

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 24-1719

UNITED STATES OF AMERICA

v.

JAMES BOST,
Appellant

On Appeal from the U.S. District Court, W.D. Pa.
Judge Christy Criswell Wiegand, No. 2:21-cr-00030-001

Before: CHAGARES, *Chief Judge*, HARDIMAN, SHWARTZ,
KRAUSE, RESTREPO, BIBAS, PORTER, MATEY,
PHIPPS, FREEMAN, MONTGOMERY-REEVES,
BOVE, MASCOTT, and FISHER, *Circuit Judges*
Argued Before Merits Panel: Apr. 9, 2025; Reargued
En Banc: Feb. 11, 2026; Filed: Oct. 13, 2026

OPINION OF THE COURT

BIBAS, *Circuit Judge*, filed the Opinion of the Court except as to Section II.B, with whom CHAGARES, *Chief Judge*, and HARDIMAN, PORTER, MATEY, FREEMAN, and FISHER, *Circuit Judges*, join; with whom MONTGOMERY-REEVES, *Circuit Judge*, joins except as to Section II.B; and with whom MASCOTT, *Circuit Judge*, joins Part I, Section II.A, and Part IV.

The right to keep and bear arms has limits, and this is one: Those who pose a risk of physical violence from misusing guns can be disarmed before that risk becomes a reality. Not every convict poses such a risk—but James Bost does. He pleaded guilty to terroristic threats and other crimes. Years later, police caught him with a pistol not once, but twice. So he was charged with having a gun despite his convictions, in violation of 18 U.S.C. § 922(g)(1), which makes it illegal for felons to have guns. He moved to dismiss the charge, arguing that this law is unconstitutional both facially and as applied to him.

But Bost’s violent conviction is *prima facie* enough to disarm him. We hold that some predicate crimes (like Bost’s conviction for terroristic threats) demonstrate a *prima facie* risk of physical violence from misusing guns and that those convicted of such crimes may presumptively be disarmed based on those convictions alone. Because the Second Amendment does not protect Bost’s access to guns, we will AFFIRM.

I. BOST’S PRIOR CRIME AND FELON-IN-POSSESSION CONVICTION

A. Years after carjacking, Bost is caught with a gun

In 2002, Bost carjacked someone, threatening to kill the driver unless she gave him money. To get that money, he drove to her mother’s home, where she escaped from the car, screaming for help. Bost was then arrested and pleaded guilty to terroristic threats and criminal conspiracy (as well as false imprisonment and simple assault). Those first two Pennsylvania crimes are first-degree misdemeanors punishable by up to five years in prison. 18 Pa. Cons. Stat. §§ 2706, 905(a), 1104(1). One element of the terroristic-threats crime required “a threat

to commit any crime of violence with intent to terrorize another.” *Id.* § 2706(a)(1) (cleaned up). Bost was sentenced to four years’ probation.

Later, while on bail for another arrest, Bost failed to appear in court. U.S. Marshals tracked him down. They found him in his girlfriend’s home, next to a couch with a stolen .38 caliber pistol on it. Bost was indicted federally for possessing a stolen gun and possessing a gun despite his convictions (based on the terroristic-threats and conspiracy convictions). 18 U.S.C. § 922(g)(1) (the so-called felon-in-possession law), (j) (possession of a stolen gun). He moved to dismiss the indictment, arguing that § 922(g)(1) is unconstitutional as applied to him and that it is facially unconstitutional.

The District Court denied Bost’s motion. It reasoned that his conviction for terroristic threats sufficed to show that he could not be trusted with a gun. And it rejected his facial challenge because he could not show that § 922(g)(1) is unconstitutional in every case. He then pleaded guilty, reserving his right to appeal his Second Amendment challenges.

The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. We review the District Court’s denial de novo, as it rested entirely on legal conclusions. *United States v. Bergrin*, 650 F.3d 257, 264 (3d Cir. 2011).

B. Though Bost did not exhaust administrative relief, he did not have to

Bost did not pursue administrative relief before bringing this appeal, but that makes no difference. A statute authorizes

the Attorney General to restore gun rights to felons who show that they are not dangerous. 18 U.S.C. § 925(c). But that process has long lain dormant. For decades, Congress refused to fund it. *United States v. Williams*, 113 F.4th 637, 661 (6th Cir. 2024); *United States v. Bean*, 537 U.S. 71, 74–75 & n.3 (2002). And even though the Attorney General has at last promulgated final regulations, the process has not yet resumed. In any event, we know of no other context in which a criminal defendant must first seek administrative permission before raising a constitutional defense in his criminal prosecution. We will not invent such a requirement here.

II. HISTORICALLY, BEFORE DISARMING SOMEONE, COURTS HAD TO MAKE AN INDIVIDUALIZED FINDING THAT HE POSED A RISK OF VIOLENCE

The Second Amendment secures the right of “the people” to “keep and bear Arms.” Since felons are part of “the people,” the amendment protects what § 922(g)(1) forbids—a felon’s having a gun. *See Range v. Att’y Gen.*, 124 F.4th 218, 232 (3d Cir. 2024) (en banc) (felons are part of “the people”). So the government must justify this restriction by analogizing to our nation’s historical tradition of gun regulation. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 29 (2022). As *Bruen* makes clear, the government need not offer a “historical twin,” but only a “well-established and representative historical *analogue*.” *Id.* at 30. The success of the analogy turns primarily on two questions: *why* and *how* the regulation burdens the right. *Id.* at 29–30.

We have already answered the first question. Two years ago, we held § 922(g)(1) unconstitutional as applied to a man

with a prior conviction for food-stamp fraud. *Range*, 124 F.4th at 232. But we flagged a limit to our holding, stressing that the government had no evidence that Range posed a risk of violence to others or that his crime “[was] closely associated with physical danger.” *Id.* at 230. That aligned with the Supreme Court’s later holding in *Rahimi* that, under a law banning such people from having guns, someone who poses “a clear threat of physical violence to another” person “may be disarmed.” *United States v. Rahimi*, 602 U.S. 680, 698 (2024). *Accord United States v. Hemani*, 146 S. Ct. 1677, 1693 (2026) (suggesting that prosecutors may need some proof that a defendant poses a special risk of misusing firearms or “a danger to himself or others”). In other words, the answer to *why* is that disarming physically dangerous people serves public safety. So §922(g)(1) is constitutional insofar as it disarms convicts who pose a risk of physical violence from misusing guns.

Now we ask the second question: *how* may the law address a risk of violence. That burden encompasses the nature of the restriction imposed, the process used to impose it, and its duration. A panel of our Court ventured an answer to that question last year for a professional gambler. *Pitsilides v. Barr*, 128 F.4th 203, 212–13 (3d Cir. 2025). But that case is no longer our touchstone. Here, we revisit that inquiry en banc.

A. Judges normally found people to pose a risk of violence individually, then disarmed them

Historically, there were two paths to disarming people. One was individualized: A court found someone to pose a risk of physical violence from misusing guns and disarmed him. The other was categorical: A law targeted a disloyal group that

risked violence to the community. In those instances, a member of the group could often get his rights back by showing that he himself did not pose a risk of violence.

Individualized judgment was the norm. For centuries, disarmament was tied to a judge's finding that someone posed a risk of physical violence from misusing guns. Sometimes, that meant punishing risky behavior. Going-armed laws punished and disarmed those who used their weapons to menace others. *See Rahimi*, 602 U.S. at 693, 697–98 (citing *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686) & 4 William Blackstone, *Commentaries* *149). Rooted in the old bans on affrays, they targeted conduct that spread fear and threatened the peace: going armed “to the Terror of the People.” *Id.* at 697 (internal quotation marks omitted). These laws were often enacted with bans on fighting, together targeting conduct likely to lead to violence. *Id.*

Other laws, like surety laws, aimed to prevent harm before it happened. *Id.* at 695–97. If someone credibly feared that another person posed a risk of physical violence, including by misusing his arms, he could complain to a magistrate. *Id.* at 696. The magistrate would hold a hearing, weigh the evidence, and decide whether the accused was likely to breach the peace. *Id.* at 696–97. If the risk was real, the accused had to post a bond promising to keep the peace for up to six months. *Id.* at 695, 697. If he failed to post it, he would go to jail; if he breached the peace, he would forfeit the bond. *Id.* at 695. Either way, the restraint was tailored to the person's risk.

The Supreme Court has blessed modern versions of this model. In *Rahimi*, it upheld a law disarming someone once a

court found that he “represents a credible threat to the physical safety of [his] intimate partner or child.” 18 U.S.C. § 922(g)(8)(C)(i). *Rahimi* relied on these same traditions: the going-armed and surety laws. 602 U.S. at 695–98.

These laws shared a common thread. The justification was public safety, and the mechanism was a court’s judgment about a particular person’s propensity for violence. When a law was punitive, a court required proof that the defendant had engaged in threatening conduct, especially with weapons, before taking those weapons away. When it was preventative, a judge or justice of the peace had to make an individualized finding that someone posed a risk of violence before requiring a bond or temporarily disarming him. Either way, a person could be disarmed only when a court found that he posed a demonstrated risk of physical violence.

B. Categorical bans were narrow, often suspect, and usually rebuttable

To be sure, some laws disarmed categories of people, but these examples are few, fraught, and often discriminatory. Most founding-era bans disarmed political enemies—groups thought capable of collective rebellion. These measures were tied to allegiance and often lifted once the perceived threat passed. Plus, many applied to groups that lawmakers refused to treat as part of “the people” protected by the Second Amendment, like slaves and American Indians. Both features meaningfully distinguish these historical bans from today’s across-the-board ban on felons. Even so, their procedures for rearmament are instructive. Contrary to our dissenting colleague’s argument, rearmament was not automatic. Often, the disarmed

person had to make some showing that he no longer posed a risk of violence.

Start with the disloyalty-based bans. Dissidents were disarmed until they proved loyalty. Fearing rebellion, the English Crown barred Catholics from bearing arms because their allegiance to the Pope supposedly made them “untrustworthy” to Protestant kings. *Kanter v. Barr*, 919 F.3d 437, 457 (7th Cir. 2019) (Barrett, J., dissenting) (quoting Adam Winkler, *Gunfight* 115 (2011)); accord Joyce Lee Malcolm, *To Keep and Bear Arms* 18–19, 122 (1994). The colonies followed suit, disarming British Loyalists, Catholics, and seditious libelers when they were thought to threaten the American cause. 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, 159–60 (2007) (Loyalists); 1 *Records of the Governor & Company of the Massachusetts Bay in New England* 211–12 (Nathaniel Bradstreet Shurtleff ed. 1853), <https://perma.cc/UV66-9VMC> (seditious libelers); *United States v. Jackson*, 85 F.4th 468, 470–472 (8th Cir. 2023) (Stras, J., dissenting from denial of rehearing en banc) (collecting sources).

But members of these groups could still get their guns back. If one was “willing to swear undivided allegiance to the sovereign,” he no longer posed a threat since he was unlikely to join an uprising. Churchill 157, 159. And some of the English bans protected individual self-defense. In a period of significant tumult, one law targeting Catholics still let them own guns for “defense of his house or person” if deemed necessary by a justice of the peace. Malcolm 123 (quoting 5 *The Parliamentary History of England from the Earliest Period to the Year 1803*,

at 182–84 (London, William Cobbett, ed. 1808–20)) (cleaned up); *An Act for Disarming Papists, and Reputed Papists, Refusing to Take the Oaths to the Government*, ch. 4, §§1–9, 1756 Va. Acts 35, 35–39 (Franklin Press, 1820) (1756), <https://perma.cc/3YTR-4HBB>. Altogether, the allegiance-based bans seem to have targeted the collective group’s perceived threat to the political community. Malcolm 141.

Colonial legislatures disarmed American Indians and slaves for similar, sometimes bigoted reasons. *See, e.g.*, Laws Enacted By The First General Assembly of Virginia, in *Colonial Origins of the American Constitution* 287 (Donald Lutz ed., 1998), <https://perma.cc/H7P8-B9ZC> (reprinting 1 *Journals of the House of Burgesses of Virginia* 9–14 (H.R. McIlwaine & John P. Kennedy eds., 1905)) (banning sale or gift of arms or ammunition to Indians on pain of death); Act of Mar. 31, 1639, *reprinted in Laws and Ordinances of New Netherland, 1638–1674*, at 18–19 (Edmund O’Callaghan ed., 1868), <https://tinyurl.com/mr37wacw> (same); *see also* *An Act for Preventing Lending Guns, Ammunition, &c to the Indians*, 1723 Conn. Pub. Acts 292, <https://perma.cc/E5XL-8D2C>; Malcolm 140–41. *But see, e.g.*, Act of Dec. 17, 1792, ch. 41, §9, *reprinted in* Shepard, 1 *Statutes at Large of Virginia* 123 (1835) (providing that “every free negro or mulatto, being a housekeeper, may be permitted to keep one gun, powder, and shot”).

Those laws, too, tracked fears that the collective group posed a danger. One law barring arms trade with Indians was a direct response to the violent uprising of a well-armed tribe. Malcolm 140 (citing Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 74 (1985) & John Trenchard, *An Argument Shewing that a Standing Army is*

Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy 114–15 (London, 1697)). And laws disarming slaves and freedmen varied with each colony’s reliance on slave labor, since more slaves meant that colonists perceived more risk. Malcolm 141. By limiting access to guns, these laws prevented organized violence by the groups and “confirmed their status as outsiders and inferiors.” *Id.*

Rearmament for members of these groups was uneven. One colony let non-hostile Indians trade arms, but others did not. *Trade with Indians*, in *The Colonial Laws of Massachusetts* 240, 240–41 (1889) (1672). And for black Americans, disarmament became more common over time. Though they were not universal, bans aiming to disarm freedmen spread. *See, e.g.,* Act of Nov. 1806, in 3 *The Laws of Maryland* 298 (Virgil Maxcy ed., 1811); *An Act to Prevent the Use of Fire Arms by Free Negroes and Free Mulattoes and for Other Purposes*, in *Laws of the State of Delaware* ch. 176, at 180. *But see, e.g.,* Stephen Halbrook, *The Founders’ Second Amendment* 166 (noting that as of 1798, Rhode Island had not “restricted the right to keep and bear arms” by law, even for the “Native American or slave”).

Even then, there was often a path back: In some states, a freedman could reclaim his arms if his neighbors or a justice of the peace certified that he was “peaceable” or “of fair character.” Act of Nov. 1806, 3 *The Laws of Maryland* 298; Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 *Drexel L. Rev.* 1, 28 (2024). Despite discriminatory aims, these laws still reflected an

understanding that arms restrictions turned on perceived dangerousness, not status alone.

A few outlier laws turned on legislative judgments about the propensity for violence by individuals within a category, rather than political judgments about the group as such. In the mid-nineteenth century, some states barred so-called “tramps” or vagrants from having guns because they were thought to have a propensity for violence. *See State v. Hogan*, 58 N.E. 572, 574–76 (Ohio 1900) (collecting state laws). But interpreting one of these laws, the Ohio Supreme Court still rested on a notion of allegiance, calling tramps “public enem[ies]” outside the social and political order as well as physically dangerous. *Id.* at 574. And these post-founding laws shed little light on founding-era meaning. *See Lara v. Comm’r, Pa. State Police*, 125 F.4th 428, 441 (3d Cir. 2025).

So for the most part, courts had to decide whether individuals posed a risk of physical violence before disarming them. As a rule, categorical bans rested on a group’s allegiance or exclusion from the political community, not on individuals’ violent tendencies. So these categorical bans are not analogous. And even laws that swept broadly left room for individuals to rebut their presumed risk of violence and reclaim their rights. Rearmament was not automatic; often, the disarmed person first had to show that he no longer posed a danger.

III. BOST’S VIOLENT CONVICTION SUFFICES, AT THIS EARLY STAGE, TO SHOW HIS RISK OF VIOLENCE

As-applied challenges let courts do what they have long done: decide who poses a risk of physical violence from misusing guns. But modern procedure must mirror historical

limits. Not every crime proves a risk of physical violence. And the stage of the case may dictate the kinds of evidence that courts may consider in assessing that risk.

Start with the threshold question: Does the underlying crime show a risk of physical violence? On a motion to dismiss, we engage in “a narrow, limited analysis geared only towards ensuring that legally deficient charges do not go to a jury.” *Bergin*, 650 F.3d at 268. Thus, courts must look only at the predicate crime that supports the § 922(g)(1) prosecution in the first place. At least when a crime has violent or threatening elements, the conviction itself is analogous to the historical bases to fear physical violence. With the going-armed laws, disarmament followed a judicial finding that the defendant had committed a crime that posed such a risk. So too today, the government may show that a felon’s predicate crime involves physical violence or the risk of it, thus justifying disarmament. It bears the burden of justifying disarmament based on the predicate crime alone—that is, of showing that the defendant falls within the category of people who risk causing physical violence. (Here, the elements of the predicate crime are sufficient; we need not decide whether they are necessary or whether the facts admitted by a defendant, found by a jury, or supported by the weight of other evidence may also be considered.) Once the government alleges an adequate predicate, it has carried its burden to support a § 922(g)(1) indictment at this early procedural stage.

This framework tracks history. At the founding, disarmament usually followed a judicial finding of a risk of physical violence. Convictions could supply that finding, but only when the predicate crime itself signaled such a risk.

Although we need not catalogue which predicate crimes show a risk of physical violence from misusing guns in and of themselves, we can say that judges are well-suited to drawing those lines. Trial judges already assess risks of violence every day: at bail, sentencing, and on supervised release, where they weigh protecting the public and often order defendants not to have guns. *See Jackson*, 85 F.4th at 478 (Stras, J., dissenting from denial of rehearing en banc) (citing 18 U.S.C. §§ 3142(b), 3553(a)(2)(C), 3563(b)(8), 3583).

Some predicate crimes speak for themselves. Violent offenses, like common-law murder, forcible rape, and common-law robbery, mark a person as such. And the going-armed laws disarmed people whose conduct was threatening. These types of convictions suffice to justify disarmament. We do *not* require that the predicate violent or threatening crime itself involved guns or the threat of guns. Unarmed forcible rapes, for instance, can qualify.

Other predicate crimes speak for themselves in the other direction: They are not even physically dangerous, let alone violent. *See, e.g., Range*, 124 F.4th at 230–31.

There may perhaps be a third, intermediate category: Still other predicate crimes may be closer calls. Though they may not involve immediate violence, they may fuel it and pose risks to the community. Whether these predicate crimes justify disarmament depends on their own historical analogies.

So at either end of the spectrum, the predicate crime tells the court enough about the felon’s risk of physical violence to decide whether to dismiss a § 922(g)(1) indictment. In the middle, it is possible that courts may have to draw more lines. But

if so, we need not draw them today. Bost was convicted of terroristic threats. The elements of that predicate crime included “a threat to commit any crime of violence with intent to terrorize another.” 18 Pa. Cons. Stat. § 2706(a)(1) (cleaned up). The *Shepard* documents confirm that he was convicted under that subsection. See *Shepard v. United States*, 544 U.S. 13, 16 (2005). That conduct fits squarely within the historical tradition of disarming those who threaten violence. It echoes the core concern of the going-armed laws: conduct that terrifies others and breaches or risks breaching the peace. Bost’s indictment is sufficient as a matter of law. And at this early stage, a court may dismiss only if the predicate conviction is insufficient as a matter of law to put the defendant *into* the category of persons who pose a risk of physical violence from misusing guns. We need not address what, if anything, could later take a defendant *out of* that category.

IV. BOST’S REMAINING CLAIMS FAIL TOO

Though Bost also raises a few more challenges, none succeeds. He claims that § 922(g)(1) is unconstitutional on its face. We have explained why Bost himself may be disarmed, dooming his facial challenge. Bost must “establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). Under that standard, *Rahimi* upheld § 922(g)(8)(C)(i) as facially constitutional because it could properly apply to Rahimi himself. 602 U.S. at 693, 700. The same is true here. That said, the Supreme Court has not squarely addressed a statute that disarms a whole category of people without requiring a judge to determine who falls within that class. Cf. *Kanter*, 919 F.3d at 465 (Barrett, J.,

dissenting) (suggesting that categorical bans may call for greater scrutiny). But we will stick with the long-established standard for facial challenges.

Relatedly, Bost says § 922(g)(1) is unconstitutionally vague because an as-applied approach leaves people guessing whether they count as people who pose a risk of violence. Not so. A law is vague only if it fails to give ordinary people fair notice or invites arbitrary enforcement. *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). Section 922(g)(1) is clear: Those convicted of crimes punishable by more than a year may not have guns. A person might debate whether he is “responsible,” but here he knows whether his conviction fits the statutory language. *Cf. Rahimi*, 602 U.S. at 701 (rejecting the “responsible” citizen standard for disarmament). And on any test, Bost’s terroristic-threats conviction qualified; there was no reason to doubt that.

Next, though Bost raises a Commerce Clause objection, he acknowledges that precedent forecloses that claim. *United States v. Singletary*, 268 F.3d 196, 205 (3d Cir. 2001). We will not disturb that precedent in this case.

Finally, Bost claims that § 922(j)’s ban on stolen guns is unconstitutional as applied to him, but it is not. The Second Amendment protects the right to keep and bear arms, not to have stolen property. The original colonies long punished those who bought, got, or stored stolen goods, with no carveouts for arms. *See, e.g., Acts and Laws of His Majesty’s Province of New Hampshire, in New England* 15–16 (1761), <https://tinyurl.com/y6e52vta> (1714 law); *2 Laws of the State of New*

York Passed at the Sessions of the Legislature Held in the Years 1785, 1786, 1787 and 1788, Inclusive 668 (1886) (1788 law), <https://tinyurl.com/4adv3mc7>; 4 *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619*, at 273 (1820), <https://tinyurl.com/7zxcek5n>. “We are aware of no evidence that firearms have ever been exempt from such regulations.” *United States v. Gore*, 118 F.4th 808, 812–13 (6th Cir. 2024) (rejecting facial challenge to § 922(j)). Without any such authority, Bost’s challenge fails.

* * * * *

History answers both why the government may disarm and how. It may disarm someone when a judge finds that he poses a risk of physical violence from misusing guns. That finding is built in when a defendant is convicted of a violent crime—so disarming him fits our tradition. Yet when the predicate crime does not show even a risk of physical violence in the first place, the government cannot go on a fishing expedition, requiring him to disprove his own risk of violence. It must provide a different analogy. But Bost was convicted of threatening others with physical violence. And violent convicts like him may *prima facie* be disarmed. We will thus AFFIRM.

SHWARTZ, Circuit Judge, concurring in the judgment, with whom KRAUSE and RESTREPO, Circuit Judges, join.

I agree with the Majority that James Bost’s felony conviction for terroristic threats makes him ineligible to possess a firearm under 18 U.S.C. § 922(g)(1) and that his motion to dismiss the indictment based on a violation of the Second Amendment fails. I also agree with the Majority that the District Court correctly denied his motion to dismiss the charge under 18 U.S.C. § 922(j) for possession of a stolen firearm because our regulatory history bars the possession of stolen property of any sort, which includes stolen handguns. I write separately to emphasize my view that § 922(g)(1) constitutionally bans all felons from possessing firearms under Supreme Court precedent, history, and due process.

Although the Majority embraces the principle that only felonies that pose a risk of physical violence from misusing guns are disarming (which is even narrower than the disqualifying crimes contemplated in Range v. Attorney General, 124 F.4th 218, 232 (3d Cir. 2024) (en banc) (“Range II”)), the Supreme Court has not so held.¹ Instead, it has thrice observed that bans on felon possession are “longstanding” and thus presumptively lawful. District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should be

¹ Indeed, the Majority’s definition of disqualifying felony, namely, one that demonstrates that an individual poses a risk of physical violence from misusing guns, does not appear tethered to any historical analogues. There are plenty of analogues that disarm those who use force to commit a felony, but there is no evidence that the principle to be gleaned from these analogues is that only felonies involving force are disarming.

taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (same); United States v. Rahimi, 602 U.S. 680, 699 (2024) (same); see also N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 80-81 (2022) (Kavanaugh, J., concurring) (reiterating that Heller and McDonald recognized “longstanding prohibitions on the possession of firearms by felons”); United States v. Hemani, 608 U.S. ___, 146 S. Ct. 1677, 1700 (2026) (Alito, J., concurring in the judgment) (repeating that “prohibitions on the possession of firearms by felons . . . are . . . presumptively lawful” (citations and internal quotation marks omitted)).² The

² Several of our sister circuits have also rejected a danger-based limitation. See Zherka v. Bondi, 140 F.4th 68, 77 (2d Cir. 2025) (holding that § 922(g)(1) is constitutional regardless of whether the underlying conviction was violent or dangerous); United States v. Hunt, 123 F.4th 697, 707 (4th Cir. 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.”), cert. denied, 145 S. Ct. 2756 (2025); United States v. Jackson, 110 F.4th 1120, 1127 (8th Cir. 2024) (concluding that “history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society” regardless of whether those persons were also deemed individually dangerous), cert. denied, 145 S. Ct. 2708 (2025); Vincent v. Bondi, 127 F.4th 1263, 1266 (10th Cir. 2025) (“[T]he Second Amendment doesn’t prevent application of § 922(g)(1) to nonviolent offenders”).

presumptive legality of such a ban is consistent with our history.³ See, e.g., Range v. Att’y Gen., 69 F.4th 96, 114 (3d Cir. 2023) (“Range I”) (en banc) (Shwartz, J., dissenting) (explaining “that felon bans are consistent with our historical tradition”); Range II, 124 F.4th at 253 (Krause, J., concurring) (“[L]egislatures 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 . . .”). As a result, the felon ban in § 922(g)(1) constitutionally applies to all felons and is not limited to individuals convicted of crimes that pose a risk of danger from misuse of firearms.⁴

³ Section 922(g)(1) does not result in permanent disarmament because (1) the statute expressly exempts those who received pardons, have had their convictions expunged or set aside, or have had their civil rights restored, 18 U.S.C. § 921(a)(33)(B)(ii), and (2) § 925(c) has been reinvigorated and provides a mechanism for an individual to seek relief from the Attorney General from the ban if he is satisfied that the individual does not present a danger to himself or others, and that rearming him is in the public interest. In fact, § 925(c) provides more relief than is obtainable in a criminal case, as a motion to dismiss the criminal case yields a dismissed indictment but does not alone result in rearmament.

There is historical support for permanent disarmament. For example, before and at the founding, those who would not swear an oath of loyalty to the sovereign were banned from possessing firearms. United States v. Aleman-Lozano, No. 25-3012, -- F.4th --- (3d Cir. Sept. 1, 2026).

⁴ The analysis in this case could stop here, as it is undisputed that Bost was convicted of a felony.

Besides being unnecessary to ensure that § 922(g)(1) is constitutionally applied, the risk-of-physical-violence-from-the-misuse-of-a-firearm carveout the Majority announced presents serious due process concerns. See Binderup v. Att’y Gen., 836 F.3d 336, 409-10 (3d Cir. 2016) (en banc) (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments); Range I, 69 F.4th at 116 (Shwartz, J., dissenting); Range II, 124 F.4th at 281-82 (Krause, J., concurring). In enacting § 922(g)(1), Congress disarmed those with a felony or felony-equivalent conviction.⁵ 18 U.S.C. § 922(g)(1); see id. § 921(a)(20) (further defining “crime punishable by imprisonment for a term exceeding one year”). By its terms, the statute provides individuals clear notice of whether their firearm possession violates federal law based on the maximum statutory penalty they faced for their prior conviction. This structure eliminates the vagaries of the Majority’s test, which requires determining whether the crime of conviction would be deemed to pose a risk of physical violence from misusing a firearm based on only the predicate offense. The Majority fails to provide sufficient notice to individuals as to whether their conviction is disarming. For

⁵ The ban under § 922(g)(1) applies to individuals “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. § 922(g)(1). “The term ‘crime punishable by imprisonment for a term exceeding one year’ does not include . . . any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or . . . 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.” Id. § 921(a)(20).

example, although the Majority's examples of common-law murder, forcible rape, and common-law robbery are apparently disarming, and each could be committed with a firearm, a firearm is not required for a conviction. Similarly, there are crimes one judge may think present the risk of physical violence from the misuse of a gun, like drug distribution, that another could conclude does not because physical force is not an element of the offense. Thus, the Majority's test does not provide guidance for an individual to know if his conviction is disarming. In fact, the Majority does not even decide whether consideration of a predicate offense is limited to its elements, or may also include the facts of conviction, creating even greater uncertainty for defendants and district courts alike. Because it is unclear whether a particular crime would be found to pose a risk of physical violence from misusing firearms, the Majority's carveout does not satisfy the due process requirement of giving an individual notice that the conduct violates the law.⁶ See Grayned v. City of Rockford, 408 U.S.

⁶ Although the Majority correctly observes that trial judges regularly assess risks of violence in making bail and sentencing decisions, these decisions involve consideration of the individual defendant's history and characteristics. See 18 U.S.C. § 3553(a)(2) (requiring sentencing judge to consider "the need for the sentence imposed. . . to protect the public from further crimes of the defendant"); id. § 3142(g)(3) (requiring judicial officers making a bail determination to consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release" in "determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community"). The Majority's approach, however, permits

courts to consider only whether the predicate crime reflects a risk of physical violence from misusing guns. Thus, the fact-based contexts of bail and sentencing do not fit where a court is limited to considering only the predicate offense. Moreover, the Majority now asks district courts to make an altogether new determination: whether an individual presents a risk of dangers or “physical violence” specifically “from misusing firearms,” without meaningful guidance on how that assessment differs from familiar bail, sentencing, or supervision decisions. As the Majority thinks that these analyses are similar, district courts are likely to give weight to our words in inconsistent ways, hindering uniformity across our Circuit.

Furthermore, the Majority’s predicate offense approach is inconsistent with Rahimi, where the Supreme Court made clear that the Second Amendment does not require courts to ignore evidence of an individual’s dangerousness in deciding whether he has a right to possess a firearm. See Rahimi, 602 U.S. at 698 (explaining that history “confirm[s] what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed”).

One interpretation of the Majority’s approach could also lead to the following situation. Assume the defendant has a prior felony conviction for bank fraud and the facts show that, when executing a warrant to arrest him for the bank fraud, law enforcement found a “hit list” and firearms. Further assume that after the defendant completes his bank fraud sentence, he is found with a firearm and another hit list and charged as a felon in possession of a firearm in violation of § 922(g)(1). There is no doubt that at the bail hearing on that charge a magistrate judge could conclude that the defendant poses a risk of danger to the community based on the evidence found

104, 108 (1972) (“[A] person of ordinary intelligence [must have] a reasonable opportunity to know what is prohibited, so that he may act accordingly.”). In addition to these due process concerns, the Majority’s failure to provide a viable framework, including its silence on whether consideration of the elements of the offense of conviction are just sufficient or also necessary, will lead to chaos in the district courts, where, in the absence of this critical guidance, judges will be deprived of a meaningful first opportunity to determine whether a given individual was convicted of a disarming offense.⁷

Because Bost was a convicted felon at the time he possessed the firearm, and the longstanding bans on felons possessing firearms are consistent with our history and tradition of permitting legislatures to make categorical disarmament decisions based on their assessments of dangerousness, barring Bost from possessing a firearm does not violate the Second Amendment.

during the bank fraud case but, under the Majority’s test, his felon in possession charge would be ripe for dismissal because the elements of his predicate bank fraud conviction do not convey a risk of physical danger based on misusing guns. Thus, under the Majority’s test, despite evidence he presents a danger, he cannot be disarmed under § 922(g)(1).

⁷ These due process concerns pose another troubling ramification. If a defendant lacks the ex ante knowledge of which of the Majority’s three categories their offense falls into, prosecutors may not be able to show the defendant had the requisite mens rea for a § 922(g)(1) charge, as required under Rehaif v. United States, 588 U.S. 225 (2019). See Range II, 124 F.4th at 281-82 (Krause, J., concurring).

MONTGOMERY-REEVES, *Circuit Judge*, concurring in part and concurring in the judgment.

I join the majority’s well-reasoned opinion, except for Section II.B, which relies on repugnant and discriminatory laws and procedures that would very likely violate the First and Fourteenth Amendments of the U.S. Constitution. The Supreme Court has confirmed that “our Nation’s tradition of fire-arm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not,” *United States v. Rahimi*, 602 U.S. 680, 700 (2024). That tradition allows Bost to be disarmed, at least temporarily, based solely on his conviction. Section II.B attempts to enlarge our historical tradition in search of “instructive” rearmament procedures to show that categories of dangerous people were not automatically rearmed. Maj. Op. at 7. But I question whether the invidious, and likely unconstitutional, laws undergirding these rearmament procedures are valid inputs for *Bruen*’s test. I need not answer that question, however, because less constitutionally infirm comparators support the same conclusion. *See, e.g., Range v. Att’y Gen.*, 124 F.4th 218, 262–63 (3d Cir. 2024) (Krause, J., concurring in the judgment) (collecting examples of “revolutionary-period statutes” under which those “disarmed . . . could prospectively regain their rights by proving to a government official that they no longer posed a danger of misusing firearms”); *United States v. Williams*, 113 F.4th 637, 654 (6th Cir. 2024) (“Rhode Island and Massachusetts allowed loyalists to keep their arms once they showed satisfactory reasons for needing weapons or by the order of colonial committees.” (citation modified)). So I join all but Section II.B.

MASCOTT, *Circuit Judge*, concurring in part and concurring in the judgment.

I respectfully concur in parts I, II.A, and IV of the Court’s opinion and in the judgment affirming Mr. Bost’s conviction. But under the Supreme Court’s precedent in *United States v. Rahimi*,¹ I would decide this case on a more limited basis and find the application of 18 U.S.C. § 922(g)(1) constitutional only as applied to Mr. Bost’s individual violent record and not categorically to an entire class of offenses. This Court is under-equipped to stand in legislative shoes and demarcate between constitutional and unconstitutional categorical statutory subclasses without the individual records before us of those whom the Court considers a continuing part of “the people.”²

In *Rahimi*, the Supreme Court held that the Second Amendment permits restrictions on gun possession by “individuals who pose a credible threat to the physical safety of others.”³ Here, this Court extends beyond its individualized holding on Mr. Bost and preemptively determines that a full category of felons may constitutionally be disarmed without any particular determination or requirement that those felons continue to pose an ongoing threat after serving time for their past crime. The Court’s Part II.B historical recitation of certain

¹ 602 U.S. 680 (2024).

² See U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

³ 602 U.S. at 693.

groups categorically limited in firearms possession does not provide evidence of a past practice supporting its broad holding on limiting constitutional protections. Those examples constitute firearms regulation of groups who at the time faced deep prejudice and lacked treatment as fully part of “the people.” The collection of illustrations is no reed on which to establish a foundation of rights protection. Those examples represent cautionary tales and “historical evils.”⁴ Therefore, I respectfully concur only with respect to the individualized application of § 922(g)(1) to Mr. Bost’s violent and threatening record, consistent with the principles of *Rahimi*.

I.

In the two *en banc* cases decided today, our Court confronts 18 U.S.C. § 922(g)(1). In *Rahimi*, the Supreme Court

⁴ See, e.g., Concurring Op. at 1 (Montgomery-Reeves, J.) (“I question whether the invidious, and likely unconstitutional, laws undergirding these rearmament procedures are valid inputs for *Bruen*’s test.”); *Range v. Att’y Gen. (Range I)*, 53 F.4th 262, 276 n.18 (3d Cir. 2022) (per curiam) (“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.”); *Rahimi*, 602 U.S. at 776 (Thomas, J., dissenting) (“Far from an exemplar of Congress’s authority, the discriminatory regimes the Government relied upon are cautionary tales. They warn that when majoritarian interests alone dictate who is ‘dangerous,’ and thus can be disarmed, disfavored groups become easy prey.”).

considered a related but significantly distinct component of that part of the U.S. Code: § 922(g)(8).⁵ The latter subsection prohibits firearms possession by an individual subject to a court order, issued after notice and a hearing, that restrains the person from intimate partner or child harassment, stalking, or threatening behavior.⁶ In contrast, § 922(g)(1) prohibits

⁵ 602 U.S. at 684–86.

⁶ In relevant part, the statute states the following:

(g) It shall be unlawful for any person—

* * *

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

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

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

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

* * *

firearms possession by any person convicted in the past of a crime punishable by a prison term exceeding one year.⁷ Both offenses subject a convicted individual to up to 15 years in prison.⁸

When the Supreme Court evaluated the constitutionality of § 922(g)(8), it assessed the statute’s particular application against the defendant and found that § 922(g)(8)(C)(i) court orders provide adequate indicia that a person presents an ongoing individualized threat, which, in turn, justifies his disarmament for the order’s duration.⁹ The Supreme Court pointedly declined to evaluate disarming individuals under the neighboring § 922(g)(8)(C)(ii), which addresses orders that

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

18 U.S.C. § 922(g)(8)(A)–(C).

⁷ *Id.* § 922(g)(1) (“It shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year.”).

⁸ *Id.* § 924(a)(8). At the time of Rahimi’s conviction, § 922(g)(8) was subject to a maximum 10-year term, but the statute has since been amended to permit 15-year terms. *See Rahimi*, 602 U.S. at 688.

⁹ 18 U.S.C. § 922(g)(8)(C)(i) (applying to “a court order that . . . includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child”).

prohibit threats and the use of force but do not actually identify their subject as an ongoing threat.¹⁰

In particular, in *Rahimi*, the defendant grabbed his girlfriend by the wrists and shoved her into his car, hitting her head against the dashboard.¹¹ He fired a gun as she fled and threatened to shoot her if she reported him.¹² The girlfriend's report of this incident and other assaults led to the issuance of the restraining order that found him a present, credible physical safety threat likely to commit violence again.¹³ While still subject to that order, Rahimi threatened another woman with a gun.¹⁴ State police, further, identified him as a suspect in at least five more shootings.¹⁵

¹⁰ *Id.* § 922(g)(8)(C)(ii) (applying to “a court order that . . . by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury”); *see Rahimi*, 602 U.S. at 693 (“Our analysis starts and stops with Section 922(g)(8)(C)(i) because the Government offers ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others. We need not decide whether regulation under Section 922(g)(8)(C)(ii) is also permissible.”).

¹¹ *Rahimi*, 602 U.S. at 686.

¹² *Id.*

¹³ *Id.* at 686–87.

¹⁴ *Id.* at 687.

¹⁵ *See id.*

The disarmament trigger that Rahimi challenged was the application of § 922(g)(8), which barred firearms possession while he remained subject to the restraining order. When the Supreme Court affirmed the constitutionality of the application of the provision, it held that the Second Amendment supported a possession ban “while the order [wa]s in effect” because the order had found that Rahimi “pose[d] a credible threat to the physical safety of an intimate partner.”¹⁶ Here, the distinct statutory trigger of § 922(g)(1) was based on Mr. Bost’s prior terroristic-threat conviction. That conviction occurred more than 20 years ago.¹⁷ Under the terms of the unique federal statutory provision before us here, that one conviction permanently criminalizes firearms possession for Mr. Bost.¹⁸

The Supreme Court has not yet ruled on the scope of the constitutional applications under § 922(g)(1) or the provision’s general constitutional reach. But as this Court notes, Mr. Bost has had numerous incidents involving threatening, violent, or unlawful behavior since his terrorist-threat conviction, up through his recent gun charge.¹⁹ In particular, Mr. Bost’s conviction for engaging in terroristic threats was based on his carjacking of a woman, threatening to kill her unless she handed over money.²⁰ He then drove to her mother’s home to

¹⁶ *Id.* at 690.

¹⁷ *See* Maj. Op. at 2.

¹⁸ *See* 18 U.S.C. § 922(g)(1).

¹⁹ *See* Maj. Op. at 2–3.

²⁰ *Id.* at 2.

get the money.²¹ After screaming for help, the woman finally escaped.²² Along with his 2002 guilty plea to terroristic threats under Pennsylvania law, Mr. Bost pleaded guilty to false imprisonment, assault, and criminal conspiracy.²³ While out on bail after arrest for a subsequent offense, Mr. Bost failed to appear back in court and was later found on a couch in his girlfriend's home with a stolen .38 caliber pistol.²⁴

As offenses where there is no record of conviction, these do not provide statutory justification for a § 922(g)(1) charge. But under the *Rahimi* principle—that individuals posing ongoing threats of physical violence may be temporarily disarmed—these facts evince the kind of ongoing threat of violence that may be constitutionally regulable consistent with the Second Amendment.²⁵

Further, options exist for Mr. Bost to escape future § 922(g)(1) prosecution. The Department of Justice has now actively engaged § 925(c).²⁶ And the Executive Branch has

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *See Rahimi*, 602 U.S. at 693 (concluding that “the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others”).

²⁶ 18 U.S.C. § 925(c) (“A person who is prohibited from possessing . . . firearms . . . may make application to the Attorney General for relief from the disabilities imposed by Federal laws . . . and the Attorney General may grant such

promulgated regulations establishing a process for ex-convicts to come out from under the reach of § 922(g)(1) so that they can reestablish access to the full range of firearm protection secured to “the people” under the Second Amendment.²⁷

Contra the dissent’s conclusion,²⁸ I agree with the Court here that the present application of § 922(g)(1) to the facts and circumstances of Mr. Bost’s case fits within the scope of *Rahimi*, given the ongoing nature of Mr. Bost’s criminal activity, possession of a stolen weapon, failure to appear, repeated offenses, and past violence including terroristic imprisonment of another individual. I accordingly concur in part and concur in the judgment and part ways with the dissent on the ultimate bottom line for Mr. Bost’s as-applied circumstances.

relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”).

²⁷ See U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); see also *Withdrawing the Attorney General’s Delegation of Authority*, 90 Fed. Reg. 13080, 13080 (Mar. 20, 2025) (withdrawing “moribund regulations” that, effectively, barred the federal government from processing individual requests made under § 925(c)).

²⁸ See Dissenting Op. at 5 (Phipps, J.).

II.

That said, in *Rahimi*, the Supreme Court pointedly reached a limited decision. First, the Supreme Court explicitly clarified it was “conclud[ing] only” that “[a]n individual found by a court to pose a credible threat” of physical violence to an intimate partner “may be temporarily disarmed.”²⁹ Second, it declined to determine across the board that all components and applications of § 922(g)(8) are constitutional. In particular, the Court did not evaluate the constitutionality of regulation under § 922(g)(8)(C)(ii)—the restraining orders subsection that requires only an instruction against violence rather than a determination that the defendant presents an ongoing threat.³⁰ Accordingly, there is no grounding in *Rahimi* for concluding, necessarily, that the Second Amendment permits the disarmament of all individuals ever convicted of an offense within the category of “terroristic threats”—especially when the offense and subsequent punishment may have occurred years or decades ago and when there is no demonstrated evidence of ongoing risk of violence or threatening behavior.

The Court’s decision today, then, moves beyond *Rahimi* by stretching to constitutionalize perpetual disarmament of Mr. Bost and any other individual convicted of an entire category of offenses. Mr. Bost’s ongoing, repeated legal violations

²⁹ *Rahimi*, 602 U.S. at 702.

³⁰ *See id.* at 693, 699 (emphasizing that a § 922(g)(8)(C)(i) prosecution applies “only once a court has found that the defendant represents a credible threat to the physical safety of another” (internal quotation marks omitted)).

arguably demonstrate that he presents an ongoing threat—bringing him within the parameters of the specific legal implications of *Rahimi*. And with the § 925(c) bypass valve now in place, Mr. Bost has potential recourse and paths for repossession if at some future point he no longer falls within the current threat category of *Rahimi*. But reaching beyond those individualized determinations involves moving far past the issues resolved by the Supreme Court and the Second Amendment’s constraints found constitutional in *Rahimi*. And the historical examples this Court relies on in Parts II.B and III for its categorical holding, consequently, fall outside the bounds of precedent.

For instance, it remains open under Supreme Court precedent which, if any, § 922(g)(1) applications are constitutional and whether there is any inherent constitutional stopping point for the length of Second Amendment restrictions following felony conviction and time served. And unless the Supreme Court were to conclude that all § 922(g)(1) triggering convictions, or certain categories of them, are automatic indicia of dangerousness justifying permanent disarmament, it will eventually have to assess when and how an ex-convict should have the opportunity to re-acquire possession rights.

These are thorny issues of constitutional law. Following is a sketch of several initial considerations.

First, how might the Court apply the lessons of *Rahimi* to § 922(g)(1)? In one sense, that provision involves a person who is more clearly outside the “bounds of law”—and, thus, even more clearly disarmable—than an individual subject to

§ 922(g)(8). Under § 922(g)(8), the defendant would be subject to a court-issued restraining order that might be issued by a single adjudicator. But the triggering event for a § 922(g)(1) charge is an actual conviction of a crime, requiring evaluation and a verdict by one's peers. That crime of conviction arguably must be serious in that § 922(g)(1) statutory disarmament applies only to crimes punishable by a term exceeding one year.³¹

In the truest sense, however, § 922(g)(1) is the more burdensome and severe curb on Second Amendment liberty. By its terms the § 922(g)(1) ban is complete. It includes no expiration date.³² After years of criminalizing more and more offenses, particularly at the federal level, the felony label “reaches conduct ranging from reading someone else’s email to opening a bottle of ketchup at the supermarket and putting it back on the shelf.”³³ Also, state-law misdemeanors trigger the lifetime disarmament imposed by § 922(g)(1) where they are

³¹ See 18 U.S.C. § 3559(a)(1)–(5) (classifying offenses with a maximum authorized prison term of more than one year as felonies); *id.* § 3156(a)(3) (defining certain criminal offenses punishable by a maximum prison term of more than one year as felonies).

³² See *Rahimi*, 602 U.S. at 766 (Thomas, J., dissenting) (“That felony conviction, in turn, triggers a permanent, life-long prohibition on exercising the Second Amendment right.” (citing 18 U.S.C. § 922(g)(1))).

³³ *United States v. Luna*, No. 25-40272, 2026 WL 2507689, at *2 (5th Cir. Aug. 25, 2026) (Willett, J., concurring) (footnotes and internal quotation marks omitted).

punishable for more than two years.³⁴ The triggering felony for the firearms prohibition under the provision does not even need to be keyed to violence. Nor must the convicted defendant have received or served the prison sentence of more than one year that stands as the possible sentence establishing the requisite threshold of seriousness under § 922(g)(1).³⁵ Further, even though a defendant cannot face a firearms ban under § 922(g)(1) until receiving the full process of a jury conviction—unlike the orders issued by just a court under § 922(g)(8)(C)(i)—attendant with those orders is the opportunity for the subject to have had notice and a hearing.³⁶ So although the § 922(g)(8)(C)(i) threat determination process is not as fulsome as the § 922(g)(1) convictions, the significantly greater permanence of the § 922(g)(1) ban arguably makes it much more severe.

³⁴ See, e.g., *Range v. Att’y Gen. (Range II)*, 124 F.4th 218, 223 (3d Cir. 2024) (en banc). But see 18 U.S.C. § 921(a)(20)(B) (excluding state misdemeanors from § 922(g)(1)’s prohibition if they are “punishable by a term of imprisonment of two years or less”).

³⁵ See 18 U.S.C. § 922(g)(8)(C)(i)–(ii) (limiting temporary disarmament connected to restraining orders to only those orders that either include a credible threat finding or by their terms explicitly prohibit physical force).

³⁶ See *id.* § 922(g)(8)(A), (C)(i) (indicating that subsection (g)(8) applies only to court orders that are “issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate”).

This Court’s past opinions are imbued with these distinctions. Sitting *en banc* in *Range II*, the Court found unconstitutional the application of § 922(g)(1) to food-stamp offenses, noting that they did not involve violence and consequently did not fall within *Rahimi*’s scope.³⁷ We have also noted that prior gambling offenses do not automatically represent a threat of *present* violence—the very type of threat that *Rahimi* held was a justification for prohibiting an individual’s gun possession.³⁸ And today, this Court holds in *Williams* that driving while intoxicated two decades ago does not constitute that kind of ongoing, present threat of violence either.³⁹

In contrast, the Court finds § 922(g)(1) constitutionally applicable here, in part, because of the specific ongoing threat of violence that Mr. Bost poses. But the Court then steps back into categorical evaluations under § 922(g)(1) and finds it constitutional to apply the § 922(g)(1) firearms ban to anyone with a prior conviction of any offense falling within the category the Court labels “terroristic threat.” The Court describes these offenses as including “a threat to commit any

³⁷ See 124 F.4th at 231–32.

³⁸ See *Pitsilides v. Barr*, 128 F.4th 203, 213 (3d Cir. 2025) (remanding “to permit the parties to pursue additional discovery of facts probative to the prevailing Second Amendment analysis, including whether Pitsilides poses a special danger of misusing firearms in a way that would endanger others”).

³⁹ See *Williams v. Att’y Gen.*, No. 24-1091, at 1–2 (3d Cir. Oct. 13, 2026).

crime of violence with intent to terrorize another.”⁴⁰ Those criteria are serious and may describe past convictions for behavior that is heinous and severe. But the Court does not further define the category, and on the face of it, the factor of “a threat” may encompass certain categories of speech, messages, or viewpoints that not all agree are threatening.⁴¹ Further, the Court gives no time limitation on how recently the prior conviction must have occurred and examines no indicia indicating whether the individual continues to have a record of behavior suggesting he remains a threat after paying the consequences for his prior offense.

This categorical determination reaches beyond the present “case” and “controversy” by pronouncing the constitutionality of the application of any “terroristic threat”

⁴⁰ Maj. Op. at 14 (quoting 18 PA. CONS. STAT. § 2706(a)(1)). Although the Court here states that such an offense for purposes of its constitutional analysis must involve “a threat to commit any crime of violence with intent to terrorize another,” *id.* (quoting 18 PA. CONS. STAT. § 2706(a)(1)), not all state-law offenses labeled “terroristic threats” necessarily require a threat to harm another person. Indeed, in Arkansas, a person can be convicted of committing a terroristic threat if he “threatens to cause . . . *property* damage.” ARK. CODE ANN. § 5-13-301(a)(1), (b)(1) (emphasis added).

⁴¹ See Renee Griffin, Note, *Searching for Truth in the First Amendment’s True Threat Doctrine*, 120 MICH. L. REV. 721, 724 (2022) (describing how some “true threat” prosecutions can result in “the unconstitutional criminalization of protected speech”).

offenses, presumably anytime, anywhere, with consequences of disarmament in perpetuity.⁴² The Court assures us this is modest—its holding authorizes just a *prima facie* showing of across-the-board constitutionality.⁴³ But that determination—albeit *prima facie*—is without respect to the circumstances of one’s conviction, the precise contours of the offense labeled “terroristic threat,” the seriousness of one’s particular offense or length of imprisonment, or the length of time since the individual served his sentence.

Moreover, the *prima facie* determination is made within the criminal context, subjecting the presumed defendant to incredibly high stakes. The full weight of the federal government’s prosecutorial authority is upon him unless, or until, the defendant convinces the court adjudicating his case that he really does continue to have individualized Second Amendment rights. That review ultimately extends all the way up to consideration by an *en banc* court. That process takes great time. For example, Mr. Bost was indicted on February 2, 2021, and his motion to dismiss his indictment was denied on November 8, 2023.⁴⁴ Williams—the named plaintiff in another Second Amendment case decided by our *en banc* court today—filed his action on June 1, 2017.⁴⁵

⁴² See Maj. Op. at 13–14.

⁴³ See *id.*

⁴⁴ See Appellant’s Br. 6.

⁴⁵ *Williams v. Garland*, No. 17-CV-2641, 2023 WL 7646490, at *1 (E.D. Pa. Nov. 14, 2023).

If such an individual does not, in fact, present a threat justifying current disarmament under *Rahimi*, he will have already suffered significant harm by the time a court concludes that a § 922(g)(1) prosecution cannot be constitutionally applied to him. The federal prosecutorial process potentially includes within its grasp a grand jury indictment, expensive and intrusive investigations, reputational impact, and detention time.⁴⁶ In other contexts, “[w]e do not force people seeking to exercise their constitutional rights to wait until they are prosecuted criminally” to seek judicial review.⁴⁷ Yet here, by the time a court adjudicates a defendant’s personal circumstances, the § 922(g)(1) defendant has already faced significant consequences, and his firearm possession and purchasing decisions have already been significantly impacted. Individuals should not face those burdens for exercising their properly held constitutional rights.

The Court, since its watershed Second Amendment analysis in *Heller*, has not yet detailed the kinds of consequences, if any, that constitutionally attach to an individual’s *prior* commission of a violent act. Both the “going armed” and surety laws that the Supreme Court relied on to uphold the constitutionality of § 922(g)(8) in *Rahimi* were

⁴⁶ See *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987) (“Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.”).

⁴⁷ *Nat’l Shooting Sports Found. v. Att’y Gen. of N.J.*, 80 F.4th 215, 219 (3d Cir. 2023) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014)).

historical examples that dealt with punishing *ongoing, current* violent threats.⁴⁸ The “going armed” laws prohibited gun possession for actual use in terrorizing or issuing threats.⁴⁹ Surety laws merely involved a hold on, and potential forfeiting of, the financial resources of a risky, threatening individual.⁵⁰

At bottom, the question that the Supreme Court has not yet addressed is whether—after a felon has paid the penalty or served the imprisonment related to his offense and returned to a fulsome role as part of “the people”—a legislature may limit (if at all) that individual’s exercise of his individual rights. Which past offenses, if any, under historical practice and tradition, suffice to mark an individual as so automatically violent that the past conviction is itself enough to qualify them as *perpetually* violent for Second Amendment purposes under *Rahimi*? If an individual commits an offense sufficiently serious, such as homicide,⁵¹ does that offense take an individual out of the full protection of “the people” for purposes of the Second Amendment? And if not, what is the justification for continuing to impose any limitation on their gun possession? Does the past violence, due to its severity,

⁴⁸ See *Rahimi*, 602 U.S. at 698–99.

⁴⁹ *Id.* at 697 (“[T]he going armed laws prohibited ‘riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land.’” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *149)).

⁵⁰ See *id.* at 762–63 (Thomas, J., dissenting).

⁵¹ See Maj. Op. at 13.

render a felon dangerous, or a threat, for his entire life, meaning his gun possession can be prima facie stripped?

That is, once that present threat ends and the past sins are atoned for through time served, what if any is the constitutional justification for continued distinct treatment? Consider other Bill of Rights norms. For example, in the Fourth Amendment context, the evaluation of searches and seizures that are reasonable without a warrant, or that reasonably trigger a warrant, may differ in the probation and parole contexts.⁵² But what about subsequent to the termination of probation or parole?⁵³ Or what about free speech, the free exercise of religion, or the freedom not to quarter troops in one's home?⁵⁴ Our legal system does not

⁵² See, e.g., *United States v. Knights*, 534 U.S. 112, 119 (2001) (“Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.” (internal quotation marks omitted)); *Samson v. California*, 547 U.S. 843, 850 (2006) (“[P]arolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.”).

⁵³ Cf. U.S. CONST. amend. IV (using the phrase “the people” to describe the contours of “[t]he right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” the phrase also used in the Second Amendment context when referring to “the right of *the people* to keep and bear Arms” (emphases added)).

⁵⁴ See, e.g., *id.* amend. I (referring to the “right of *the people* peaceably to assemble” (emphasis added)); see also *id.* amend. IV (“[t]he right of *the people* to be secure in their

commonly treat these liberties as being more limited for previously convicted criminals who have paid their societal debts, distinct from the rest of society. What, then, would be the concrete justification for interpreting constitutional firearm possession rights to apply distinctly to ex-convicts such that § 922(g)(1) charges are constitutional? The Supreme Court has cautioned: “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’”⁵⁵ So does a distinct and unique justification serve to constitutionally validate the application of § 922(g)(1) to Second Amendment rights where ex-convicts do not face constraints on the exercise of *other* individual liberties? The question is worth considering.

That said, in *Heller*, the Supreme Court clearly stated that the landmark Second Amendment decision did not call

persons, houses, papers, and effects, against unreasonable searches and seizures” (emphasis added)); *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (reserving to “the States” or “to the people” the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States”); *cf. id.* amend. III (not expressly referring to “the people” in the Third Amendment’s prohibition on the quartering of soldiers in homes during peace times, without consent).

⁵⁵ *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 70 (2022) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)).

into question felon firearm possession bans.⁵⁶ But *Heller* did not specifically reexamine those bans, explore historical justifications for them, or address their permanent nature for all felons. And the Supreme Court’s subsequent opinions in *Bruen*, *Rahimi*, and *Wolford v. Lopez*⁵⁷ have indicated that a history of relevant regulation is required to justify Second Amendment restraints. The federal felon-in-possession ban was initially enacted in 1938,⁵⁸ and the theory and form of criminal punishment in America has changed significantly since the founding. The Court’s examples today show past categorical limits on Second Amendment rights or groups who faced deep societal prejudice, so those examples do not genuinely demonstrate how “the people” under the Second Amendment are to be constitutionally treated.⁵⁹ Moreover, even those limits did not necessarily extend for a lifetime, terminating when the groups facing opposition and prejudice

⁵⁶ See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . .”).

⁵⁷ 609 U.S. 185 (2026).

⁵⁸ See *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011).

⁵⁹ See *supra* note 4.

were no longer perceived as posing a societal risk to the majority that imposed the prejudicial constraints.⁶⁰

Separately, then-Judge Barrett pointed out in a separate writing on the Seventh Circuit in *Kanter v. Barr* that state power to permanently strip convicted felons of their voting rights has been recognized as constitutional.⁶¹ Does that enduring constraint on ex-convicts who have concluded serving time for their criminal offense provide some kind of record of a practice justifying a constraint on Second Amendment liberty for that same group? Not necessarily. As a policy and practical matter, most states automatically restore voting rights after release from custody.⁶² Some do not strip

⁶⁰ See, e.g., *United States v. Vazquez-Ramirez*, 163 F.4th 706, 719 (9th Cir. 2026) (Bumatay, J., concurring in the judgment) (“A 1756 Virginia law barred Catholics from owning firearms *unless they took oaths of allegiance and supremacy to the Commonwealth.*” (emphasis added)).

⁶¹ See 919 F.3d 437, 453 (7th Cir. 2019) (Barrett, J., dissenting); see also *Hawkins v. Youngkin*, 149 F.4th 433, 441 (4th Cir. 2025), *cert. denied sub nom. Hawkins v. Spanberger*, 146 S. Ct. 1642 (2026) (“States may constitutionally disenfranchise felons, and the Constitution does not require States to ever restore those voting rights once lost, even after a person has completed their sentence and any period of parole.” (citing *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974))).

⁶² See *Restoration of Voting Rights for Felons*, NAT’L CONF. STATE LEGISLATURES (Sept. 2, 2026), <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights?maptype=tile> (“In 23 states, felons lose their voting rights only while incarcerated, and receive automatic

incarcerated felons of their ability to vote in the first place.⁶³ Many others provide a process for voting rights restoration.⁶⁴

Judicial writings have at times distinguished between “civic rights,” such as voting rights, exercised “as part of the collective enterprise of self-governance,” and “individual rights,” like gun possession, free speech, and the exercise of religion.⁶⁵ Arguably, the character of civic rights involving the affirmative responsibility to conscientiously and with integrity participate in society may perform functions distinct from the individual rights protections safeguarding against government intrusion and oppression.⁶⁶

restoration upon release. . . . In 15 states, felons lose their voting rights during incarceration, and for a period of time after, typically while on parole and/or probation. Voting rights are automatically restored after this time period.”).

⁶³ *Id.* (discussing District of Columbia, Maine, and Vermont).

⁶⁴ *See id.*

⁶⁵ *Kanter*, 919 F.3d at 462–63 (Barrett, J., dissenting); *see also Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 388 & n.19 (1982) (distinguishing between “civil rights,” like the right to enter contracts, and “political rights,” like the right to vote).

⁶⁶ *See Kanter*, 919 F.3d at 453 (Barrett, J., dissenting) (observing that as a civic duty, voting involves the application of character and affirmative responsibility in contrast to a number of the individual rights spelled out in constitutional

But our legal system has not resolved whether voting rights and responsibilities and individual liberties are fully in *pari materia*. And putting aside any possible functional distinction between voting and individual rights, it's difficult to see, as a textual matter, why certain individual liberties *cannot* be permanently revoked upon conviction (speech), but others *can* (gun rights). And the terms of the Constitution do not appear on their face to distinguish between “the people” for purposes of individual rights versus collective societal participation. Consider the terms of the Bill of Rights. The phrase “the people” is employed to designate the group subject to the right in the context of individual liberties such as the First Amendment freedom of assembly and the Fourth Amendment freedom to be free from unreasonable searches and seizures along with the Second Amendment “right of the people to keep and bear Arms.”⁶⁷ But the Ninth and Tenth

amendments protecting the individual autonomy of “the people”).

⁶⁷ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of *the people* peaceably to assemble, and to petition the Government for a redress of grievances.” (emphasis added)); *id.* amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of *the people* to keep and bear Arms, shall not be infringed.” (emphasis added)); *id.* 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)).

Amendments then use the phrase to designate the group holding collective residual power in private society alongside States and the United States.⁶⁸ In any event, the question of how much or whether individual rights protections can be limited for people who have paid their debt to society is an open one at the level of the highest Court.⁶⁹

Rahimi, of course, did not reach these particular questions. Nor did it address what process requirements, if any, must be provided for individuals to regain possession rights. Perhaps courts must look for an analogue to the past surety process.⁷⁰ Or perhaps it is adequate for criminal

⁶⁸ See *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to *the people*.” (emphasis added)); see also *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by *the people*.” (emphasis added)); cf. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 119–33 (2008) (discussing concepts of popular sovereignty and the use of the phrase “the people” in constitutional text).

⁶⁹ See *Rahimi*, 602 U.S. at 713 (Gorsuch, J., concurring) (“We do not resolve whether the government may disarm an individual permanently.”).

⁷⁰ See *id.* at 764 (Thomas, J., dissenting) (“After providing sureties, a person kept possession of all his firearms; could purchase additional firearms; and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money.”).

defendants to just have the chance to make their case to a district judge in a motion to dismiss their § 922(g)(1) indictments, following prosecution.⁷¹ But if so, this poses a more fundamental question: Is an active process under § 925(c) adequate? And whose job is it to determine what showing must be made—a court in its quest to determine the constitutionally maximal regulation allowable under the Second Amendment or a *legislature*?⁷²

⁷¹ See, e.g., *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024) (“Recall that several historical examples authorized the official doing the disarming, usually the local justice of the peace, to make the dangerousness determination. Often, he was guided by some benchmarks, either a loyalty oath, the attestations of others, or some other statutory criteria. District judges serve the same function when they entertain as-applied challenges to § 922(g)(1)’s applicability.”).

⁷² Cf. *id.* at 663 (“The history reveals that *legislatures* may disarm groups of people, like felons, whom the legislature believes to be dangerous—so long as each member of that disarmed group has an opportunity to make an individualized showing that he himself is not actually dangerous.” (emphasis added)); *United States v. Bullock*, 123 F.4th 183, 185 (5th Cir. 2024) (“The historical record demonstrates ‘that *legislatures* have the power to prohibit dangerous people from possessing guns.’” (emphasis added) (quoting *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting))); *Pitsilides*, 128 F.4th at 212 (“Instead, we look to the principles underlying our regulatory tradition, and the question here is whether Pitsilides may be disarmed consistent with the historical principle that *legislatures* may disarm a person who poses a danger to the physical safety of others.” (emphasis added)); *United States v. Jackson*, 110 F.4th

III.

Beyond the question of whether Supreme Court precedent extends to support categorical possession bans without present evidence of an ongoing safety threat, it is not clear that carving up good and bad categories under a congressionally enacted statute is consistent with the limited adjudication of discrete “cases” and “controversies.”⁷³ In significant separation-of-powers cases, several Justices on the Supreme Court have suggested that such a practice “seemingly confers legislative power to the Judiciary.”⁷⁴ Such “policy choices belong to Congress.”⁷⁵ It is outside the judicial role to

1120, 1128 (8th Cir. 2024) (“*Legislatures* historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed.” (emphasis added)).

⁷³ See U.S. CONST. art. III, § 2.

⁷⁴ *United States v. Arthrex, Inc.*, 594 U.S. 1, 33 (2021) (Gorsuch, J., concurring in part and dissenting in part); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 253 (2020) (Thomas, J., concurring in part and dissenting in part) (“Instead of declining to enforce an unconstitutional statute in an individual case, this Court has stated that courts must ‘seve[r] and excis[e]’ portions of a statute to ‘remedy’ the constitutional problem. . . . [But] [t]he Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute.” (first and second alterations in original) (quoting *United States v. Booker*, 543 U.S. 220, 245 (2005))).

⁷⁵ *Arthrex*, 594 U.S. at 33 (Gorsuch, J., concurring in part and dissenting in part).

sever certain parts of a statute when evaluating constitutional challenges to it. For example, in *United States v. Arthrex, Inc.*, the Supreme Court held that Congress’s decision to vest inferior officers—namely, members of the Patent Trial and Appeal Board—with the power to make final, unreviewable decisions within the Executive Branch violated Article II of the Constitution.⁷⁶ To remedy that constitutional infirmity, the Court concluded that a provision preventing a principal officer from reviewing those decisions could not “constitutionally be enforced.”⁷⁷ Justice Gorsuch, however, charged the majority with violating the separation of powers.⁷⁸ The proper course, in his eyes, would have been for the Court to “simply decline[] to enforce the statute in the case or controversy at hand.”⁷⁹

Here, Part III of the Court’s opinion reaches beyond resolving Mr. Bost’s specific “case” to conclude that § 922(g)(1) may be applied to all “terroristic threat” offenses—not just for individuals convicted under the Commonwealth of Pennsylvania state law forming the basis for the current case but for any offense falling within the Court’s “terroristic

⁷⁶ *See id.* at 6, 19 (majority opinion).

⁷⁷ *Id.* at 25.

⁷⁸ *See id.* at 32 (Gorsuch, J., concurring in part and dissenting in part) (“Early American courts did not presume a power to ‘sever’ and excise portions of statutes in response to constitutional violations. Instead, when the application of a statute violated the Constitution, courts simply declined to enforce the statute in the case or controversy at hand.”).

⁷⁹ *Id.*

threat” bucket. The majority limits these constitutionalized offenses by describing that they must involve “conduct that terrifies others and breaches or risks breaching the peace.”⁸⁰

But fashioning disarmament policy and selecting which offenses merit conviction, or even which range of punishments are appropriate for criminal offenses, historically are legislative tasks.⁸¹ Here, in § 922(g)(1), Congress and the President enacted a prohibition on firearm possession by any individual convicted of an offense with a possible prison term of more than one year. Congress then also established a process to be overseen by the U.S. Attorney General for those subject to the firearm ban to have their firearm rights restored. The Court’s only job in resolving a specific case or controversy like the firearm rights of Mr. Bost here is to determine whether application of those statutory policies is consistent with Second Amendment rights. The Court does not have the constitutional role of making a policy determination of what the proper process of Second Amendment rights restoration should be. Nor is it up to a Court to determine whether certain classes of felonies are more amenable to possession bans than others. Congress has made that choice. And the question here simply is whether Mr. Bost correctly alleges that the choice is unconstitutional as applied to him as well as facially

⁸⁰ Maj. Op. at 14.

⁸¹ See, e.g., *Rahimi*, 602 U.S. at 698 (“[W]e do not suggest 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”); see also *supra* note 72.

unconstitutional. Because the Court here also reaches for a middle ground refashioning the statute, I respectfully decline to join parts II.B and III of the opinion.

PHIPPS, *Circuit Judge*, dissenting, with whom BOVE, *Circuit Judge*, joins.

As this Court held in *Range v. Attorney General*, 124 F.4th 218 (3d Cir. 2024) (en banc), felons, despite their criminal histories, are part of ‘the people’ whose rights to keep and bear Arms are protected by the Second Amendment. *Id.* at 228. Thus, under the *Bruen* framework, see *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022), the only way that 18 U.S.C. § 922(g)(1), which criminalizes a felon’s possession of a firearm or ammunition, can comport with the Second Amendment is if it is “consistent with the Nation’s historical tradition of firearm regulation.” *United States v. Hemani*, 608 U.S. 772, 780 (2026) (quoting *Bruen*, 597 U.S. at 24). But there is no historical analogue to justify the presumptive permanent disarmament effectuated by 18 U.S.C. § 922(g)(1), and for that reason, I respectfully dissent.

As this Court previously recognized, “in the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society.” *Range*, 124 F.4th at 231. Moreover, the earliest historical foundation for permanent disarmament of convicts dates back to the 1930s, and that was for persons who had committed violent crimes.¹ The modern restriction on felons – manifested through the expression “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[,]” 18 U.S.C. § 922(g)(1) – was first enacted in 1961.² And while the Supreme Court has not “cast doubt on longstanding prohibitions on the possession of firearms by felons,” *District*

¹ See Federal Firearms Act, Pub. L. No. 75-785, § 2(f), 52 Stat. 1250, 1251 (1938).

² See An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, § 2, 75 Stat. 757 (1961); see also Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 197, 230–31 (codified at 18 U.S.C. § 922).

of *Columbia v. Heller*, 554 U.S. 570, 626 (2008),³ this Court has explained 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.” *Range*, 124 F.4th at 229. Thus, § 922(g)(1) does something foreign to our historical tradition of firearms regulation – it presumptively permanently disarms an otherwise free person. For that reason, it is unconstitutional as applied to James Bost, who is a felon who has repaid his debt to society.⁴

³ See also *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring).

⁴ I agree with the Majority Opinion that § 922(g)(1) does not facially violate the Second Amendment, but I do so for different reasons. To be facially unconstitutional, a statute must be incapable of lawful application. See *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (explaining that a facial Second Amendment challenge “requires a defendant to ‘establish that no set of circumstances exists under which the Act would be valid’” (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). And, by presumptively disarming all felons – those in prison, those on supervised release, probation, or parole, as well as those who are otherwise free – there is at least one application of § 922(g)(1) that is sufficiently historically grounded: the disarmament of felons serving life sentences without the possibility of parole. See *Range*, 124 F.4th at 249 (Phipps, J., concurring) (“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.”); see also *United States v. Moore*, 111 F.4th 266, 271–72 (3d Cir. 2024) (explaining that the “historical practice of disarming a convict during his sentence . . . is like temporarily disarming a convict on supervised release,” and thus holding that § 922(g)(1) is constitutional as applied to those on supervised release).

The Majority Opinion dutifully acknowledges that a modern firearms regulation must use a similar means to a historical regulation, and that to meet that requirement, the “duration” of disarmament must be comparable. Maj. Op. at 5.⁵ But the identified individualized examples of arms restrictions – going-armed and surety laws – did not impose permanent disarmaments; they were temporary restrictions.⁶

The referenced categorical bans are likewise invalid comparators. Because the Second Amendment protects “the people,” U.S. Const. amend. II, the disarmament of Loyalists – those whose allegiance was to the Crown and not the United States – cannot be viewed as analogous to the presumptive permanent disarmament of “the people,” understood as members of the national “political community.” *Wolford v.*

⁵ See also *Rahimi*, 602 U.S. at 692 (explaining that “how” and “why” regulations that burden the Second Amendment right “are central” to the *Bruen* framework); *Hemani*, 680 U.S. at 790 (explaining that historical laws that “differ[] significantly from how” a modern law works may not be apt comparators). Put differently, the ‘how prong’ of the second step of the *Bruen* analysis includes ‘how long.’ Cf. *Rahimi*, 602 U.S. at 692 (“Even when a law regulates arms-bearing for a permissible reason . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding.”).

⁶ The punishment for going armed was a prison sentence and forfeiture of the specific arms, after which the convicted person could again keep and bear arms. See *Rahimi*, 602 U.S. at 697. And surety laws required persons with an adjudicated risk of disturbing the peace to post a bond, which could not last more than six months at a time. See *id.* at 696–97. If the bond was not posted, the person would be incarcerated for a term, and if it was posted, the person would lose it by breaching the peace. See *id.* at 695; cf. *Hemani*, 680 U.S. at 789. So, if the person posted bond, he was not disarmed, and if he did not post bond, he was disarmed only during his term of incarceration.

Lopez, 609 U.S. 185, 195 (2026) (quoting *Heller*, 554 U.S. at 580); cf. 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, 159 (2007) (explaining that in Revolutionary War-era disarmaments, “one can discern an attempt to preserve the connection between the right to keep arms and membership in the body politic”). And the other categorical bans – of Catholics, American Indians, and slaves – would be unconstitutional today as forms of invidious discrimination. See *Range*, 124 F.4th at 229 (explaining that “restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments”). As such, those restrictions should be treated as “cautionary tales,” not as historical comparators, to avoid validating the invidious discrimination inherent in them. *United States v. Rahimi*, 602 U.S. 680, 776 (2024) (Thomas, J., dissenting); cf. *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 482 (2020) (explaining that the anti-Catholic Blaine Amendment and state “no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause”).

Other historical practices effectuating an indirect permanent disarmament – such as the death penalty and life imprisonment – are not analogous to § 922(g)(1). To be a relevant comparator, the historical restriction must relate to the keeping or bearing of arms. See *Rahimi*, 602 U.S. at 689 (explaining “that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation’” (quoting *Bruen*, 597 U.S. at 24)); see also *United States v. Bonner*, 159 F.4th 338, 343–44 (5th Cir. 2025) (Willett, J., concurring). And the imposition of those punishments was not directly associated with the keeping or bearing of arms. Even more, those measures were punitive, applying only to persons then subject to criminal sentences, as opposed to free persons. See *Folajtar v. Att’y Gen.*, 980 F.3d

897, 912, 921 (3d Cir. 2020) (Bibas, J., dissenting) (explaining that “[t]he colonists did not treat ex-cons as a permanently exiled underclass” and asserting that “[i]t makes no sense to argue that the historical treatment of felons about to be executed licenses us to strip surviving felons of their rights once they have paid their debts to society”). Thus, the historical imposition of the death penalty and life-imprisonment are not “relevantly similar” to the presumptive permanent disarmament of free persons effectuated by § 922(g)(1). *Bruen*, 597 U.S. at 29.

As a way around the lack of a historical tradition of permanent disarmament of free persons, the United States contends that disarmament under § 922(g)(1) is not permanent. Specifically, it argues that through the administrative process set forth in 18 U.S.C. § 925(c), a felon may be rearmed as long as he or she “will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.” *Id.* That is beside the point because even with an operational § 925(c) program, § 922(g)(1) still presumptively disarms felons who were otherwise free persons on a permanent basis, and, as explained above, there is no analogous historical tradition of presumptive permanent disarmament.⁷ The United States’ position also

⁷ In footnote 3 of her concurrence, Judge Shwartz points out that disarmament under § 922(g)(1) is not permanent due to the possibility of a pardon, expungement, or rights-restoration. Those possibilities do exist, but they do not cure the absence of a historical tradition of firearms regulation that *presumptively* permanently disarmed otherwise free people. Under § 922(g)(1), felons, once they have paid their debt to society, permanently lose their right to bear arms absent a pardon, expungement, or restoration. Not only does that presumptive permanent loss of rights lack grounding in any history and tradition of firearms regulation, but it is also altogether foreign to other constitutional protections. Once a felon completes his sentence along with any subsequent period

fails as applied to Bost because at the time of his § 922(g)(1) offense in January 2020, the § 925(c) program was not operational due to a lack of funding through an appropriations bar. *See United States v. Bean*, 537 U.S. 71, 75 & n.3 (2002). So, despite the recent revival of the § 925(c) program,⁸ at the time of Bost’s felon-in-possession offense, § 922(g)(1) functioned as a permanent disarmament.

In sum, without a historical basis for the presumptive permanent disarmament of felons after they have repaid their debts to society, § 922(g)(1) is unconstitutional as applied to such persons.⁹

of supervised release or parole, he becomes a free person. He does not have to await a pardon, expungement, or restoration to have free speech rights, to freely exercise religion, to be protected from unreasonable searches and seizures, or to benefit from equal protection of the laws. Those constitutional rights could not be presumptively permanently denied to an otherwise free person, and a felon who has fully discharged his criminal punishment likewise cannot be subjected to a presumptive permanent disarmament of the right to keep and bear arms.

⁸ *See, e.g.*, Granting of Relief; Federal Firearms Privileges, 91 Fed. Reg. 32094 (May 29, 2026); Granting of Relief; Federal Firearms Privileges, 91 Fed. Reg. 8532 (Feb. 23, 2026); Granting of Relief; Federal Firearms Privileges, 90 Fed. Reg. 17835 (Apr. 29, 2025).

⁹ Even without § 922(g)(1), there are still means of protecting the population from recidivist gun crimes. *Cf. generally* Application for Relief from Disabilities Imposed by Federal Laws with Respect to the Acquisition, Receipt, Transfer, Shipment, Transportation, or Possession of Firearms, 90 Fed. Reg. 34394, 34396 (July 22, 2025) (“Research has shown that violent offenders recidivate at a higher rate than non-violent offenders.” (footnote omitted)). The periods of confinement and supervised release for dangerous criminals may be

increased. *See, e.g.*, 18 U.S.C. § 3553(a)(2)(C) (requiring consideration for federal sentences of the need “to protect the public from further crimes of the defendant”); *id.* at § 3583(c) (requiring, by cross-reference to 18 U.S.C. § 3553(a)(2)(C), consideration of the need to protect the public from further crimes of the defendant in “determining whether to include a term of supervised release” and its length). Relatedly, the terms of supervised release or parole for dangerous criminals may include restrictions on the ability to keep and bear arms. *See Estras v. United States*, 606 U.S. 185, 192 (2025) (explaining that “[s]upervised release is a form of postconfinement monitoring that permits a defendant a kind of conditional liberty by allowing him to serve part of his sentence outside of prison,’ subject to conditions on his behavior” (quoting *Mont v. United States*, 587 U.S. 514, 523 (2019))). Nor does the unconstitutional application of § 922(g)(1) mean that federal and state legislators are powerless to act with respect to the prevention of gun violence; instead, it reflects the governing legal standard that to comply with the Second Amendment, any such regulation must be consistent with our Nation’s historical tradition of firearms regulation.

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