UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. REY DAVID FULCAR, Defendant	Criminal No. 23-10053-DJC

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The United States of America, by and through the United States Attorney for the District of Massachusetts and undersigned Assistant United States Attorney, hereby respectfully opposes Defendant Rey David Fulcar's motion to dismiss the indictment. *See* Motion to Dismiss, Docket Entry ("D.E.") 52. Defendant challenges the constitutionality of Count One of the indictment, Felon in Possession of Firearm and Ammunition, a violation of Title 18, United States Code, Section 922(g)(1), based on the U.S. Supreme Court's decision in *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 142 S. Ct. 2111 (2022). Binding First Circuit Court of Appeals precedent upholding the constitutionality of Section 922(g)(1) dictates that Defendant's motion be summarily denied. Application of the legal standard articulated in *Bruen*, as demanded by Defendant, does not lead to a contrary result. Whatever infringements of the Second Amendment may be vindicated by *Bruen*, this Nation's historical tradition of disarming violent, criminal recidivists like Defendant is undeniable, and Section 922(g)(1) is facially constitutional and as applied to Defendant.

RELEVANT FACTUAL BACKGROUND

Recognizing that the universe of facts in this case is relatively modest and straightforward, and that the Court has already been familiarized with these facts over the course of multiple rounds of briefing in these proceedings, *see* Opposition to Defendant's Motion for Release from Custody, D.E. 22 (and attached exhibits), and Opposition to Defendant's Motion to Suppress, D.E. 40 (and attached exhibits), the government recites and summarizes only those pertinent facts regarding Defendant's criminal history and dangerousness.

Defendant's arrest history as an adult began at the age of 18. He sustained his first criminal conviction at the age of 19, on or about March 9, 2006 in West Roxbury District Court. In that case, Defendant was convicted of the following violations of Massachusetts law and sentenced to one year custody in a house of correction: Possession of a Class A Controlled Substance, Possession with Intent to Distribute a Class A Controlled Substance, Resisting Arrest, and Assault and Battery on a Police Officer.

On July 23, 2022, the day of the alleged offense, Defendant was 36-years-old. The allegations in this case are strikingly similar to Defendant's first offenses of conviction, approximately 16 years earlier, suggesting that the intervening time had done virtually nothing to reform, rehabilitate, or ameliorate Defendant's dangerousness and criminal bent. Defendant was surveilled by investigators to a street-level drug deal, during which he sold three small bags of cocaine. When Defendant was stopped by police officers shortly thereafter, he struggled with officers, temporarily broke free of their hold, and ran. After securing Defendant, the officers found 13 bags of cocaine and fentanyl hidden in his underwear, and five packages of marijuana and $1,141 dollars in his car. Investigators later searched Defendant's apartment and discovered

more cocaine and fentanyl, drug paraphernalia, cash, and a .380 caliber Ruger semi-automatic pistol loaded with seven rounds of ammunition.

Since 2005, Defendant has been in and out of jail in connection with numerous arrests and criminal convictions, including: Larceny From a Person in West Roxbury District Court in 2006; Larceny From a Person and Resisting Arrest in Boston District Court in 2006; Carrying a Dangerous Weapon, Knowingly Receiving Stolen Property, Resisting Arrest, and Possession of Burglarious Tools in Brookline District Court in 2007; Trafficking over 28 grams of Cocaine in Essex County Superior Court in 2008; and Assault and Battery on a Police Officer in Boston District Court in 2017.

Most significantly, on April 18, 2013, in Suffolk County Superior Court, Defendant pleaded guilty to several serious criminal offenses under Massachusetts law: two counts of Armed Assault with Intent to Murder, Aggravated Assault and Battery by means of a Dangerous Weapon, Unlawfully Carrying a Loaded Firearm, and Possession of a Firearm without a License. Defendant was sentenced to a term of imprisonment from five years to five years and one day, to be followed by three years of probation. According to police reports, Defendant's committed these particularly abhorrent crimes on November 8, 2011, when he fired multiple gunshots into an occupied home in Jamaica Plain. The two victims were inside the house at the time, one of whom was struck by a bullet under his left eye.

ARGUMENT

1. Controlling precedent is dispositive on the constitutionality of Section 922(g)(1), and the Court need go no further.

Under the "law of the circuit" doctrine, the Court is "bound by a prior panel decision" in that circuit. *United States v. Mouscardy*, 722 F. 3d 68, 77 (1st Cir. 2013) (quoting *United States v. Grupee*, 682 F. 3d 143, 149 (1st Cir. 2012)). The First Circuit has repeatedly upheld the

constitutionality of various provisions of Section 922 under the Second Amendment, including subsection 922(g)(1). *See United States v. Torres-Rosario*, 658 F. 3d 110, 113 (1st Cir. 2011); *see also United States v. Rene E.*, 583 F. 3d 8 (1st Cir. 2009) (upholding handgun possession prohibition for juveniles, subsection 922(x)(2)); *United States v. Booker*, 644 F. 3d 12 (1st Cir. 2011) (upholding possession prohibition for crime of domestic violence misdemeanants, subsection 922(g)(9)).

The First Circuit relied on *District of Columbia v. Heller,* 554 U.S. 570 (2008) and *McDonald v. City of Chicago* 130 S. Ct. 3020 (2010) when it rejected the Second Amendment challenge to Section 922(g)(1) in *Torres-Rosario*, and not the means-end scrutiny later adopted by the First Circuit in *Gould v. Morgan,* 907 F.3d 659, 668-69 (1st Cir. 2018) and subsequently abrogated by *Bruen*. *Torres-Rosario*, 658 F. 3d 113-14 (observing that *Heller* and *McDonald* "did not cast doubt on such longstanding regulatory measures as prohibition on the possession of firearms by felons") (quoting *McDonald*, 130 S. Ct. at 3047). Importantly, the Supreme Court in *Bruen* opined that it was not establishing a new standard but only "reiterate[d]" the "standard for applying the Second Amendment" that was already set forth in *Heller*. *Bruen*, 142 S. Ct. at 2129-30. Justice Alito explained in his concurrence that *Bruen* did not "disturb[ ] anything that [the Court] said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns." *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring). And Justice Kavanaugh (joined by the Chief Justice) emphasized that "the Second Amendment allows a 'variety' of gun regulations" and reiterated *Heller*'s statement about not "cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons." *Id*. at 2162 (Kavanaugh, J., concurring) (quotation omitted).

The First Circuit's decision in *Torres-Rosario* upholding the constitutionality of Section 922(g)(1) is consistent with the text-and-history analysis required by *Bruen*, as it relied on *Heller* for recognition of the "longstanding regulatory measures as prohibition on the possession of firearms by felons," 554 U.S. at 627, and the Second Amendment's focus on "law-abiding, responsible citizens," 554 U.S. at 635. *See Torres-Rosario*, 658 F. 3d at 112-13. Therefore, notwithstanding Defendant's suggestions to the contrary, *Bruen* neither overrules *Torres-Rosario* or undermines its rationale. The law of the circuit must be applied unless an intervening precedent overrules it, or at least provides a "basis for questioning" it. *United States v. Bowers*, 27 F.4th 130, 134 (1st Cir. 2022). On this question, the Court is not empowered to disregard the First Circuit's decision in *Torres-Rosario*, and that decision controls. *See United States v. Davis*, Crim. No. 23-10018-DJC, D.E. 49 (electronic text order, March 17, 2023); *United States v. Trinidad*, Crim. No. 21-398, 2022 WL 10067519, at *3 (D.P.R. Oct. 17, 2022). Accordingly, Section 922(g)(1) is constitutional, and Defendant's motion must be denied.

2. Section 922(g)(1) is facially constitutional under *Bruen*.

In striking down a licensing scheme that allowed officials to deny concealed-carry permits even when applicants had satisfied threshold criteria in *Bruen*, the Supreme Court explained the two-part framework for analyzing Second Amendment challenges:

> [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."

142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961).

Even if the Court considers Defendant's facial constitutional challenge to Section 922(g)(1) under the *Bruen* standard, the motion to dismiss still fails. The Second Amendment's plain text does not foreclose Congress' goal of categorically banning firearm possession by convicted felons, and Section 922(g)(1) is consistent with the Nation's historical tradition of firearms regulation.

a. The plain text of the Second Amendment does not extend to convicted felons, *i.e.* Defendant.

In *Bruen* the Supreme Court underscored the fact that the petitioners were "two ordinary, law-abiding, adult citizens," explaining that they were part of "'the people' whom the Second Amendment protects." 142 S. Ct. at 2134. *Bruen* explicitly endorsed the constitutionality of "shall-issue" concealed-carry licensing regimes, employed by 43 states, that "require applicants to undergo a background check or pass a firearms safety course" to ensure that "those bearing arms" are "'law-abiding, responsible citizens.'" Id. at 2138 n.9. Indeed, the decision expressly linked the protection of rights under the Second Amendment to "law-abiding" citizens no fewer than 11 times. *See id*. 2122 (two times), 2125 (one time), 2131 (one time), 2133 (two times), 2134 (one time), 2138 (one time), 2150 (one time), 2156 (two times). *Bruen* echoed the Court's precedents interpreting the Second Amendment in favor of dispossession statutes. Courts in this district considering this issue in the wake of *Bruen* have reached the same conclusion: Second Amendment rights extend only to law-abiding citizens and does not protect Defendant's conduct here. *See Davis*, Crim. No. 23-10018-DJC, D.E. 49; *United States v. Belin*, Crim. No. 21-10040-RWZ, D.E. 65, Memorandum & Order at 3 (D. Mass March 2, 2023); *see also United States v. McNulty*, Crim. No. 22-10037-WGY, 2023 WL 4826950 at *5 (D. Mass July 27, 2023) (holding that the Second Amendment does not protect unlicensed dealing in firearms)

The Second Amendment's historical context supports the notion that ts plain text is not inconsistent with dispossessing felons of their firearms. *Heller* explained that "the Second

Amendment was not intended to lay down a 'novel principl[e]' but rather codified a right 'inherited from our English ancestors.'" *Heller*, 554 U.S. at 599 (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281(1897)); *see id*. at 592 ("[T]he Second Amendment . . . codified a pre-existing right."). The 1689 English Bill of Rights, which "has long been understood to be the predecessor to our Second Amendment," *id*. at 593, provided that "the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law," *id*. (quoting 1 W. & M., ch.2, § 7, in 3 Eng. Stat. at Large 441). The wording of that provision indicates 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." *Range v. Attorney General U.S.*, 53 F. 4th 262, 275 (3d Cir. 2022), reh'g en banc granted, opinion vacated, 2023 U.S. App. LEXIS 1061, 2023 WL 118469 (3d Cir. Jan. 6, 2023). Although the Second Amendment uses somewhat broader language, nothing indicates that it was intended to protect the firearm-bearing rights of lawbreakers.

Accordingly, in light of Defendant's multiple felony convictions and interpreting the Second Amendment's plain text, the rights of "the people" does not encompass Defendant and his conduct in this case is not constitutionally protected.

b. Even if Defendant's rights were protected by the Second Amendment, Section 922(g)(1) is still constitutional because the statute is consistent with a longstanding tradition of firearms regulation.

As of this filing, the government is unaware of any court in the Nation striking down Section 922(g)(1) as facially unconstitutional as a result of the *Bruen* decision. By contrast, the opinions rejecting constitutional challenges to Section 922(g)(1) under *Bruen* are legion, and too lengthy to cite here. *See* Appendix I (collecting opinions outside of the District of Massachusetts upholding Section 922(g)(1)). Every court to have considered the question to date has concluded either that felons are not within the cohort of citizens covered by the Second Amendment's

guarantees, or that keeping firearms away from convicted felons is consistent with this Nation's historical tradition of firearms regulation, or both.

The nation has a longstanding tradition of disarming unvirtuous or dangerous citizens extending back to 1791, when the Second Amendment was ratified by Congress, and earlier. Section 922(g)(1) fits comfortably within this tradition. Courts have frequently recognized, "'the right to bear arms was tied to the concept of a virtuous citizenry[;]…accordingly, the government could disarm 'unvirtuous citizens.'" *Folajtar v. Attorney General of the U.S.*, 980 F.3d 897, 902 (3d Cir. 2020) (quoting *Binderup v. Attorney General of the U.S.*, 836 F.3d 336, 348 (3d Cir. 2016); *see also United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). In *Bruen*, the Supreme Court acknowledged that both society and technology have changed since the eighteenth century, and, accordingly, that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Bruen*, 142 S. Ct. at 2133. In such cases, *Bruen* directed courts to engage in "analogical reasoning" to determine whether a modern regulation has a "historical analogue" demonstrating that the regulation is consistent with the nation's historical tradition of firearm regulation. *Id*.

The historical record supports prohibiting convicted felons from possessing firearms. "*Heller* identified as a 'highly influential' 'precursor' to the Second Amendment the Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents," written in 1787, four years before the Second Amendment was ratified. *United States v. Skoien*, 614 F. 3d 638, 640 (7th Cir. 2010) (en banc) (citing *Heller,* 554 U.S. at 658). That document notes that "the people have a right to bear arms for the defence of themselves and their own state….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*." *Id.* (quoting Bernard Schwartz, The

Bill of Rights: A Documentary History 662, 665 (1971)) (emphasis added). This proposal contemplated prohibiting those convicted of crimes from possessing weapons.

Similarly, many scholars agree that the prohibition of possession of firearms by those deemed dangerous is supported by history. *See, e.g.,* Lawrence Rosenthal, The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control, 92 Wash. U.L. Rev. 1187, 1239 (2015) ("[H]istory suggests that when the legislature restricts the possession of firearms by discrete classes of individuals reasonably regarded as posing an elevated risk for firearms violence, prophylactic regulations of this character should be sustained."); 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, 1377 (2009) (citing historical examples for the proposition that "any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms.'").

Samuel Adams offered an amendment at the Massachusetts convention to ratify the Constitution, recommending "that the said Constitution be never construed to authorize Congress…to prevent the people of the United States, who are peaceable citizens, from keeping their own arms." Schwartz, The Bill of Rights, 674-675, 681. In the same vein, "[m]any of the states, whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of a crime." *Skoien*, 614 F. 3d at 640. Put simply, as the Seventh Circuit has determined, "felons were not historically understood to have Second Amendment rights." *Kanter v. Barr*, 919 F. 3d 437, 445 (7th Cir. 2019), *abrogated by Bruen*, 142 S. Ct. 2111. Statutes disarming persons considered a risk to society, such as convicted felons, are well known to the American legal tradition, including colonial-era laws disarming those who defamed acts of Congress, failed to swear allegiance to the state, or refused to defend the colonies. *Folajtar*, 980

F. 3d at 908 & n.11) (reviewing colonial laws from Connecticut, Pennsylvania, and Massachusetts). Moreover, "at their ratification conventions, several states proposed amendments limiting the right to bear arms to both law-abiding and 'peaceable' citizens." *Id*. at 908 (reviewing proposed amendments in Pennsylvania, New Hampshire, and Massachusetts).

The United States has a historical tradition of imposing restrictions on felons, and stripping felons of rights, well beyond mere disarmament. For centuries, felonies have been "the most serious category of crime." *Medina v. Whitaker*, 913 F. 3d 152, 158 (D.C. Cir. 2019). In 1769, Blackstone defined a felony as "an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt." 4 William Blackstone, *Commentaries on the Laws of England* 95 (1769) (capitalization omitted). Blackstone observed that "[t]he idea of felony is so generally connected with that of capital punishment, that we find it hard to separate them." *Id.* at 98.

Capital punishment and forfeiture of estate were also commonly authorized punishments in the American colonies (and then the states) up to the time of the founding. *Folajtar*, 980 F.3d at 904-05. Capital punishment for felonies was "ubiquit[ous]" in the late eighteenth century and was "the standard penalty for all serious crimes." *See Baze v. Rees*, 553 U.S. 35, 94 (2008) (Thomas, J., concurring in the judgment) (citing Stuart Banner, The Death Penalty: An American History 23 (2002)). Indeed, the First Congress (which drafted and proposed the Second Amendment) made a variety of felonies punishable by death, including treason, murder on federal land, forgery, counterfeiting, uttering a forged or counterfeited public security, and piracy on the high seas. *See* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112-115 (1790). And many American jurisdictions up through the end of the 1700s

authorized complete forfeiture of a felon's estate. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 332 & nn.275-276 (2014) (citing statutes).

A few examples demonstrate the severe consequences of committing a felony at the time. In 1788, just three years before the Second Amendment's ratification, New York passed a law providing for the death penalty for crimes such as burglary, robbery, arson, malicious maiming and wounding, and counterfeiting. 2 Laws of the State of New York Passed at the Sessions of the Legislature (1785-1788) at 664-65. The act established that every person convicted of an offense making the person "liable to suffer death, shall forfeit to the people of this State, all his, or her goods and chattels, and also all such lands, tenements, or hereditaments, at the time of any such offense committed, or at any time after." *Id.* at 666. For all other felonies, the authorized punishment for "the first offence" was a "fine, imprisonment, or corporal punishment," and the punishment "for any second offense . . . committed after such first conviction" was "death." *Id.* at 665. Similarly, in 1777, Virginia adopted a law for the punishment of forgery, which the legislature believed had previously "ha[d] not a punishment sufficiently exemplary annexed thereto." 9 William Waller Hening, Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature 302 (1821). The act stated that anyone convicted of forging, counterfeiting, or presenting for payment a wide range of forged documents "shall be deemed and holden guilty of felony, shall forfeit his whole estate, real and personal, shall receive on his bare back, at the publick whipping post, thirty nine lashes, and shall serve on board some armed vessel in the service of this commonwealth, without wages, for a term not exceeding seven years." *Id.* at 302-03.

Throughout the 1700s, other American colonies punished a variety of crimes with death, estate forfeiture, or both. For example, a 1700 Pennsylvania law provided that any person

convicted of "wilfully firing any man's house, warehouse, outhouse, barn or stable, shall forfeit his or her whole estate to the party suffering, and be imprisoned all their lives in the House of Correction at hard labor." 2 The Statutes at Large of Pennsylvania from 1682 to 1801, at 12 (1896). A 1705 Pennsylvania law provided that a person convicted of rape "shall forfeit all his estate" if unmarried, and "one-third thereof" if married, in addition to receiving 31 lashes and imprisonment for "seven years at hard labor." *Id.* at 178. As 1715 Maryland law provided that anyone convicted of "corruptly embezzling, impairing, razing, or altering any will or record" that resulted in injury to another's estate or inheritance "shall forfeit all his goods and chattels, lands and tenements." 1 The Laws of Maryland[,] With the Charter, The Bill of Rights, the Constitution of the State, and its Alterations, The Declaration of Independence, and the Constitution of the United States, and its Amendments 78-79 (1811). A 1743 Rhode Island law provided that any person convicted of forging or counterfeiting bills of credit "be adjudged guilty of Felony" and "suffer the Pains of Death" and that any person knowingly passing a counterfeit bill be imprisoned, pay double damages, and "forfeit the remaining Part of his Estate (if any he hath) both real and personal, to and for the Use of the Colony." Acts and Laws of The English Colony of Rhode Island and Providence-Plantations in New-England in America 33-34 (1767). And a 1750 Massachusetts law provided that rioters who refused to disperse "shall forfeit all their lands and tenements, goods and chattles [sic]," in addition to receiving 39 lashes and one year's imprisonment. 3 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay (1878).

As the D.C. Circuit has observed, "it is difficult to conclude that the public, in 1791, would have understood someone facing death and estate forfeiture to be within the scope of those entitled to possess arms." *Medina*, 913 F. 3d at 158.

Additionally, individuals convicted of felonies historically forfeited various civic rights. Felons were generally excluded from service on juries in eighteenth-century America. *See* Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 Am. Univ. L. Rev. 65, 179 (2003). They were also generally excluded from voting. *See Green v. Bd. of Elections of City of N.Y.*, 380 F. 2d 445, 450 (2d Cir. 1967) ("[E]leven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons."). Just as historical laws required persons convicted of felonies to forfeit civic rights, Section 922(g)(1) permissibly imposes a firearms disability "as a legitimate consequence of a felony conviction." *Tyler v. Hillsdale County Sheriff's Dep't,* 837 F. 3d 678, 708 (6th Cir. 2016) (en banc) (Sutton, J., concurring in most of the judgment); *Binderup*, 836 F. 3d at 349 ("[P]ersons who have committed serious crimes forfeit the right to possess firearms in much the way 'they forfeit other civil liberties[.]'").

Thus, "tradition and history" show that "those convicted of felonies are not among those entitled to possess arms" under the Second Amendment. *Medina*, 913 F. 3d at 158, 160.

Bruen recognized that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791." *Bruen*, 142 S. Ct. at 2132. Thus, when considering "modern regulations that were unimaginable at the founding," the historical inquiry will "often involve reasoning by analogy." *Id. Bruen* identified two relevant metrics for this analogical inquiry: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133 (quotation marks omitted). Put another way, the "central considerations" are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133 (emphasis and quotation marks omitted)

Under the first metric, Section 922(g)(1) imposes *no* "burden [on] a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2133. "[C]onviction of a felony necessarily removes one from the class of 'law-abiding, responsible citizens' for purposes of the Second Amendment. . . ." *Hamilton*, 848 F. 3d at 626. Moreover, the burden imposed on the felon's rights is *less* severe than the consequences imposed by the historical laws discussed above, which included the death penalty and forfeiture of one's entire estate.

Furthermore, the modern and historical laws are "comparably justified." *Bruen*, 142 S. Ct. at 2133. The historical laws sought to adequately punish felons, to communicate society's disapproval of their crimes, and to deter re-offending. Section 922(g)(1) serves a more limited but equally justified purpose. It seeks to protect society from further crimes committed by felons, who have previously shown disregard for society's laws and are more likely to reoffend, potentially in dangerous ways.

Section 922(g)(1) and these historical laws are "relevantly similar," *id.* at 2132, because they imposed severe consequences on the commission of a felony and authorized legislatures to disarm untrustworthy, unvirtuous, or dangerous people. The lack of an identical historical statute does not suggest that the founding generation would have viewed Section 922(g)(1) as violating the Second Amendment. As one district court observed, a "list of the laws that *happened to exist* in the founding era is . . . not the same thing as an exhaustive account of what laws would have been theoretically believed to be permissible by an individual sharing the original public understanding of the Constitution." *United States v. Kelly*, No. 3:22-CR-00037, 2022 WL 17336578, at *2 (M.D. Tenn. Nov. 16, 2022). Founding-era legislatures cannot be presumed to have legislated to the full limits of their constitutional authority. And a law may be constitutional even if would have been "unimaginable at the founding." *Bruen*, 142 S. Ct. at 2132-33. Section

922(g)(1), far from being unimaginable at the founding, would have been consistent with the other serious legal consequences flowing from a felony conviction.

Therefore, the Court can conclude that the Nation has a tradition of firearms regulation, and categorically and permanently disarming convicted felons is consistent with that tradition. Section 922(g)(1) passes constitutional muster when analyzed under the Second Amendment and *Bruen*.

3. Defendant cannot show that Section 922(g)(1) is unconstitutional as applied to the facts of this case.

The Second Amendment protects the right of law-abiding, responsible citizens to keep firearms in their homes for self-defense. *Heller*, 554 U.S. at 629. *Heller* clarified that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. As set forth herein, there is a longstanding tradition of regulating firearms and disarming violent, recidivist felons like Defendant, and Section 922(g)(1) is constitutional as applied here. Even if this Court considered a distinction between certain types of felonies and those that would justify a categorical possession ban, clearly Defendant, with convictions for Armed Assault with Intent to Murder and illegal firearms possession and use convictions, would meet any standard for a categorical ban.

The fact that the firearm was found in Defendant's apartment is immaterial to the statutory disqualification, or its constitutionality. By his motion, Defendant appears to suggest that the firearm's presence in a home is particularly meaningful under the Second Amendment and *Bruen*. This notion is contradicted by Supreme Court precedent and the plain text of the Second Amendment itself, which draws no "home/public distinction with respect to the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2134.

The First Circuit rejected an as-applied challenge in *Torres-Rosario* similar to the one at bar because of the violent nature of the defendant's predicate convictions, holding: "[a]ssuming arguendo that the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban, drug dealing is not likely to be among them" because it is "notoriously linked to violence." 658 F.3d at 113. The government is unaware of any case in which the First Circuit has recognized any distinction between violent and non-violent felonies – or any other classification of felonies – for the purposes of applying Section 922(g)(1)'s prohibition of possession of firearms by felons.

Nevertheless, some out-of-circuit courts have entertained the view post-*Bruen* that the Second Amendment allows disarming only violent or otherwise dangerous felons. Thus far, the only successful challenges to the constitutionality of Section 922(g)(1) have been a handful of as-applied challenges. *See, e.g., United States v. Quailes*, Crim. No. 1:21-00176-JPW, D.E. 102, Memorandum (M.D. Pa. August 22, 2023) (prior drug trafficking convictions, and government failed to meet burden under *Bruen*); *United States v. Forbis*, Crim. No. 4:23-00133-GFK, D.E. 37, Order (N.D. Ok. August 17, 2023) (prior drunk driving and drug possession convictions, and government failed to meet burden); *Range v. Attorney General*, 69 F.4th 96, 98 (3d Cir. 2023) (prior felony-equivalent false statement conviction, and government failed to meet burden); *but see*, *e.g., United States v. Jordan*, No. EP-22-CR-01140-DCG-1, 2023 WL 157789, at *7–8 (W.D. Tex. Jan. 11, 2023) (rejecting as-applied challenge to Section 922(g)(1)); *United States v. Grinage*, No. SA-21-CR-00399-JKP, 2022 WL 17420390, at *7–8 (W.D. Tex. Dec. 5, 2022) (same); *United States v. Melendrez-Machado*, No. EP-22-CR-00634-FM, 2022 WL 17684319, at *6 (W.D. Tex. Oct. 18, 2022) (same); *United States v. Jackson*, No. CR 21-51 (DWF/TNL), 2022 WL 4226229, at *3 (D. Minn. Sept. 13, 2022) (same).

The facts of this case are readily distinguishable from the successful as-applied challenges cited above, and the case cited by Defendant in his motion, *United States v. Bullock*, Crim. No. 3:18-00165-CWR-FKB (S.D. Ms. June 28, 2023). In *Bullock*, the defendant's prior conviction was many years before the charged unlawful firearms possession, there was little support for the notion that the defendant was presently dangerous, and, under the circumstances of that case, the government failed to satisfy its burden of showing that permanently disarming the defendant was consistent with the nation's tradition of firearms regulation. By comparison, in this case, Defendant has been convicted of multiple dangerous and violent felony offenses, including an egregious offense where he attempted to murder two people using a firearm. At the time Defendant possessed the firearm, he was actively trafficking dangerous controlled substances, cocaine and fentanyl. And Defendant kept the firearm in the same place he maintained and stored those drugs and drug proceeds, a fact evoking the specter of violence in defense of those drugs and drug proceeds. As has been repeatedly observed by the First Circuit, drugs and guns often form a lethal combination, and that combination poses a tremendous danger to the community. Under these circumstances, Defendant cannot justly appeal to the Second Amendment right of armed self-defense in one's home. Defendant's illicit purpose for possessing the firearm in his apartment is not cognizable under the Second Amendment, particularly in light of the aforementioned historical analogues for permanently disarming convicted felons and other dangerous individuals like Defendant. Rather, Defendant's constitutional attack on Section 922(g)(1) under *Bruen* seeks to pervert the Second Amendment protections that are intended for law-abiding citizens, and it should be rejected.

CONCLUSION

For all the foregoing reasons, Defendant's motion to dismiss should be denied.

Respectfully submitted,

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Date: September 13, 2023

Certificate of Service

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By: /s/ *Fred M. Wyshak, III*
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