 (2005) (Thomas, J., dissenting) (calling for § 922(g)(1) to apply to a *wider* category of individuals, specifically those convicted in foreign courts).

[30] *Singletary*, 268 F.3d at 205.

[31] As the Majority acknowledges, Op. 16, Justice Kavanaugh's concurrence in *Bruen*, joined by the Chief Justice, asserted that felon-possession prohibitions remain "presumptively lawful" under *Heller* and *McDonald*. 142 S. Ct. at 2162 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008)) (citing *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010)).

have brought."[32] To meet this burden, they must demonstrate "(1) the invasion of a concrete and particularized legally protected interest and resulting [actual or imminent] injury. . . . (2) a causal connection between the injury and the conduct complained of . . . and [3] that the injury will be redressed by a favorable decision."[33]

Before the District Court, Range alleged that "he suffers the on-going harm of being unable to obtain firearms from licensed federal firearms dealers."[34] While the District of Columbia Court of Appeals has recognized a cognizable injury where "the federal regulatory scheme thwarts [a challenger's] continuing desire to purchase a firearm," it did so in cases where the regulation's facial constitutionality was at issue.[35]

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[32] *Blunt v. Lower Merion Sch. Dist.,* 767 F.3d 247, 278 (3d Cir. 2014) (citing *Danvers Motor Co. v. Ford Motor Co.,* 432 F.3d 286, 291 (3d Cir. 2005)).

[33] *Id*. at 278 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[34] Appx026.

[35] *Dearth v. Holder*, 641 F.3d 499, 503 (D.C. Cir. 2011) (affirming that the petitioner suffered a cognizable injury where "the federal regulatory scheme thwarts his continuing desire to purchase a firearm"); *see Parker v. District of Columbia,* 478 F.3d 370, 376 (D.C. Cir. 2007) ("The formal process of application and denial, however routine, makes the injury to [the petitioner's] alleged constitutional interest concrete and particular."), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008); see *United States v. Salerno,* 481 U.S. 739, 745 (1987) ("A party asserting a facial challenge 'must establish that no set of circumstances exists under which the Act would be valid.").

Here, Range brought only an as-applied challenge.[36] Moreover, he has identified no specific firearm that he has been prohibited from possessing. To sustain a conviction under § 922(g)(1), the government must prove beyond a reasonable doubt that the specific firearm possessed by the individual moved through interstate commerce.[37] The reason is that while the nexus need only be minimal,[38] § 922(g)(1) simply does not

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[36] *See United States v. Marcavage,* 609 F.3d 264, 273 (3d Cir. 2010) ("An as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.").

[37] *See Singletary,* 268 F.3d at 200; *accord United States v. Shambry*, 392 F.3d 631, 632 (3d Cir. 2004); *United States v. Leuschen*, 395 F.3d 155, 160 (3d Cir. 2005).

[38] *See Shambry*, 392 F. 3d at 635 (citing *United States v. Corey,* 207 F.3d 84, 88 (1st Cir.2000) ("[T]he 'interstate nexus' element was met provided the government demonstrated that [the defendant] possessed the shotgun in a state other than the one in which it was manufactured."); *United States v. Lawson,*173 F.3d 666, 670 (8th Cir. 1999) (finding that the stipulation that the guns were manufactured outside of the state where the defendant possessed them satisfied "'the minimal nexus that the firearms have been, at some time, in interstate commerce,' that is, that the firearms at some point prior to [the defendant's] possession . . . crossed a state line" (quoting *United States v. Shelton,* 66 F.3d 991, 992 (8th Cir. 1995) (per curiam))); *United States v. Pierson,* 139 F.3d 501, 504 (5th Cir. 1998) ("[E]vidence that a gun was manufactured in one state and possessed in another state is sufficient to establish a past connection between the firearm and interstate commerce."); *United States v. Crump,* 120 F.3d

criminalize possession of firearms *out* of interstate commerce. Here, Range has not asserted that this constitutionally reviewed regulation of commerce intrudes on any Second Amendment rights by establishing in § 922(g)(1) a prohibition on certain channels of commerce, *i.e.*, felons, possessing firearms that have circulated in interstate commerce.[39]

462, 466 & n. 2 (4th Cir. 1997) ("[It] is our view that the movement of a firearm beyond the boundaries of its state of manufacture 'substantially affects' interstate commerce. . . ."); *United States v. Lewis,* 100 F.3d 49, 50 (7th Cir. 1996) ("[P]roof of a gun's manufacture outside of the state in which it was allegedly possessed is sufficient to support the factual finding that the firearm was 'in or affecting commerce.'" (quoting *United States v. Lowe,* 860 F.2d 1370, 1374 (7th Cir. 1988))); *United States v. Farnsworth,* 92 F.3d 1001, 1006 (10th Cir. 1996) (finding expert testimony that the defendant's gun had been manufactured in a different state from that in which it was found was sufficient nexus to interstate commerce); *United States v. Sanders,* 35 F.3d 61, 62 (2d Cir. 1994) (finding fact that gun was manufactured in a state different from that in which it was possessed was sufficient nexus to interstate commerce); *United States v. Morris,* 904 F.2d 518, 519 (9th Cir. 1990) (same); *United States v. Singleton,* 902 F.2d 471, 473 (6th Cir. 1990) ("[T]he mere fact that the firearm was manufactured in a different state established a sufficient nexus with interstate commerce.")).

[39] The Eighth Circuit recently rejected a similar as-applied challenge to § 922(g)(1). The decision underscored Congress' recognition that "only through adequate Federal control over interstate and foreign commerce in these weapons" could the "grave problem" of lawlessness and violent crime in the United States be dealt with, as it arose from the "widespread

In short, the harm that Range has asserted is not constitutional. He has failed to set forth the necessary interstate commerce connections to allow federal jurisdiction of his complaint. He has merely established that a thoroughly reviewed statute has had its intended effect by preventing him from possessing a firearm in interstate commerce because of his particular criminal conviction, which falls within the statute's clearly defined ambit.

This jurisdictional deficiency has put Range's claims beyond our reach. It is not unlikely, however, that a future challenge to the prohibition of § 922(g)(1) will come before us in which federal jurisdiction has been properly established. In such a case, I would share the concern expressed today by my dissenting colleagues[40] about the extent to which this precedential opinion may reverberate beyond the circumstances presented in this as-applied challenge. Certainly, such an analysis would be crucial for us should a future, similar challenge arise within our jurisdiction, particularly on a facial basis.

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traffic in firearms moving in or otherwise affecting interstate or foreign commerce" and "the ease with which any person can acquire firearms other than a rifle or shotgun." *United States v. Jackson*, No. 22-2870, 2023 WL 3769242, *8 (8th Cir. June 2, 2023). Although the court thus tacitly and, in my view, appropriately acknowledged that Congress' authority to regulate here was under the Commerce Clause, it unfortunately did not address whether Jackson had established standing accordingly for his as-applied challenge.

[40] *See generally* Shwartz Dissent; Krause Dissent 4–5.

For the above reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2835

BRYAN DAVID RANGE,
Appellant

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA;
REGINA LOMBARDO, Acting Director,
Bureau of Alcohol,
Tobacco, Firearms, and Explosives

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(E.D. Pa. No.5-20-cv-03488)

ORDER SUR PETITION
FOR REHEARING EN BANC

Present: CHAGARES, Chief Judge, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, and ROTH*, Circuit Judges

A majority of the active judges having voted for rehearing en banc in the above captioned case, it is ordered that the petition for rehearing is GRANTED. The case will be argued before the en banc court on Wednesday, February 15, 2023 at 10:00 a.m. The opinion and judgment entered November 16, 2022 are hereby vacated.

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* Judge Roth's vote is limited to panel rehearing; will participate as a member of the en banc court pursuant to 3d. Cir. I.O.P. 9.6.4.

The Appellees shall file a supplemental brief in response to the arguments raised in Appellant's petition for rehearing, not to exceed 15 pages, within 14 days from the date of this order. Appellees shall file 15 hard copies of the supplemental brief.

BY THE COURT,

s/ Michael A. Chagares
Chief Judge

Dated: 6 January 2023

PRECEDENTIAL

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ATTORNEY GENERAL UNITED
STATES OF AMERICA; REGINA LOMBARDO,
Acting Director, Bureau of Alcohol, Tobacco, Firearms
and Explosives

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. No. 5-20-cv-03488)
District Judge: Honorable Gene E.K. Pratter

Argued on September 19, 2022

Before: SHWARTZ, KRAUSE and ROTH, Circuit Judges

(Opinion filed November 16, 2022)

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OPINION

Per Curiam[*]

In *District of Columbia v. Heller*, the Supreme Court held that "the right of the people to keep and bear Arms," enshrined in the Second Amendment, is an individual right. 554 U.S. 570, 595 (2008). While the precise contours of that individual right are still being defined, the Court has repeatedly stated that it did not question the "longstanding prohibition[] on the possession of firearms by felons." *Id.* at 626.

Appellant Bryan Range falls in that category, having pleaded guilty to the felony-equivalent charge of welfare fraud under 62 Pa. Cons. Stat. § 481(a). He now brings an as-applied challenge to 18 U.S.C. § 922(g)(1), contending that his disarmament is inconsistent with the text and history of the Second Amendment and is therefore unconstitutional under *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). We disagree. Based on history and tradition, we conclude that "the people" constitutionally entitled to bear arms are the "law-abiding, responsible citizens" of the polity, *id.* at 2131, a category that properly excludes those who have demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses, whether or not those crimes are violent. Additionally, we conclude that even if Range falls within "the people," the Government has met its burden to demonstrate that its prohibition is consistent with historical tradition. Accordingly, because Range's felony-equivalent conviction places him outside the class of people traditionally entitled to Second Amendment rights, and

[*] We issue this precedential opinion *per curiam* to reflect both its unanimity and the highly collaborative nature of its preparation.

because the Government has shown the at-issue prohibition is consistent with historical tradition, we will affirm the District Court's summary judgment in favor of the Government.

I. Factual and Procedural Background

In 1995, Range pleaded guilty to making false statements about his income to obtain $2,458 of food stamp assistance in violation of 62 Pa. Cons. Stat. § 481(a), a conviction that was then classified as a misdemeanor punishable by up to five years' imprisonment.[1] Range was sentenced to three years' probation, $2,458 in restitution, $288.29 in costs, and a $100 fine. He has paid the fine, costs, and restitution.

Congress has deemed it "unlawful for any person . . . who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year"—the definition of a felony under both federal law, 18 U.S.C. § 3156(a)(3), and traditional legal principles, *see Felony*, Black's Law Dictionary (11th ed. 2019)—to "possess in or affecting commerce, any firearm or ammunition."[2] 18 U.S.C.

[1] In 2018, Pennsylvania amended § 481(b) so that welfare fraud involving "$1,000 or more" in fraudulently obtained assistance became a "[f]elony of the third degree." 62 Pa. Cons. Stat. § 481(b) (2018). However, the parties agree that the offense's categorization at the time of Range's guilty plea controls for purposes of our analysis.

[2] Congress exercised its discretion to exclude certain categories of offenses from this ban, such as "antitrust violations, unfair trade practices, restraints of trade, or other similar offenses[.]" 18 U.S.C. § 921(a)(20)(A).

§ 922(g)(1). In deference to state legislatures, Congress also raised the bar for "any State offense classified by the laws of the State as a misdemeanor" by excluding from the prohibition those misdemeanors "punishable by a term of imprisonment of two years or less." *Id.* § 921(a)(20)(B).[3] Put differently, it treated state misdemeanors punishable by more than two years' imprisonment as felony-equivalent offenses. As the maximum punishment for Range's offense was five years' imprisonment, his conviction subjected him to § 922(g)(1).

Three years after his conviction, Range attempted to purchase a firearm but was "rejected by the instant background check system." App. 46, 68, 203. Range's wife subsequently bought him a deer-hunting rifle, and when that rifle was destroyed in a house fire, she bought him another.[4] Sometime in 2010 or 2011, believing his first rejection was an error, Range again attempted to purchase a firearm. Again, he was rejected by the instant background check system. Several years after this rejection, Range "researched the matter" and learned that he was barred from purchasing and possessing firearms because of his welfare fraud conviction. App. 46, 205–06. Having "realize[d] that [he] was not allowed to

[3] For ease of reference, we use the term "felony-equivalent" to refer to these misdemeanors. We do not address whether individuals convicted of misdemeanors carrying lesser punishments can be disarmed consistent with the Second Amendment.

[4] A shotgun that Range's father had given him as a teenager was also destroyed in the fire. After his father died in 2008, Range came into possession of his father's pistol, but gave it away within a month.

possess a firearm," he sold his deer hunting rifle to a firearms dealer. App. 201.

Range has hunted regularly for at least twenty years, most frequently using a bow or a muzzleloader. During the years that he possessed a deer hunting rifle, he routinely hunted with it on the first morning and the two Saturdays of each two-week season. He maintained a Pennsylvania hunting license at the time he filed his lawsuit and averred in deposition testimony that if not barred by § 922(g)(1), he would "for sure" purchase another hunting rifle and "maybe a shotgun" for self-defense in his own home. App. 46, 184, 197, 198, 200–02, 210.

In 2020, Range filed suit in the Eastern District of Pennsylvania, seeking a declaratory judgment that § 922(g) violates the Second Amendment as applied to him, as well as an injunction to bar its enforcement against him. Both Range and the Government moved for summary judgment. The District Court applied the two-step test that this Court adopted in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010) and amplified in *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc), which asks whether (1) a regulation burdens conduct protected by the right to keep and bear arms, and (2) if so, whether that regulation survives means-end scrutiny, *id.* at 346 (quoting *Marzzarella*, 614 F.3d at 89). Applying *Binderup*, the District Court concluded that Range's challenge failed at step one because the Second Amendment does not protect "unvirtuous citizens," including any person convicted of "a serious offense," *id.* at 349, and Range's offense qualified as serious under the factors we had identified.

The District Court therefore granted the Government's motion for summary judgment, and this appeal followed.

While Range's appeal was pending, the Supreme Court issued *Bruen*, rejecting the means-end component of the second step of *Marzzarella* and *Binderup* and holding the first step was "broadly consistent with *Heller*" to the extent it focused on "the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. The Government filed a letter pursuant to Federal Rule of Appellate Procedure 28(j), contending that Range's Second Amendment challenge still must fail under *Bruen*'s framework. Range responded with his own Rule 28(j) letter, underscoring *Bruen*'s emphasis on history and asserting "there is no history in 1791 that given the facts of Mr. Range's case that he would be disarmed and prevented from owning and possessing firearms." Dkt. No. 41 at 2. The panel ordered supplemental briefing on (1) *Bruen*'s impact, if any, on the multifactor analysis developed in *Binderup* and *Holloway v. Attorney General*, 948 F.3d 164 (3d Cir. 2020); (2) whether *Bruen* shifts the burden to the Government to prove that the challenger is outside the scope of those entitled to Second Amendment rights, and whether the Government has met that burden here; and (3) whether we should remand this matter to the District Court.[5]

[5] The relevant factual record has been fully developed, and the appeal raises "purely legal questions upon which an appellate court exercises plenary review," *Comite' De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 187 (3d Cir. 2014) (quoting *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 159 (3d Cir. 1998)), so we can apply *Bruen* and resolve this matter without remand, *see Hudson*, 142 F.3d at 159.

In supplemental briefing on the effect of *Bruen*, Range argues that the history and tradition of the Second Amendment demonstrates that only individuals with a dangerous propensity for violence, as opposed to peaceful citizens like him, can be disarmed. *Amici* filed a brief on Range's behalf, echoing his contention that "[t]he historical tradition of disarming dangerous persons provides no justification for disarming Range." Amicus Br. 26. The Government urges us to reject a narrow focus on dangerousness, reaffirm our holdings in *Binderup* and subsequent cases that the Second Amendment extends only to people considered "virtuous citizens," and therefore hold that there is a longstanding tradition of disarming citizens who are not law-abiding.

With the benefit of *Bruen*, cases applying *Bruen*,[6] and the parties' briefing and arguments, we turn to the merits of Range's appeal.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291. We review the District Court's order granting summary judgment *de novo, see Mylan Inc. v. SmithKline Beecham Corp.*, 723 F.3d 413, 418 (3d Cir. 2013), viewing the facts and making all reasonable inferences in the non-movant's favor, *see Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 266–67 (3d Cir. 2005). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of law when the non-moving party fails to make "a sufficient showing on an essential element of her case with respect to which she has the burden of proof."[7] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

III. *Bruen*'s Doctrinal Impact

Applying *Bruen*'s historical focus, we conclude § 922(g)(1) comports with legislatures' longstanding authority and discretion to disarm citizens unwilling to obey the government and its laws, whether or not they had demonstrated a propensity for violence. We proceed in two parts. We begin by explaining how the Supreme Court replaced our two-step framework with a distinct test focused on the text and history of the Second Amendment. Next, we examine disarmament laws from the seventeenth to the nineteenth centuries to

[6] Although we appear to be the first Court of Appeals to address the constitutionality of 18 U.S.C. § 922(g)(1) since the Supreme Court decided *Bruen*, a number of district courts have done so. *See United States v. Young*, No. 22-CR-54, 2022 WL 16829260, at *11 (W.D. Pa. Nov. 7, 2022); *United States v. Minter*, No. 22-CR-135, 2022 WL 10662252, at *6–7 (M.D. Pa. Oct. 18, 2022); *United States v. Trinidad*, No. 21-CR-398, 2022 WL 10067519, at *3 (D.P.R. Oct. 17, 2022); *United States v. Raheem*, No. 20-CR-61, 2022 WL 10177684, at *3 (W.D. Ky. Oct. 17, 2022); *United States v. Carrero*, No. 22-CR-30, 2022 WL 9348792, at *3 (D. Utah Oct. 14, 2022); *United States v. Riley*, No. 22-CR-163, 2022 WL 7610264, at *10, *13 (E.D. Va. Oct. 13, 2022); *United States v. Price*, No. 22-CR-97, 2022 WL 6968457, at *9 (S.D.W. Va. Oct. 12, 2022); *United States v. Daniels*, No. 3-CR-83, 2022 WL 5027574, at *4 (W.D.N.C. Oct. 4, 2022); *United States v. Charles*, No. 22-CR-154, 2022 WL 4913900, at *11 (W.D. Tex. Oct. 3, 2022); *United States v. Siddoway*, No. 21-CR-205, 2022 WL 4482739, at *2 (D. Idaho Sept. 27, 2022); *United States v. Collette*, No. 22-CR-141, 2022 WL 4476790, at *8 (W.D. Tex. Sept. 25, 2022); *United States v. Coombes*, No. 22-CR-189, 2022 WL 4367056, at *8, *11 (N.D. Okla. Sept. 21, 2022); *United States v. Hill*, No. 21-CR-107, 2022 WL 4361917, at *3 (S.D. Cal. Sept. 20, 2022); *see also United States v. Ridgeway*, No. 22-CR-175, 2022 WL 10198823, *2 (S.D. Cal. Oct. 17, 2022); *United States v. Cockerham*, No. 21-CR-6, 2022 WL 4229314, at *2 (S.D. Miss. Sept. 13, 2022); *United States v. Jackson*, No. CR 21-51, 2022 WL 4226229, at *3 (D. Minn. Sept. 13, 2022); *United States v. Burrell*, No. 21-20395, 2022 WL 4096865, at *3 (E.D. Mich. Sept. 7, 2022);

determine whether Range's disarmament fits within the nation's history and tradition of the right to keep and bear arms.

United States v. Ingram, No. 18-CR-557, 2022 WL 3691350, at *3 (D.S.C. Aug. 25, 2022).

[7] While Range's standing to bring this claim was not challenged by Government nor discussed by the District Court, "we have 'an independent duty to satisfy ourselves of our jurisdiction . . . .'" *Bedrosian v. IRS*, 912 F.3d 144, 149 (3d Cir. 2018) (quoting *Papotto v. Hartford Life & Acc. Ins. Co.*, 731 F.3d 265, 269 (3d Cir. 2013)). The party invoking federal jurisdiction must establish the three elements forming "the irreducible constitutional minimum of standing": injury in fact, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "When an individual is subject to [threatened enforcement of a law], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Here, Range met his burden by showing that the Government's prohibition twice thwarted him from purchasing a firearm and by averring that he would purchase a hunting rifle but for § 922(g)(1). *See Parker v. District of Columbia,* 478 F.3d 370, 376 (D.C. Cir. 2007) ("The formal process of application and denial, however routine, makes the injury to [the petitioner's] alleged constitutional interest concrete and particular."), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008); *Dearth v. Holder*, 641 F.3d 499, 503 (D.C. Cir. 2011) (affirming that the petitioner suffered a cognizable injury where "the federal regulatory scheme thwarts his continuing desire to purchase a firearm").

A. Post-*Bruen* Standard for Second Amendment Challenges

The Supreme Court's decision in *Bruen* modifies our prior test for analyzing Second Amendment challenges to 18 U.S.C. § 922(g)(1).

Before *Bruen*, we analyzed Second Amendment challenges under a two-part test that was eventually adopted by most of our sister Circuits. *Marzzarella*, 614 F.3d at 89; *see also Binderup*, 836 F.3d at 346 ("Nearly every court of appeals has cited *Marzzarella* favorably."). At the first step, we considered whether the challenged law burdened conduct within the scope of the Second Amendment. *Marzzarella*, 614 F.3d at 89. In examining this subject, we observed that "the right to bear arms was tied to the concept of a virtuous citizenry and that accordingly, the government could disarm 'unvirtuous citizens[,]" including "any person who has committed a serious

criminal offense, violent or nonviolent."[8] *Binderup*, 836 F.3d at 348 (quoting *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)); *see also Heller*, 554 U.S. at 626–27 & n.26. If the first step was met, we proceeded to the second step and assessed whether the regulation withstood means-end scrutiny. *Marzzarella*, 614 F.3d at 89.

Bruen, however, abrogated *Binderup*'s two-step inquiry and directed the federal courts, in a single step, to look to the Second Amendment's text and "the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2126, 2130; *see also Frein v. Pa. State Police*, 47 F.4th 247, 254, 256 (3d Cir. 2022) (recognizing *Bruen* abrogated our two-step

[8] On that point, Judge Ambro's three-judge plurality in *Binderup* was joined by the seven judges who signed onto Judge Fuentes's partial concurrence and partial dissent. *See Binderup*, 836 F.3d at 348–49; *id*. at 387, 389–90 (Fuentes, J., concurring in part). Judge Hardiman, joined by four other judges, concurred in part and concurred in the judgment. *Id.* at 357 (Hardiman, J., concurring in part). Judge Hardiman reasoned that under "traditional limitations on the right to keep and bear arms" legislatures could disarm only individuals with a "demonstrated proclivity for violence." *Id.*; *see also Folajtar v. Att'y Gen.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting) (stating that "the historical limits on the Second Amendment" permitted legislatures to disarm felons "only if they are dangerous"), *cert. denied sub nom. Folajtar v. Garland*, 141 S. Ct. 2511 (2021).

framework).[9] "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Bruen*, 142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). Additionally, because "the Constitution presumptively protects [individual] conduct" covered by "the Second Amendment's plain text," the Court explained, the government has the burden of justifying its regulation of that conduct by demonstrating "not simply [] that the regulation promotes an important

[9] Given *Bruen*'s focus on history and tradition, *Binderup*'s multifactored seriousness inquiry no longer applies. In the context of a challenge based upon the challenger's status post-*Binderup*, *Bruen* requires consideration of whether there is a historical foundation for governmental restrictions on firearms possession based on the challenger's specific status. If that status changes, then the law would no longer apply to that person. Thus, there is still room for "as-applied" challenges even after *Bruen*.

interest," but that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*[10]

Under *Bruen*, the question is whether the regulation at issue is "relevantly similar" to regulations at the Founding. *Id.* at 2132 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 773 (1993)). To make that determination, we must employ "analogical reasoning" and compare "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33. Specifically, the government must "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133. "So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.*

Bruen does not preclude our review of Range's appeal on the record before us. *Bruen* did not address the substantive issues that we must now determine. Unlike the open-carry licensing regime in *Bruen* that created a conduct-based constraint on public carry, § 922(g)(1) imposes a status-based restriction—namely, a possession ban on those convicted of crimes punishable by more than one year in prison or by more

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[10] In *Binderup*, we had imposed the burden at step one on the challenger, rather than on the government, 836 F.3d at 347, but after *Bruen,* we note that the government must now meet this burden in the district court, *see* 142 S. Ct. at 2126 (citing *United States v. Boyd*, 999 F.3d 171, 185 (3d Cir. 2021)). Because *Bruen* came down after the Government made its case in the District Court, we look to its filings in the District Court as well as its supplemental briefs on *Bruen*'s impact to find that it has met its burden.

than two years in prison in the case of state law misdemeanors. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1443 (2009) (distinguishing between "what," "who," "where," "how," and "when" firearm restrictions). Despite that difference, *Bruen* still requires us to assess whether the Government has demonstrated through relevant historical analogues that § 922(g)(1) "is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. at 2134. As set forth below, the historical record shows that legislatures had broad discretion to prohibit those who did not respect the law from having firearms. Our assessment confirms that individuals like Range, who commit felonies and felony-equivalent offenses, are not part of "the people" whom the Second Amendment protects. Therefore, § 922(g)(1) as applied to Range is constitutional under the Second Amendment.

B. Scope of Second Amendment Rights in Historical Perspective

As instructed by *Bruen*, we begin our analysis with the text of the Second Amendment, which protects "the right of the people to keep and bear Arms," U.S. Const. amend. II, and consider if Range, as a felon equivalent under 18 U.S.C. § 921(a)(20)(B), is among those protected by the Amendment. *Cf. Binderup*, 836 F.3d at 357 (Hardiman, J., concurring in part) ("[T]he Founders understood that not everyone possessed Second Amendment rights. These appeals require us to decide who count among 'the people' entitled to keep and bear arms."); *United States v. Quiroz*, No. 22-CR-00104, 2022 WL 4352482, at *10 (W.D. Tex. Sept. 19, 2022) (explaining "this

Nation does have a historical tradition of excluding specific groups from the rights and powers reserved to 'the people'").

The language of *Bruen* provides three insights into pertinent limits on "the people" whom the Second Amendment protects. First, the majority characterized the holders of Second Amendment rights as "law-abiding" citizens no fewer than fourteen times. *Bruen*, 142 S. Ct. at 2122, 2125, 2131, 2133–34, 2135 n.8, 2138 & n.9, 2150, 2156; *accord Heller*, 554 U.S. at 625, 635. These included its holding that the New York statute "violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms," *Bruen*, 142 S. Ct. at 2156, its explanation that the Second Amendment "'elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense," *id.* at 2131 (quoting *Heller*, 554 U.S. at 635), and its instruction to identify historical analogues to modern firearm regulations by assessing "how and why the regulations burden a law-abiding citizen's right to armed self-defense," *id.* at 2133.[11] The Court

[11] *See also Bruen* 142 S. Ct. at 2122 ("[T]he Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense."); *id.* ("[O]rdinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense."); *id.* at 2125 (explaining petitioners were "law-abiding, adult citizens"); *id.* at 2133 (describing New York's argument that "sensitive places where the government may lawfully disarm law-abiding citizens include all places where people typically congregate" (quotations omitted)); *id.* at 2134 (reiterating that petitioners are "two ordinary, law-abiding,

also quoted nineteenth-century sources extending the right to keep and bear arms to "all loyal and well-disposed inhabitants," and disarming any person who made "an improper *or* dangerous use of weapons." *Id.* at 2152 (emphasis added) (quoting Cong. Globe, 39th Cong., 1st Sess., at 908–909; and Circular No. 5, Freedmen's Bureau, Dec. 22, 1865).

Second, the Court clarified that, despite the infirmity of New York's discretionary may-issue permitting regime, "nothing in our analysis should be interpreted to suggest the

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adult citizens"); *id.* at 2135 n.8 ("[I]n light of the text of the Second Amendment, along with the Nation's history of firearm regulation, we conclude below that a State may not prevent law-abiding citizens from publicly carrying handguns because they have not demonstrated a special need for self-defense."); *id.* at 2138 ("Nor is there any such historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense."); *id.* at 2138 n.9 (noting shall-issue public carry licensing laws "do not necessarily prevent 'law-abiding, responsible citizens' from exercising their Second Amendment right to public carry" but rather "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens" (quotation omitted)); *id.* at 2150 (observing "none [of the historical regulations surveyed] operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose"); *id.* at 2156 ("Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to demonstrate a special need for self-protection distinguishable from that of the general community in order to carry arms in public." (quotations omitted)).

unconstitutionality of the 43 States' 'shall-issue' licensing regimes . . . [,] which often require applicants to undergo a [criminal] background check" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact 'law-abiding, responsible citizens.'" *Id.* at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). These criminal background checks that the Court indicated are constitutional are not limited to violent offenses; shall-issue statutes typically disqualify any person "prohibited from possessing a firearm under federal law." Wash. Rev. Code Ann. § 9.41.070(1)(a) (2021); *accord* Colo. Rev. Stat. Ann. § 18-12-203(1)(c) (2021); Kan. Stat. Ann. § 75-7c04(a)(2) (2021); Miss. Code. Ann. § 45-9-101(2)(d) (2022); N.H. Rev. Stat. Ann. § 159:6(I)(a) (2021); N.C. Gen. Stat. Ann. § 14-415.12(b)(1) (2022).

Third, neither *Bruen* nor either of the Court's earlier explanations of the individual right to keep and bear arms casts doubt on § 922(g)(1). To the contrary, Justice Scalia's majority opinion in *Heller* twice described "prohibitions on the possession of firearms by felons" as both "longstanding" and

"presumptively lawful[.]" 554 U.S. 626–27 & n.26.[12] Writing for the *McDonald* plurality, Justice Alito "repeat[ed] those assurances." 561 U.S. at 786. In *Bruen*, Justice Thomas's majority opinion acknowledged that the right to keep and bear arms is "subject to certain reasonable, well-defined restrictions," *Bruen*, 142 S. Ct. at 2156 (citing *Heller*, 554 U.S. at 581), and the concurrences by Justices Alito and Kavanaugh, the latter joined by the Chief Justice, echoed the Court's assertions in *Heller* and *McDonald*. *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626–27 & n.26); *id.* at 2157 (Alito, J., concurring); *see also United States v. Coombes*, No. 22-CR-00189, 2022 WL 4367056, at *9 (N.D. Okla. Sept. 21, 2022) ("[T]he *Bruen* majority did not abrogate its prior statements in *Heller* and *McDonald*.").

Thus, although the Supreme Court has not provided an "exhaustive historical analysis . . . of the full scope of the Second Amendment," *Bruen,* 142 S. Ct. at 2128; *Heller*, 554 U.S. at 626, *Heller*, *McDonald*, and *Bruen* provide a window

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[12] We note that Congress enacted the federal felon-in-possession statute in 1938 and extended it to non-violent offenses in 1961. *See United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011); *cf. Freedom from Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 283 (3d Cir. 2019) (describing a 75-year-old religious symbol as part of "our Nation's public tradition" and therefore "entitled . . . to a 'strong presumption of constitutionality'" under the First Amendment (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019))). As explained below, however, the history and tradition of disarming those who have committed offenses demonstrating disrespect for the rule of law dates back to at least the seventeenth century.

into the Court's view of the status-based disarmament of criminals: that this group falls outside "the people"—whether or not their crimes involved violence—and that § 922(g)(1) is well-rooted in the nation's history and tradition of firearm regulation.[13]

Our Court's own review of the historical record supports the Supreme Court's understanding: Those whose criminal records evince disrespect for the law are outside the community of law-abiding citizens entitled to keep and bear arms.[14] Our previous decisions, endorsed by several sister courts of appeals, have expressed a related view in terms of the

[13] It remains the case, of course, that the executive branch also has authority to impose firearms-related directives and regulations consistent with the history and tradition, *e.g.*, in the form of executive orders or through ATF or local executive agencies.

[14] By no means do we suggest that legislatures have carte blanche to disarm anyone who commits any crime. Rather, we decide only that the disarmament of individuals convicted of felony and felony-equivalent offenses comports with the Second Amendment.

theory of "civic virtue."[15] *See, e.g.*, *Folajtar v. Att'y Gen.*, 980 F.3d 897, 902 (3d Cir. 2020); *Binderup*, 836 F.3d at 348; *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012); *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). Moreover, as detailed below, the pertinent historical periods were replete with laws "relevantly similar" to the modern prohibition on felon firearm possession because they categorically disqualified people from possessing firearms

[15] Numerous works of legal scholarship have espoused the civic virtue theory of the Second Amendment. *See, e.g.*, Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1360 (2008); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 492 (2004); Saul Cornell, *"Don't Know Much About History": The Current Crisis in Second Amendment Scholarship*, 29 N. Ky. L. Rev. 657, 672 (2002) [hereinafter Cornell, *Don't Know Much About History*]; David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 Mich. L. Rev. 588, 626 (2000); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 L. & Contemp. Probs. 143, 146 (1986); Anthony J. Zarillo III, Comment, *Going off Half-Cocked: Opposing as-Applied Challenges to the "Felon-in-Possession" Prohibition of 18 U.S.C. § 922(g)(1)*, 126 Penn St. L. Rev. 211, 238 (2021). We concur with the civic virtue theory inasmuch as a person's lack of virtue in the eyes of the community served as a proxy for willingness to disobey the law.

based on a judgment that certain individuals were untrustworthy parties to the nation's social compact.[16]

The *Bruen* Court warned that "not all history is created equal" and catalogued the sources that are most probative of the right's original meaning. 142 S. Ct. at 2136. Emphasizing that the right codified in the Second Amendment was a "*pre-existing right*," the Court saw particular relevance in "English history dating from the late 1600s, along with American colonial views leading up to the founding." *Id.* at 2127 (citing *Heller*, 554 U.S. at 595).[17] The Court made this same point in *Heller*. 554 U.S. at 592. The *Bruen* Court also found highly relevant post-ratification practices from the late eighteenth and early nineteenth centuries. *See Bruen*, 142 S. Ct. at 2136. In contrast, although the Court considered history from Reconstruction to the late nineteenth century, it underscored that it did so merely to confirm its conclusions and that evidence from this period is less informative. *See id.* at 2137.

[16] *See Folajtar*, 980 F.3d at 911 ("Legislatures have always regulated the right to bear arms.").

[17] When assessing Founding-era precedents, we must assume they derive from a coherent understanding of the right to keep and bear arms shared among the American populace. *See Heller*, 554 U.S. at 604–05 ("[T]hat different people of the founding period had vastly different conceptions of the right to keep and bear arms . . . simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.").

1. England's Restoration and Glorious Revolution

We begin with the late seventeenth century, when the English government repeatedly disarmed individuals whose conduct indicated a disrespect for the sovereign and its dictates. Also, the advent of the English Bill of Rights during this period confirmed Parliament's authority to delineate which members of the community could "have arms . . . by Law." 1 W. & M., Sess. 2, ch. 2, § 7 (Eng. 1689).

In the contentious period following the English Civil War, the restored Stuart monarchs disarmed nonconformist (*i.e.*, non-Anglican) Protestants. *See* Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 45 (1994) (describing how Charles II "totally disarmed . . . religious dissenters"); Amicus Br. 6 ("Leading up to the Glorious Revolution of 1688, . . . nonAnglican [sic] Protestants were often disarmed."). The reason the Crown seized nonconformists' weapons, according to *Amici*, is that non-Anglican Protestants were dangerous. But the notion that *every* disarmed nonconformist was dangerous defies common sense. Moreover, *Amici*'s resort to dangerousness as the sole explanation for this measure ignores Anglicans' well-documented concern that nonconformists would not obey the King and abide by the law.

By definition, nonconformists refused to participate in the Church of England, an institution headed by the King as a matter of English law. *See Church of England*, BBC (June 30, 2011),
https://www.bbc.co.uk/religion/religions/christianity/cofe/cof

e_1.shtml (describing "the Act of Supremacy" enacted during the reign of Henry VIII). Indeed, many refused to take mandatory oaths recognizing the King's sovereign authority over matters of religion. *See* Frederick B. Jonassen, *"So Help Me?": Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath*, 12 Cardozo Pub. L., Pol'y & Ethics J. 303, 322 (2014) (describing Charles II's reinstation of the Oath of Supremacy); Caroline Robbins, *Selden's Pills: State Oaths in England, 1558–1714*, 35 Huntington Lib. Q. 303, 314–15 (1972) (discussing nonconformists' refusal to take such oaths). Anglicans, in turn, accused nonconformists of believing that their faith exempted them from obedience to the law. *See* Christopher Haigh, *'Theological Wars': 'Socinians' v. 'Antinomians' in Restoration England*, 67 J. Ecclesiastical Hist. 325, 326, 334 (2016). In short, the historical record suggests nonconformists as a group were disarmed because their religious status was viewed as a proxy for disobedience to the Crown's sovereign authority and disrespect for the law, placing them outside the civic community of law-abiding citizens.

Even when Protestants' right to keep arms was restored, it was expressly made subject to the discretion of Parliament. One year after the Glorious Revolution of 1688 replaced the Catholic King James II with William of Orange and Mary, James's Protestant daughter, *see* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 Nw. U. L. Rev. 203, 228 (2021), Parliament enacted the English Bill of Rights, which declared: "Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and *as allowed by Law*," 1 W. & M., Sess. 2, ch. 2, § 7 (Eng. 1689) (emphasis added). Thus, this declaration, which the Supreme Court has described as the "predecessor to our Second Amendment,"

Bruen, 142 S. Ct. at 2141 (quoting *Heller*, 554 U.S. at 593), reveals the "historical understanding," *id.* at 2131, that the legislature—Parliament—had the power and discretion to determine who was sufficiently loyal and law-abiding to exercise the right to bear arms. *Cf.* Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 47–48 (2000) (explaining how the English Bill of Rights preserved Parliament's authority to limit who could bear arms).

In 1689, Parliament enacted a status-based restriction forbidding Catholics who refused to take an oath renouncing their faith from owning firearms, except as necessary for self-defense. An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M., Sess. 1, ch. 15 (Eng. 1688); *see* Malcolm, *supra*, at 123. Proponents of the view that disarmament depended exclusively on dangerousness have argued that Catholics categorically posed a threat of violence at this time. *See Kanter v. Barr*, 919 F.3d 437, 457 (7th Cir. 2019) (Barrett, J., dissenting); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 723 (2009). Again, however, this interpretation not only rests on the implausible premise that all Catholics were violent, but also ignores the more likely historical reason for disarming this entire group: their perceived disrespect for and disobedience to the Crown and English law. That is manifest in the statute's oath requirement. When individuals swore that they rejected the tenets of Catholicism, their right to own weapons was restored. An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W. & M., Sess. 1, ch. 15 (Eng. 1688).

Disavowal of religious tenets hardly demonstrated that the swearing individual no longer had the capacity to commit

violence; rather, the oath was a gesture of allegiance to the English government and an assurance of conformity to its laws. Likewise, contemporaneous arguments against tolerating Catholicism contended that Catholics' faith subverted the rule of law by placing the dictates of a "foreign power," *i.e.*, the Pope, before English legal commands. *See* Diego Lucci, *John Locke on Atheism, Catholicism, Antinomianism, and Deism*, 20 Etica & Politica/Ethics & Pol. 201, 228–29 (2018). The disarmament of Catholics in 1689 thus provides another example of the seizure of weapons from individuals whose status demonstrated, not a proclivity for violence, but rather a disregard for the legally binding decrees of the sovereign.

2. Colonial America

The earliest firearm legislation in colonial America prohibited Native Americans, Black people, and indentured servants from owning firearms.[18] *See* Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607–1794*, 16 Law & Hist. Rev. 567, 578–79 (1998). *Amici* contend that these restrictions affected individuals outside the political community and so cannot serve as analogues to contemporary restraints on citizens like

[18] The status-based regulations of this period are repugnant (not to mention unconstitutional), and we categorically reject the notion that distinctions based on race, class, and religion correlate with disrespect for the law or dangerousness. We cite these statutes only to demonstrate legislatures had the power and discretion to use status as a basis for disarmament, and to show that status-based bans did not historically distinguish between violent and non-violent members of disarmed groups.

Range. Amicus Br. 30–31; *see also Carpio-Leon*, 701 F.3d at 978 n.1 (concluding such individuals may not have been part of "the people" at the Founding). But even accepting *Amici*'s argument, colonial history furnishes numerous examples in which full-fledged members of the political community as it then existed—*i.e.*, free, Christian, white men—were disarmed due to conduct evincing inadequate faithfulness to the sovereign and its laws.

During the late 1630s, for example, an outspoken preacher in Boston named Anne Hutchinson challenged the Massachusetts Bay government's authority over spiritual matters and instead advocated personal relationships with the divine. *See* Edmund S. Morgan, *The Case Against Anne Hutchinson*, 10 New Eng. Q. 635, 637–38, 644 (1937). Governor John Winthrop accused Hutchinson and her followers of being Antinomians, those who viewed their salvation as exempting them from the law, and banished her. *Id.* at 648; Ann Fairfax Withington & Jack Schwartz, *The Political Trial of Anne Hutchinson*, 51 New Eng. Q. 226, 226 (1978). The colonial government also disarmed at least fifty-eight of Hutchinson's supporters, not because those supporters had demonstrated a propensity for violence, but "to embarrass the offenders," as they were forced to personally deliver their arms to the authorities in an act of public submission. James F. Cooper, Jr., *Anne Hutchinson and the "Lay Rebellion" Against the Clergy*, 61 New Eng. Q. 381, 391 (1988). Disarming Hutchinson's supporters, in other words, served to shame colonists whose disavowal of the rule of law placed them outside the Puritan's civic community and obedience to the commands of the government. *Cf.* John Felipe Acevedo, *Dignity Takings in the Criminal Law of Seventeenth-Century England and the Massachusetts Bay Colony*, 92 Chi.-Kent L. Rev. 743, 761 (2017) (describing other shaming punishments used at the time, including scarlet letters).

Likewise, Catholics in the American colonies (as in Britain) were subject to disarmament without demonstrating a proclivity for violence. It is telling that, notwithstanding Maryland's genesis as a haven for persecuted English Catholics, *see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103

Harv. L. Rev. 1409, 1424 (1990), Maryland—as well as Virginia and Pennsylvania—confiscated firearms from their Catholic residents during the Seven Years' War, *see* Bellesiles, *supra*, at 574; Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 263 (2020). That decision was not in response to violence; to the contrary, Catholics had remained peaceable even when the colony's Anglican Protestants took control of its government and required Catholics to take oaths recognizing the legal authority of the Crown, rather than the Pope, over matters of religion. *See* Michael Graham, S.J., *Popish Plots: Protestant Fears in Early Colonial Maryland, 1676–1689*, 79 Cath. Hist. Rev. 197, 197 (1993) ("[L]ittle sustained opposition to [the Anglican leadership] crystallized within the colony. What the Protestant Associators had done . . . was widely accepted."); Denis M. Moran, *Anti-Catholicism in Early Maryland Politics: The Protestant Revolution*, 61 Am. Cath. Hist. Soc'y 213, 235 (1950) (explaining how the oaths "asserted the king's supremacy in spiritual as well as in temporal matters"). In sum, Protestants in the colonies—as in England—disarmed Catholics not because they uniformly posed a threat of armed resistance, but rather because the Protestant majorities in those colonies viewed Catholics as defying sovereign authority and communal values.

3. Revolutionary War

Revolutionary-era history furnishes other examples of legislatures disarming non-violent individuals because their

actions evinced an unwillingness to comply with the legal norms of the nascent social compact.[19]

John Locke—whose views profoundly influenced the American revolutionaries[20]—argued that the replacement of individual judgments of what behavior is transgressive with communal norms is an essential characteristic of the social contract. *See* John Locke, *Two Treatises of Government* § 163 (Thomas I. Cook, ed., Hafner Press 1947) (reasoning "there only is political society where every one of the members hath quitted his natural power [to judge transgressions and] resigned it up into the hands of the community"). Members of a social compact, he explained, have a civic obligation to comply with communal judgments regarding proper behavior.[21]

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[19] Again, we cite the repugnant, status-based regulations of an earlier period—disarming individuals on the basis of political affiliation or non-affiliation—merely to demonstrate the Nation's tradition of imposing categorical, status-based bans on firearm possession.

[20] *See* Thad W. Tate, *The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument*, 22 Wm. & Mary Q. 375, 376 (1965); *see also Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (observing "John Locke [was] one of the thinkers who most influenced the framers[]").

[21] Locke based this duty on the consent of those within the political society; however, he contended that mere presence in a territory constituted tacit consent to the laws of the reigning sovereign. *See* Locke, *supra*, § 119 ("[I]t is to be considered what shall be understood to be a sufficient declaration of a man's consent to make him subject to the laws of any

In the newly proclaimed states, compliance with that civic obligation translated to entitlement to keep and bear arms, with many of the newly independent states enacting statutes that required individuals, as a condition of keeping their arms, to commit to the incipient social compact by swearing fidelity to the revolutionary regime.[22] *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 158 (2007).

In Connecticut, for example, as hostilities with Britain worsened, colonists denounced loyalists' dereliction of their duties to the civic community. The people of Coventry passed

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government. There is a common distinction of an express and a tacit consent which will concern our present case. . . . [E]very man that hath any possessions or enjoyment of any part of the dominions of any government doth thereby give his tacit consent and is as far forth obliged to obedience to the laws of that government, during such enjoyment, as any one under it; whether this his possession be of land to him and his heirs for ever, or a lodging only for a week, or whether it be barely travelling freely on the highway; and, in effect, it reaches as far as the very being of anyone within the territories of that government.").

[22] We cite these laws as evidence of the original understanding of the Second Amendment and the traditions concerning firearms regulation in historical context. Of course, our social and political awareness has obviously evolved significantly since that time, and by today's standards, the concept of restricting fundamental rights based on political affiliation would be repugnant to the Constitution, including the First Amendment.

a resolution in 1774 stating loyalists were "unworthy of that friendship and esteem which constitutes the bond of social happiness, and ought to be treated with contempt and total neglect." G.A. Gilbert, *The Connecticut Loyalists*, 4 Am. Hist. Rev. 273, 280 (1899) (describing this resolution as "a fair sample of most of the others passed at this time"). "Committees of Inspection" publicized the names and addresses of suspected loyalists in local newspapers, describing them as "persons held up to public view as enemies to their country," *id.* at 280–81, and in 1775, this stigmatization of individuals suspected of infidelity to the inchoate United States culminated in a statute prohibiting anyone who defamed resolutions of the Continental Congress from keeping arms, voting, or serving as a civil official, *see id.* at 282.

Pennsylvania likewise disarmed non-violent individuals who were unwilling to abide by the newly sovereign state's legal norms. The legislature enacted a statute in 1777 requiring all white male inhabitants above the age of eighteen to swear to "be faithful and bear true allegiance to the commonwealth of Pennsylvania as a free and independent state," Act of June 13, 1777, § 1 (1777), 9 The Statutes at Large of Pennsylvania from 1652–1801 110, 111 (William Stanley Ray ed., 1903), and providing that those who failed to take the oath—without regard to dangerousness or propensity for physical violence—"shall be disarmed" by the local authorities, *id.* at 112–13, § 3.

This statute is particularly instructive because Pennsylvania's 1776 state constitution protected the people's right to bear arms. *See* Cornell, *Don't Know Much About History*, *supra*, at 670–71; Marshall, *supra*, at 724. Yet Pennsylvania's loyalty oath law deprived sizable numbers of pacifists of that right because oath-taking violated the religious

convictions of Quakers, Mennonites, Moravians, and other groups. Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, 2 N.Y.U. J.L. & Liberty 28, 51 (2006); *see also* Thomas C. McHugh, Moravian Opposition to the Pennsylvania Test Acts, 1777 to 1789, at 49–50 (Sept. 7, 1965) (M.A. thesis, Lehigh University) (on file with the Leigh Preserve Institutional Repository). So while *Amici* contend that individuals disarmed under loyalty oath statutes "posed a grave danger and were often violent," Amicus Br. 12, Pennsylvania's disarmament of this sizable portion of the state's populace cannot be explained on that ground. *See Heller*, 554 U.S. at 590 ("Quakers opposed the use of arms not just for militia service, but for any violent purpose whatsoever. . . ."); *cf. Folajtar*, 980 F.3d at 908 n.11 (explaining "[r]efusing to swear an oath" does not "qualify as dangerous").

Instead, the Pennsylvania legislature forbade Quakers and other religious minorities from keeping arms because their refusal to swear allegiance demonstrated that they would not submit to communal judgments embodied in law when it conflicted with personal conviction. *See* Wedeking, *supra*, at 51–52 (describing how Quakers were "penal[ized] for allegiance to their religious scruples over the new government"). The act, in other words, was "an effort by Pennsylvania's Constitutionalist party to restrictively define citizenship"—*i.e.*, what eventually became "the people"—"to those capable of displaying the requisite virtue." Cornell, *Don't Know Much About History*, *supra*, at 671.

Exercising its broad authority to disarm individuals who disrespected the rule of law, Virginia's General Assembly also passed a loyalty oath statute in 1777. An Act to Oblige the

Free Male Inhabitants of this State Above a Certain Age to Give Assurance of Allegiances to the Same, and for Other Purposes ch. III (1777), 9 Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature in the Year 1619 281, 281 (William W. Hening ed., 1821). That law disarmed "all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service" who refused to swear their "allegiance and fidelity" to the state. *Id.* But these individuals could not have been considered dangerous spies or threats of violence: the statute still required disarmed individuals to attend militia trainings and run drills without weapons, *id.* at 282—an indignity previously inflicted upon free Black men, Churchill, *supra*, at 160. Instead, this use of disarmament as a method of public humiliation reveals the statute's true social function: distinguishing those unwilling to follow the dictates of the new government from law-abiding members of the civic community.

In sum, the "how and why," *Bruen*, 142 S. Ct. at 2133, of these oath statutes' burden on the right to bear arms teaches us two things about the historical understanding of status-based prohibitions. First, in keeping with Locke's view that compliance with communal judgment is an inextricable feature of political society, these laws "defined membership of the body politic" by disarming individuals whose refusal to take these oaths evinced not necessarily a propensity for violence, but rather a disrespect for the rule of law and the norms of the civic community. Churchill, *supra*, at 158. Second, legislatures were understood to have the authority and broad discretion to decide when disobedience with the law was sufficiently grave to exclude even a non-violent offender from the people entitled to keep and bear arms. *Cf.* Dru Stevenson,

In Defense of Felon-in-Possession Laws, 43 Cardozo L. Rev. 1573, 1586 (2022) ("[T]he founders thought the legislature should decide which groups pose a threat to the social order or the community.").

4. Ratification Debates

The ensuing deliberations over whether to ratify the Constitution similarly illustrate the Founding generation's understanding of legislatures' power and discretion over disarmament of those not considered law-abiding.

In Pennsylvania, debates between the Federalists and Anti-Federalists "were among the most influential and widely distributed of any essays published during ratification." Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 227 (1999). Those essays included "The Dissent of the Minority," which was published by the state's Anti-Federalist delegates, *id.* at 232–33, and which the Supreme Court has viewed as "highly influential" to the adoption of the Second Amendment, *Heller*, 554 U.S. at 604. The amendment proposed by the Dissent of the Minority stated:

> [T]he people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them *unless for crimes committed*,

> or real danger of public injury from individuals.

2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971) (emphasis added).

As the Dissent of the Minority's proposal makes clear, members of the Founding generation viewed "[c]rimes committed—violent or not—[as] . . . an independent ground for exclusion from the right to keep and bear arms." *Binderup*, 836 F.3d at 349 (quotation omitted); *see also Folajtar*, 980 F.3d at 908–09. *Amici* insist that the proposal's crime and danger clauses must be read together as authorizing the disarmament of dangerous criminals only. *See* Amicus Br. 16; *see also* Greenlee, *supra* at 267; *Binderup*, 836 F.3d at 367 (Hardiman, J., concurring in part). But the Dissent of the Minority's use of the disjunctive "or" refutes this counterargument: The dissenters distinguished between criminal convictions and dangerousness, and provided that *either* could support disarmament. *See, e.g.*, *United States v. Woods*, 571 U.S. 31, 45–46 (2013) (explaining the "ordinary use" of "or" "is almost always disjunctive"—*i.e.*, "the words that it connects are to 'be given separate meanings'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

The Dissent of the Minority therefore comports with the longstanding tradition in English and American law of disarming even non-violent individuals whose actions demonstrated a disrespect for the rule of law as embodied in the sovereign's binding norms.

5. Other Non-Violent Offenses

Punishments meted out for a variety of non-violent offenses between the seventeenth and nineteenth centuries provide additional support for legislatures' authority to disarm even non-violent offenders.

Historically, several non-violent felonies were punishable by death and forfeiture of the perpetrator's entire estate. *See Folajtar*, 980 F.3d at 904–05. As the Government observes, those offenses included larceny, repeated forgery, and false pretenses—all of which involve deceit or the wrongful deprivation of another's property and closely resemble Range's welfare fraud offense. Appellees' Supp. Br. 7–8.[23] *A fortiori*, given the draconian punishments that traditionally could be imposed for these types of non-violent felonies, the comparatively lenient consequence of disarmament under 18 U.S.C. § 922(g)(1) is permissible.[24]

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[23] *See* Answering Br. 15 (citing 1 Wayne R. LaFave, *Substantive Criminal Law* § 2.1(b) (3d ed. 2017); Francis Bacon, *Preparation for the Union of Laws of England and Scotland*, *in* 2 *The Works of Francis Bacon* 160, 163–64 (Basil Montagu ed., Cary & Hart 1844); and 2 Jens David Olin, *Wharton's Criminal Law* § 28:2 (16th ed. 2021)).

[24] The *Kanter* dissent takes issue with this analysis in part because the death penalty was not always imposed. 919 F.3d at 458–62 (Barrett, J., dissenting). How punishments were meted out is beside the point. What matters is the exposure. *See id.* at 459 ("[M]any crimes remained eligible for the death penalty . . . .").

Additionally, legislatures in the American colonies and United States authorized the seizure of firearms from individuals who committed non-violent, misdemeanor hunting offenses.[25] In 1652, New Netherlands passed an ordinance that forbid "firing within the jurisdiction of this city [of New Amsterdam] or about the Fort, with any guns at Partridges or other Game that may by chance fly within the city, on pain of forfeiting the Gun . . . ." 1652 N.Y. Laws 138. A 1745 North Carolina law prohibited nonresidents from hunting deer in "the King's Wast" and stated that any violator "shall forfeit his gun" to the authorities. Act of Apr. 20, ch. III (1745), 23 Acts of the North Carolina General Assembly 218, 219 (1805). New Jersey enacted a statute "for the preservation of deer, and other game" in 1771 that punished non-residents caught trespassing with a firearm by seizing the individuals' guns. 1771 N.J. Laws 19–20.

State legislatures continued to enact such laws after the Revolution. To protect the sheep of Naushon Island, Massachusetts passed a statute requiring armed trespassers on

[25] We appreciate that these laws involved the isolated disarmament of the firearm involved in the offense, not a ban on possession as in the other laws we discuss above. Nevertheless, they support the notion that legislatures' power to strip citizens of their arms was not limited to cases involving violent persons or offenses.

the island to forfeit their guns.[26] An Act for the Protection and Security of the Sheep and Other Stock on Tarpaulin Cove Island, Otherwise Called Naushon Island, and on Nennemessett Island, and Several Small Islands Contiguous, Situated in the County of Dukes County § 2 (1790), 1 Private and Special Statutes of the Commonwealth of Massachusetts 258, 259 (Manning & Loring ed., 1805). Virginia and Maryland punished individuals who hunted wild fowl on rivers at night by seizing their guns. 1832 Va. Acts 70; 1838 Md. Laws 291–92. And Delaware law required non-residents who hunted wild geese on the state's waterways to forfeit their guns, even though the statute specified that this hunting offense was a misdemeanor. 12 Del. Laws 365 (1863).

As these centuries of hunting statutes show, legislatures repeatedly exercised their authority to decide when non-violent

[26] A plaintiff suing the trespasser could alternatively seek the value of the trespasser's firearms. An Act for the Protection and Security of the Sheep and Other Stock on Tarpaulin Cove Island, Otherwise Called Naushon Island, and on Nennemessett Island, and Several Small Islands Contiguous, Situated in the County of Dukes County § 2 (1790), 1 Private and Special Statutes of the Commonwealth of Massachusetts 258, 259 (Manning & Loring ed., 1805).

offenses were sufficiently grave transgressions to justify limiting violators' ability to keep and bear arms.[27]

* * * * *

We draw three critical lessons from the historical record examined above. First, legislatures traditionally used status-based restrictions to disqualify categories of persons from possessing firearms. Second, they did so not merely based on an individual's demonstrated propensity for violence, but rather to address the threat purportedly posed by entire categories of people to an orderly society and compliance with its legal norms. Third, legislatures had, as a matter of separated powers, both authority and broad discretion to determine when

[27] We note that history and tradition may indicate that pretextual disarmament is inconsistent with the Second Amendment. *Cf.* 1 William Blackstone, *Commentaries* app. *300 (St. George Tucker ed., Birch & Small 1803) (decrying how "[i]n England, the people have been disarmed, generally, under the specious pretext of preserving the game"); *Drummond v. Robinson Twp.*, 9 F.4th 217, 227–29 (3d Cir. 2021). Range does not claim his conviction was pretextual, however, so we leave the issue for another day.

individuals' status or conduct evinced such a threat sufficient to warrant disarmament.[28]

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[28] Deference to state legislatures not only accords with longstanding national tradition, but also respects state legislatures' unique ability to channel local concerns and values into criminal law. *See* Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 Va. L. Rev. 127, 188 (2020) ("[F]ederal reliance on state law disturbs uniformity by baking into federal law variations in state law. But far from being a downside, regional disparity is an asset."); *see also* Paul H. Robinson & Tyler Scot Williams, *Mapping American Criminal Law: Variations Across the 50 States* 4 (2018) (surveying state variation in the incorporation of desert, deterrence, and incapacitation norms into their criminal laws). There is good reason that the criminal codes of arid states like Nevada and Colorado include offenses like diverting irrigation water, Nev. Rev. Stat. § 207.225 (2021), and causing prairie fires, Colo. Rev. Stat. § 18-13-109 (2022), which the code of a state like Maryland does not.

In addition to preserving federalism and the separation of powers, upholding legislative determinations of when crimes are sufficiently serious to warrant disarmament avoids forcing "judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] experience' in the field." *Bruen*, 142 S. Ct. at 2130 (quoting *McDonald*, 561 U.S. at 790–91). And as explained above, judicial determinations of when a crime is sufficiently violent have proven infeasible to apply in other contexts. *See Binderup*, 836 F.3d at 410 (Fuentes, J., concurring in part).

IV. Range's Claims

Having identified the appropriate test and reviewed the historical evidence in this area, we now turn to Range's claims.

Range committed an offense that Pennsylvania has classified as a misdemeanor punishable by more than two years' imprisonment, 62 Pa. Cons. Stat. § 481(a), and Congress has concluded is sufficiently serious to exclude Range from the body of law-abiding, responsible citizens entitled to keep and bear arms, *see* 18 U.S.C. §§ 921(a)(20)(B), 922(g)(1).[29] That determination fits comfortably within the longstanding tradition of legislation disarming individuals whose actions

[29] Some of our esteemed colleagues have expressed concerns about the breadth of state offenses that trigger disarmament under 18 U.S.C. § 922(g)(1). *Binderup*, 836 F.3d at 372 n.20 (Hardiman, J., concurring in part); *Folajtar*, 980 F.3d at 921 (Bibas, J., dissenting). But we do not perceive any inherent absurdity in a state's interest in punishing drug offenders, *see* Ariz. Rev. Stat. Ann. § 13–3405, or individuals who abuse public services like recycling programs, *see* Mich. Comp. Laws Ann. § 445.574a(1)(d), or libraries, *see* 18 Pa. Cons. Stat. Ann. § 3929.1. Indeed, enforcement of the laws cited by our colleagues illustrates why legislatures have chosen to designate them as felonies. *Cf. United States v. Bocook*, 59 F.3d 167, 167 (4th Cir. 1995) (describing a prosecution for uttering obscene language by means of radio communication when a defendant "broadcast[s] unauthorized radio messages to aircraft and air traffic controllers" in which he "used obscene language, harassed a female air traffic controller, made threats to shoot down aircraft, and transmitted recorded music, weather reports, and warnings about his own activities").

evince a disrespect for the rule of law. Interpreting the text of the Second Amendment in light of the right's "historical background," *Bruen*, 142 S. Ct. at 2127 (quoting *Heller*, 554 U.S. at 592), we conclude that Range's criminal conviction placed him beyond the ambit of "the people" protected by the Second Amendment.

Range asserts that "[t]he Government has failed to meet its burden of proving that the plaintiff's conviction places him outside the scope of those entitled to Second Amendment rights based on the historical analysis of those who can be disarmed."[30] Appellant's Supp. Br. 1. Notwithstanding the

[30] Moreover, in his supplemental brief, Range appears to raise the issue that a permanent ban on firearm possession lacks a historical basis. *See* Appellant's Supp. Br. 3–4. As to arguments concerning the duration of a ban, Congress has addressed it in two ways. First, Congress has exempted any person whose conviction "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" from disarmament. § 921(a)(20). Second, Congress also permitted the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to restore individuals' ability to possess firearms upon consideration of their personal circumstances, criminal record, and the public interest. 18 U.S.C. § 925(c). But these assessments proved so resource intensive for ATF that Congress has refused to fund the program since 1992. *See Logan v. United States*, 552 U.S. 23, 28 n.1 (2007); S. Rep. No. 102-353 (1992). As we previously noted, "[i]f [the petitioner] and others in his position wish to seek recourse, it is to the legislature, and not to the judiciary, that efforts should be directed." *Folajtar*, 980 F.3d at 911; *Binderup*, 836 F.3d at 402-03 (Fuentes, J., concurring in part and dissenting in part).

historical evidence surveyed above, Range contends that his disarmament is inconsistent with the nation's tradition of firearm regulation "because he is not dangerous." Opening Br. 28. Echoing positions expressed by some judges, *Amici* agree, arguing "English and American tradition support firearm prohibitions on dangerous persons" but "[t]here is no tradition of disarming peaceable citizens." Amicus Br. 2; *see Folajtar*, 980 F.3d at 912 (Bibas, J., dissenting); *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting); *Binderup*, 836 F.3d at 369 (Hardiman, J., concurring in part). Our review of the historical record convinces us otherwise. Non-violent individuals were repeatedly disarmed between the seventeenth and nineteenth centuries because legislatures determined that those individuals lacked respect for the rule of law and thus fell outside the community of law-abiding citizens. That longstanding tradition refutes Range's constrictive account of Anglo-American history as prohibiting the government from disarming non-violent individuals.

Amici offer a few statutes that purportedly prove legislatures' inability to disarm non-violent offenders, but these laws confirm our view. Specifically, *Amici* cite a 1785 Massachusetts law that forbid tax collectors and sheriffs from embezzling tax revenue. Amicus Br. 32 (citing 1785 Mass. Laws 516).[31] Although the statute permitted estate sales to recover embezzled funds, "the necessities of life—including firearms—could not be sold." *Id.* Likewise, *Amici* discuss a 1650 Connecticut law exempting weapons from execution in civil actions and four statutes providing similar protections for

[31] We note that *Amici* cited to a 1786 Massachusetts law, but the language *Amici* references comes from Chapter 46 of the 1785 Act of Massachusetts.

militia arms. *Id.* at 33 (citing *The Public Records of the Colony of Connecticut, Prior to the Union with New Haven Colony, May 1665*, at 537 (J. Hammond Trumbull ed., 1850); 1 Stat. 271, § 1 (1792); *Archives of Maryland Proceedings and Acts of the General Assembly of Maryland*, at 557 (William Hand Browne ed., 1894); An Act for Settling the Militia ch. XXIV (1705), 3 Statutes at Large: Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619 335, 339 (William W. Hening ed., 1823); An Act for the Settling and Better Regulation of the Militia ch. II (1723), 4 Statutes at Large: Being a Collection of all the Laws of Virginia from the First Session of the Legislature, in the Year 1619 118, 121 (William W. Hening ed., 1820). But *Amici* place more weight on those laws than they can rightly bear. The fact that legislatures did not *always* exercise their authority to seize the arms of individuals who violated the law does not show that legislatures *never* could do so. Rather, these laws underscore legislatures' power and discretion to determine when disarmament is warranted. And, as detailed above, Range and *Amici*'s contention that legislatures lacked the *authority* to disarm non-violent individuals "flatly misreads the historical record." *Heller*, 554 U.S. at 603.

We believe the Supreme Court's repeated characterization of Second Amendment rights as belonging to "law-abiding" citizens supports our conclusion that individuals convicted of felony-equivalent crimes, like Range, fall outside

"the people" entitled to keep and bear arms.[32] *See, e.g.*, *Bruen*, 142 S. Ct. at 2122; *Heller*, 554 U.S. at 635. As Judge Hardiman explained in his *Binderup* concurrence, Second Amendment challenges to § 922(g)(1) "require us to decide who count among 'the people' entitled to keep and bear arms" because "the Founders understood that not everyone possessed Second Amendment rights." 836 F.3d at 357 (Hardiman, J., concurring in part); *see also* Oral Arg. at 49:54 (*Amici* discussing which individuals fall outside "the people").

[32] A concern with which district courts have wrestled when assessing the constitutionality of 18 U.S.C. § 922(g)(1) after *Bruen* is that interpreting "the people" in the Second Amendment to exclude individuals convicted of offenses would deviate from that phrase's meaning in the First and Fourth Amendments. *Cf. Collette*, 22-CR-141, 2022 WL 4476790, at *8 ("[T]his Nation has a longstanding tradition of exercising its right—as a free society—to exclude from 'the people' those who squander their rights for crimes and violence."), *with Coombes*, No. 22-CR-189, 2022 WL 4367056, at *4 ("[T]he court declines to carve out felons from the scope of the Second Amendment's protection of 'the people.'"). But Justice Stevens's dissent leveled that very criticism against the *Heller* majority: "[T]he Court limits the protected class to 'law-abiding, responsible citizens.' But the class of persons protected by the First and Fourth Amendments is *not* so limited; for even felons (and presumably irresponsible citizens as well) may invoke the protections of those constitutional provisions." 554 U.S. at 644 (Stevens, J., dissenting). However, our reasoning applies solely to the Second Amendment and does not imply any limitation on the rights of individuals convicted of felony and felony-equivalent offenses under other provisions of the Constitution.

Focusing our inquiry on the meaning of "the people" also comports with the Lockean principles that animated Founding-era disarmaments of individuals whose unwillingness to abide by communal norms placed them outside political society. *Cf. Heller*, 554 U.S. at 580 (suggesting "the people" refers to "all members of the *political community*" (emphasis added)); Cornell, *Don't Know Much About History*, *supra*, at 671 (contending the right to keep and bear arms was historically "limited to those members of the polity who were deemed capable of exercising it in a virtuous manner").

But even if we were to adopt the contrary view, treating Range as covered by "the Second Amendment's plain text[,]" *Bruen*, 142 S. Ct. at 2126, would "yield the same result," *Kanter*, 919 F.3d at 452 (Barrett, J., dissenting). *Bruen* requires the Government to (1) provide relevant historical analogues demonstrating a traditional basis for disarming those who commit felonies and felony-equivalent crimes, and (2) show that the challenger was convicted of a felony or felony-equivalent offense. *Cf. Charles*, No. 22-CR-154, 2022 WL 4913900, at *9 ("[R]eading *Bruen* robotically would require the Government in an as-applied challenge[] to find an analogy specific to the crime charged. . . . That's absurd.").

The Government has satisfied its burden on both prongs. First, as discussed above, our Nation's tradition of firearm regulation permits the disarmament of those who committed felony or felony-equivalent offenses. *See Holloway*, 948 F.3d at 172 ("We 'presume the judgment of the legislature is correct and treat any crime subject to § 922(g)(1) as disqualifying unless there is a strong reason to do otherwise.'" (quoting *Binderup*, 836 F.3d at 351)). The Government has established as much through its detailed discussion of our pre-*Bruen* jurisprudence concerning the "the historical justification for stripping felons [of Second Amendment rights], including those convicted of offenses meeting the traditional definition of a felony." Appellees' Supp. Br. 2–3, 7 (quoting *Binderup*, 836 F. 3d at 348); *see also* Answering Br. 11–12.

The Government has also shown that Range was convicted of a felony or felony-equivalent offense. Range pleaded guilty to welfare fraud in violation of 62 Pa. Cons. Stat. § 481(a), a misdemeanor punishable by up to five years' imprisonment. Range's conviction therefore qualifies as a felony-equivalent offense under both federal law, 18 U.S.C. § 921(a)(20)(B), and traditional legal principles, *see Felony*, Black's Law Dictionary (11th ed. 2019). Accordingly, Range may be disarmed consistent with the Second Amendment. *See* Answering Br. at 16 (citing *Hamilton v. Pallozzi*, 848 F.3d 614, 627 (4th Cir. 2017))

V. Conclusion

We have conducted a historical review as required by *Bruen* and we conclude that Range, by illicitly taking welfare money through fraudulent misrepresentation of his income, has

demonstrated a rejection of the interests of the state and of the community. He has committed an offense evincing disrespect for the rule of law. As such, his disarmament under 18 U.S.C. § 922(g)(1) is consistent with the Nation's history and tradition of firearm regulation.

For the above reasons, we will affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRYAN DAVID RANGE,	:	
Plaintiff	:	**CIVIL ACTION**
v.	:	
	:	**No. 20-3488**
REGINA LOMBARDO *et al.*,	:	
Defendants	:	

ORDER

AND NOW, this 30th day of August, 2021, upon consideration of the Government's Motion for Summary Judgment (Doc. No. 12), Mr. Range's Motion for Summary Judgment (Doc. No. 13), the Government's Statement of Undisputed Facts (Doc. No. 14), the Government's Response in Opposition to Mr. Range's Motion for Summary Judgment (Doc. No. 15), the Government's Response in Opposition to Mr. Range's Statement of Undisputed Material Facts (Doc. No. 16), Mr. Range's Response in Opposition to the Government's Motion for Summary Judgment (Doc. No. 17), and the Government's Reply in Support of its Motion for Summary Judgment (Doc. No. 18), it is **ORDERED** that:

1. The Government's Motion for Summary Judgment (Doc. No. 12) is **GRANTED**.
2. Mr. Range's Motion for Summary Judgment (Doc. No. 13) is **DENIED**.
3. Mr. Range's Complaint (Doc. No. 1) is **DISMISSED** with prejudice.
4. The Clerk of Court shall mark this case **CLOSED** for all purposes, including statistics.

BY THE COURT:

s/Gene E.K. Pratter

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRYAN DAVID RANGE,	:	
Plaintiff	:	**CIVIL ACTION**
v.	:	
	:	**No. 20-3488**
REGINA LOMBARDO *et al.*,	:	
Defendants	:	

MEMORANDUM

PRATTER, J. AUGUST 30, 2021

Bryan Range pled guilty to making a false statement to obtain food stamps assistance more than 25 years ago, which was then a misdemeanor offense. While Mr. Range served no time in prison because of this conviction, the crime to which he pled guilty was punishable by up to five years' imprisonment. As a result, 18 U.S.C. § 922(g) prohibits him from owning a weapon.

Mr. Range seeks the Court's declaratory judgment that § 922(g) as applied to him violates the Second Amendment. Because the Court concludes that Mr. Range's conduct is sufficiently "serious," as that term is defined by Third Circuit precedent, § 922(g) is constitutional as applied. The Court will grant the Government's motion for summary judgment, and deny Mr. Range's motion for summary judgment.

BACKGROUND

Mr. Range pled guilty, in August 1995, to one count of making a false statement to obtain food stamps assistance, in violation of 62 Pa. C.S. § 481(a). At that time, Mr. Range mowed lawns for a living, earning between $9 and $9.50 an hour, or approximately $300 per week. He and his wife struggled to make ends meet caring for their three children—a three-year-old and twin two-year-olds. Mrs. Range prepared an application for food stamps, which she and Mr. Range both signed. The application omitted Mr. Range's income. Mr. Range alleges that he did not review

the application, but accepted responsibility for it and acknowledged that it was wrong to not fully disclose his income. Mr. Range was sentenced to three years' probation, which he satisfactorily completed, $2,458 in restitution, $288.29 in costs, and a $100 fine. He served no time in jail. But as will become relevant later, Mrs. Range—who allegedly prepared the application and also signed it—was not charged with a crime.

Violations of 62 Pa. C.S. § 481(a) were at the time classified as first-degree misdemeanors,[1] punishable by up to five years' imprisonment. Mr. Range alleges that when he pled guilty, neither the prosecution nor the judge informed him of the maximum potential sentence, or of the fact that by pleading guilty, he thereafter would be barred from possessing firearms.

Since 1995, Mr. Range's only other "criminal" history includes minor traffic and parking infractions, as well as a fishing offense in 2011. He testified that he thought he had renewed his fishing license, and that after paying the fine, he renewed the license.

At one time, Mr. Range attempted to purchase a firearm, but was rejected by the background check system. The employee at the gun store Mr. Range visited reviewed a list of prohibiting offenses with Mr. Range, and Mr. Range verified that he had not committed any of them. The employee told Mr. Range that the rejection was likely due to a computer error (a

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[1] Mr. Range's conduct was classified as a first-degree misdemeanor at the time, but in 2018 the Pennsylvania legislature amended 62 Pa. C.S. § 481 so that fraudulently obtained assistance of $1,000 or more is now classified as a felony of the third degree. However, the parties agree—as does the Court—that the classification of Mr. Range's conduct at the time of his conviction governs. *See Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 351 (3d Cir. 2016) (en banc) ("[T]he category of serious crimes changes over time as legislative judgments regarding virtue evolve."); *United States v. Irving*, 316 F. Supp. 3d 879, 890 (E.D. Pa. 2018), *aff'd sub nom. United States v. Mills*, No. 18-3736, 2021 WL 2351114 (3d Cir. June 9, 2021) (applying *Binderup* and noting that "having the Court rule on the constitutionality of an [indictment] based on a jury's verdict some two months later" would "require some form of judicial time travel").

common refrain of modern life), and that he should retry his purchase at a later time. But because Mrs. Range had not been convicted of falsifying the application (or any other crime), she was able to pass a background check. She purchased a hunting rifle and gifted it to Mr. Range. When that gun later was destroyed in a house fire, she gifted him a different rifle.

Years later, Mr. Range again tried to purchase a gun and was again rejected. Once more, the store employee told him that the rejection was a mistake. But when Mr. Range researched the matter further, he learned that he was barred from possessing firearms because of his public assistance application conviction. Mr. Range sold his only firearm so that he would be compliant with the law, and then he brought this lawsuit.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable jury could return a verdict for the non-moving party. *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

On a motion for summary judgment, the Court views the evidence presented in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255. However, "[u]nsupported assertions, conclusory allegations, or mere suspicions are insufficient to overcome a motion for summary judgment." *Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 252 (3d Cir. 2010).

The movant is initially responsible for informing the Court of the basis for the motion for summary judgment and identifying those portions of the record that demonstrate the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on a particular issue, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. After the moving party has met the initial burden, the non-moving party must set forth specific facts showing that there is a genuinely disputed factual issue for trial by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

DISCUSSION

The controlling issue in this case is what limits the Second Amendment puts on the ability of governments to limit access to firearms because of a citizen's non-violent misdemeanor conviction. This debate asks how to interpret language in the Supreme Court's watershed Second Amendment case, *District of Columbia v. Heller*, 554 U.S. 570 (2008). After concluding that the Second Amendment protects an individual's right to possess firearms, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," and that such laws are "presumptively lawful." *Heller*, 554 U.S. at 626-27 & n.26. However, courts have grappled with whether a

challenger could rebut *Heller*'s "presumption" that such laws are lawful, at least as applied to them, and whether laws that prohibit the possession of firearms by misdemeanants are also consistent with the Second Amendment.

Our Third Circuit Court of Appeals very recently addressed and tackled one of the "uncharted frontiers" remaining after *Heller*. *See Drummond v. Robinson Twp.*, No. 20-1722, 2021 WL 3627106 (3d Cir. Aug. 17, 2021). While analyzing the issue of the possible interference of zoning rules with citizens' Second Amendment right to bear arms, the appellate panel underscored lessons from *Heller* that demand the delicate balancing of the right to bear arms with the not unlimited nature of that right that leaves room for lawful restrictions, subject to heightened judicial scrutiny on it. *Id.* at *11-12.

Turning to the specific *Heller* frontier presented by Mr. Range, the Third Circuit Court of Appeals first considered this question en banc in *Binderup v. Attorney General of the United States of America*, 836 F.3d 336 (3d Cir. 2016) (en banc). *Binderup* itself shows the challenging topography of the topic. Three opinions were issued in *Binderup*, none of which represented a majority. Judge Ambro, joined by two other judges, wrote for the court. Judge Hardiman was joined by four other judges, concurring in the judgment. Judge Fuentes was joined by six other judges in an opinion concurring in part and dissenting in part. The Third Circuit Court of Appeals has since treated Judge Ambro's opinion as controlling based on an analysis under *Marks v. United States*, 430 U.S. 188, 193 (1977), because it represented the median position between the dissenting and concurring opinions. *See Beers v. Attorney General*, 927 F.3d 150, 155-56 (3d Cir. 2019), *judgment vacated on other grounds*, *Beers v. Barr*, 140 S. Ct. 2758 (mem.) (2020).

Binderup adopted, with some modifications, *United States v. Marzzarella*'s two-step approach to determining whether a crime was "serious." *Binderup*, 836 F.3d at 345 (citing *United*

States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)). At the first step, a court considers whether the Second Amendment is implicated. *See Drummond*, 2021 WL 3627106, at *3 (citing *Marzzarella*, 614 F.3d at 89). If the claimant has committed a "serious" offense, rendering that person an "unvirtuous citizen" who was historically barred from possessing a firearm, that person is judged to have lost his or her Second Amendment rights. *Holloway v. Attorney General United States*, 948 F.3d 164, 171 (3d Cir. 2020) (quoting *Binderup*, 836 F.3d at 348-49). "[I]f the challenger succeeds at step one, the burden shifts to the Government to determine that the regulation satisfied some form of heightened scrutiny." *Binderup*, 836 F.3d at 347. *See also Drummond*, 2021 WL 3627106, at *3.

Accordingly, the Court will first consider whether Mr. Range's conduct is sufficiently "serious" for Mr. Range to lose his Second Amendment rights. Then, if it finds that the Second Amendment is implicated, it will consider whether the Government has carried its burden of demonstrating that the regulation satisfies heightened scrutiny.

A. *Marzzarella* Step One: Whether the Second Amendment is Implicated

Binderup set forth a nonexclusive four-factor test for determining whether a crime is "serious": "(1) whether the conviction was classified as a misdemeanor or a felony, (2) whether the criminal offense involves violence or attempted violence as an element, (3) the sentence imposed, and (4) whether there is a cross-jurisdictional consensus as to the seriousness of the crime." *Holloway*, 948 F.3d at 172 n.10 (citing *Binderup*, 836 F.3d at 351-52). *Holloway* itself added one more factor: (5) the potential for physical harm to others. *See id.* at 173.

The Government concedes that Mr. Range satisfies four out of the five factors. His conviction was classified as a misdemeanor, the criminal offense does not involve violence or attempted violence as an element, he was not sentenced to any jail time, and the crime involved

no potential for physical harm to others. But the parties dispute whether there is a "cross-jurisdictional consensus" as to the seriousness of his crime.

The parties agree that between 39 and 41 jurisdictions in the United States would have classified Mr. Range's conduct as a felony.[2] Mr. Range concedes that 39 jurisdictions would likely constitute a consensus, and the Court agrees—for at least two reasons. First, the word "consensus" implies something short of total unanimity, but rather the acknowledged existence of a "general agreement." *See* Consensus, Black's Law Dictionary (11th ed. 2019) ("A general agreement; collective opinion."); Consensus, Shorter Oxford English Dictionary (6th ed. 2007) ("Agreement or unity of opinion, testimony, etc.; the majority view, a collective opinion . . . ."). Second, as the challenger, the burden rests with Mr. Range to make a "'strong' showing that . . . he has not committed a 'serious' crime." *Holloway*, 948 F.3d at 172 (quoting *Binderup*, 836 F.3d at 347). Therefore, even if this particular case falls close to the line, it is Mr. Range's burden to prove that there is *not* a consensus.

But Mr. Range argues that the proper point of reference is not all 50 states, but rather only those states that criminalize the making of a false statement regarding food stamps specifically. He argues that the Court should disregard the 15 states that punish conduct like Mr. Range's as a felony under a general theft or falsification statute.

The Court disagrees. Every time that the Third Circuit Court of Appeals has applied the *Binderup* balancing test, it has considered the laws of all 50 states. Mr. Range cites no authority for his argument that the Court should only consider laws that define the elements of a crime in the same way as the state in which the challenger was convicted. Instead, he argues that the law

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[2] *See* Doc. Nos. 17 at 18; 18 at 6. Because the parties agree that the difference between 39 and 41 jurisdictions should make no difference to the Court's analysis, the Court will not discuss the details of the parties' dispute over the classification of the remaining two jurisdictions.

should recognize that "there is a difference between a poor parent who applies for too many food stamps, and a sophisticated fraudster who schemes to systematically bilk Medicare of millions." Perhaps, like compassionate human nature, or a personal gauge of morality, the law should make such a distinction. Indeed, it can certainly be said that the law should be written in a way to recognize many finer or closer distinctions than it does. No doubt there are even finer gradations of guilt between the two extremes Mr. Range proposes.[3] But under our system of government it is within the prerogative of every state to choose between having a more complex criminal code that defines its statutes narrowly, and more general criminal statutes that are accompanied by a greater range of possible punishments. Nothing in *Binderup*, or any opinion applying its multifactor test, provides that a state's choice to classify conduct like Mr. Range's as a felony is irrelevant merely because the drafters of the laws in any given state choose to define crimes with more general language.

Because the Court has concluded that there is a cross-jurisdictional consensus that making a false statement regarding food stamps is serious, the question is whether this one factor is sufficiently important for the Government to prevail here. Mr. Range argues that it is not, for several reasons. First, he argues that the law's classification as a misdemeanor or a felony is the most important factor. In support of this argument, he notes that the Third Circuit Court of Appeals has described the law's classification as "generally conclusive." *Folajtar v. Att'y Gen. of the United States*, 980 F.3d 897, 900 (3d Cir. 2020), *cert. denied sub nom. Folajtar v. Garland*, No. 20-812, 2021 WL 1520793 (U.S. Apr. 19, 2021). The Third Circuit Court of Appeals has also held that the underlying conduct's "potential for danger and risk of harm to self and others" was

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[3] Indeed, the compelling tug on the human heart such as Mr. Range appears to present has stood the test of time and modalities in literature. *See* Victor Hugo, Les Misérables (Norman Denny trans., Penguin Books 1982) (1862).

sufficiently important that the Government prevailed even though the other four factors weighed in favor of the challenger. *See Holloway*, 948 F.3d at 164. Mr. Range reasons that because *Binderup* endorsed a balancing test, he need not prevail on every factor, especially where, as here, both of the factors that the Third Circuit Court of Appeals has treated as most important support his claim.

Mr. Range's position is not without merit. The plurality opinion in *Binderup* described the factor test as a balancing test, not a set of elements that all petitioners must meet. *See Binderup*, 836 F.3d at 351. And Judge Fuentes's opinion dissenting in part likewise viewed the plurality's holding as endorsing a balancing test of factors. *See id.* at 411 ("Judge Ambro's approach . . . would require district court judges to consider a variety of factors in order to assess a crime's 'seriousness' . . . .") (Fuentes, J., dissenting). One could reason that had *Binderup* intended future challengers to "run the gauntlet," satisfying every factor, it would have said so.

However, that is not how subsequent opinions interpreting *Binderup* have used the multifactor test. Both times that it has applied *Binderup*, the Third Circuit Court of Appeals has held for the Government even though only one factor weighed in its favor. The Government prevailed in *Holloway* even though only the (newly-minted) "likelihood of physical harm" factor weighed in its favor. *Holloway*, 948 F.3d at 173. The Government also prevailed in *Folajtar* even though the only factor in its favor was the law's classification as a felony rather than a misdemeanor. *Follajtar*, 980 F.3d at 900. Indeed, the fact that the dissents in *Folajtar* and *Holloway* both argued that the majorities had improperly treated one factor as dispositive only confirms this interpretation of those opinions. Even more important is language in *Binderup* itself. While no court has held that the cross-jurisdictional factor is similarly important, dicta in *Binderup* suggests that its absence would have been dispositive. *See Binderup*, 836 F.3d at 353 ("Were the

Challengers unable to show that so many states consider their crimes to be non-serious, it would be difficult for them to carry their burden at step one.").

Mr. Range next argues that the Government's proposed approach improperly renders the law's classification as a "one-way rachet, employed only in felony cases to assist the government's defense but relegated to a lower status when considering misdemeanors." Doc. No. 13-1 at 16. But a one-way rachet is exactly what the Third Circuit Court of Appeals has twice imposed, once in *Folajtar* where it treated a crime's classification as dispositive, and once in *Holloway* where it relied solely on the likelihood of physical harm. While Mr. Range argues that *Folajtar* stands for the proposition that a law's classification as a felony or a misdemeanor is "generally conclusive," that is not what *Folajtar* said. Rather, it said that "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. It simply did not speak to the relative importance of a law's classification as a misdemeanor. Thus, this Court cannot adopt Mr. Range's view that a law's classification as a misdemeanor is generally conclusive that a law is not serious, because this would be inconsistent with *Holloway*, which held for the Government even though the offense was a misdemeanor. *See Holloway*, 948 F.3d at 174 ("While 'generally the misdemeanor label . . . in the Second Amendment context is . . . important' and is a 'powerful expression' of the state legislature's view, it is not dispositive." (alterations in original) (quoting *Binderup*, 836 F.3d at 352)).

While Mr. Range argues that this approach is inconsistent with *Binderup*'s description of the standard as a "balancing test," the Court is bound to follow *Folajtar* and *Holloway*. Moreover, this route makes sense when considered against the wider context of as applied challenges to § 922(g)(1). Challengers like Mr. Range do face an uphill battle because statutes are presumptively constitutional. *See, e.g.*, *Holloway*, 948 F.3d at 172 (noting that the burden rests

with the challenger to demonstrate that § 922(g) is unconstitutional as applied); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) (noting that courts should "presume in favor of [a statute's] validity, until its violation of the Constitution is proved beyond a reasonable doubt"). And it is not merely each state's determination of a statute's seriousness that the Court is considering. Congress has also determined that the conduct in question was sufficiently serious to justify disarmament. This fact operates as a powerful "sixth factor" present in every case, weighing in favor of the Government.

While the Court acknowledges that this can be considered a matter of first impression, it concludes that the cross-jurisdictional consensus factor—like the subject law's classification as a felony, and the likelihood of physical harm—is generally conclusive that a crime is serious.[4] *See Binderup*, 836 F.3d at 353.

CONCLUSION

For the foregoing reasons, the Court will grant the Government's Motion for Summary Judgment, and deny Mr. Range's Motion for Summary Judgment. An appropriate order follows.

BY THE COURT:

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

[4] Because the Government prevails at *Marzarella* step one, the Court will not proceed to step two to consider whether the Government has produced sufficient evidence to withstand heightened scrutiny.