CASE NO. 21-4121

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MELYNDA VINCENT,
Plaintiff-Appellant,
v.
MERRICK GARLAND, et. al.,
Defendants-Appellees

On Appeal from the United States District Court,
For the District of Utah
Honorable Judge David Barlow, presiding
Case No. 2:20-cv-00883-DBB

BRIEF OF APPELLANT MELYNDA VINCENT

Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF RELATED CASES

There are no prior or related appeals.

INTRODUCTION

It has long been recognized that when lawmakers pass a statute, absent express indication otherwise, the new law "brings the old soil with it."[1] The same, as the United States Supreme Court's decision in *New York Pistol & Rifle Association v. Bruen* makes clear, must be true of constitutional protections. The "old soil" of the Second Amendment's right to bear arms has been neglected by courts and Congress, left untilled and buried under strata of statutory sediment, layers of laws that covered up constitutional commands. But the Court in *Bruen* unearthed the old soil and resurrected its protections, directing courts to evaluate the scope of Second Amendment rights not through twentieth-century Congressional statutes but instead through founding-era practices. And those practices throughout early America are clear: one did not lose the right to bear arms because of non-violent felony convictions.

A permanent ban on the right to bear arms was largely unknown in America until Congress effectively stripped all felons—violent and non-violent alike—of that right in 1961. In doing so, Congress ignored the pedigree of the Second Amendment's protections. But no matter how benevolent their motivations or how benign they view the collateral consequences, lawmakers cannot abridge fundamental rights that the Constitution guarantees. Indeed, Congress can no more

[1] *Sekhar v. United States*, 570 U.S. 729, 733 (2013) (citation omitted).

legislate away one's fundamental rights than it can legislate away the Constitution itself. The "old soil" here traces its roots to the very foundation of the Second Amendment—the right to protect oneself. And *Bruen* gives that old soil, and Melynda Vincent's right to bear arms, new life.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of dismissal of a lawsuit challenging the constitutionality of 18 U.S.C. § 922(g)(1) and Utah Code Ann. § 76-10-503(3)(a) as applied to Melynda Vincent. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1346. This Court's jurisdiction is founded in 28 U.S.C. § 1291. Final judgment was entered October 5, 2021.[2] The notice of appeal and an amended notice of appeal were filed on October 5, 2021.[3]

STATEMENT OF THE ISSUE

A lifetime firearms ban for attempting to pass a $498.12 false check violates the Second Amendment as applied to a fully reformed and peaceable woman who poses no danger to public safety.

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[2] Aplt. App. Vol. 1 at 116. Citations to the record follow the preceding convention. Citations to other sources are formatted according to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).
[3] Aplt. App. Vol. 1 at 117–20.

CONCISE STATEMENT OF THE CASE

Melynda Vincent is a licensed clinical social worker, business owner, mother, and public health activist.[4] Ms. Vincent is a responsible law-abiding citizen who has no history of violent behavior or any other conduct that would suggest she would not responsibly possess a firearm for self-defense.

In 2008, Ms. Vincent suffered from drug addiction and was homeless.[5] During this dark period, she attempted to negotiate a false check in the amount of $498.12 at a Salt Lake City grocery store.[6] She eventually pled guilty to bank fraud on May 30, 2008.[7] After this low, Ms. Vincent transformed her life.

Ms. Vincent has not used illegal drugs since April 22, 2007.[8] She performed remarkably on pretrial release. Ms. Vincent defeated her addictions to drugs and alcohol and graduated from drug treatment on October 12, 2007.[9] The late Judge Dee Benson recognized her remarkable progress and character and sentenced Ms. Vincent to probation without a day of imprisonment.[10] Judge Benson's faith in Ms. Vincent paid off.

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[4] Aplt. App. Vol. 1 at 34–37.
[5] Aplt. App. Vol. 1 at 28.
[6] Aplt. App. Vol. 1 at 28.
[7] Aplt. App. Vol. 1 at 28.
[8] Aplt. App. Vol. 1 at 29.
[9] Aplt. App. Vol. 1 at 29.
[10] Aplt. App. Vol. 1 at 29.

Ms. Vincent turned her life around. She graduated from Salt Lake Community College in 2006.[11] For her superior academic performance, she was admitted to the Phi Beta Kappa Honor Society.[12] Ms. Vincent obtained a B.S. in behavioral health in 2010 from Utah Valley University.[13] In 2013 Ms. Vincent obtained a master's in social work from the University of Utah.[14] In 2018, Ms. Vincent earned her second master's degree this time in public administration from the University of Utah.[15] She now owns and operates a thriving private practice providing counseling and therapy.[16] Ms. Vincent is the Founder and Executive Director of the Utah Harm Reduction Coalition, a non-profit organization that develops, drafts, and implements humane, science-driven drug and criminal justice policies.[17]

Ms. Vincent is a single mother.[18] She wants to possess a firearm for protection.[19] Ms. Vincent does not believe she should be at greater risk for physical and sexual assault simply because of her distant and non-violent financial offense. Ms. Vincent sought relief from the Judicial Branch. She filed her

[11] Aplt. App. Vol. 1 at 29, 34.
[12] Aplt. App. Vol. 1 at 29, 34.
[13] Aplt. App. Vol. 1 at 29, 34.
[14] Aplt. App. Vol. 1 at 29, 34.
[15] Aplt. App. Vol. 1 at 29, 34.
[16] Aplt. App. Vol. 1 at 29, 34.
[17] Aplt. App. Vol. 1 at 29, 34.
[18] Aplt. App. Vol. 1 at 29.
[19] Aplt. App. Vol. 1 at 29.

complaint on December 20, 2020, seeking a declaration that the federal and state felon-dispossession statutes are unconstitutional as applied to her.[20] She filed an amended complaint on December 26, 2020.[21]

The United States and the State of Utah each filed a motion to dismiss on February 16, 2021.[22] On October 5, 2021, the district court granted the motions to dismiss.[23] The district court acknowledged the individual right to possess arms recognized in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008),[24] but found, however, that Ms. Vincent's challenges "failed as a matter of law" because the Tenth Circuit does not allow as-applied challenges to the felon-dispossession statutes.[25] Judgment dismissing Ms. Vincent's claim was entered October 5, 2021.[26] This appeal timely followed.

On November 4, 2021, Ms. Vincent filed a motion to abate appellate proceedings until the Supreme Court issued its decision in *New York Pistol & Rifle Association v. Bruen,* 213 L. Ed. 2d 387, 142 S. Ct. 2111, 2134 (2022), which motion was granted. The Supreme Court decided *Bruen* on June 23, 2022. *Bruen*

[20] Aplt. App. Vol. 1 at 8–24.
[21] Aplt. App. Vol. 1 at 25–37.
[22] Aplt. App. Vol. 1 at 38–81.
[23] Aplt. App. Vol. 1 at 110–15.
[24] Aplt. App. Vol. 1 at 111.
[25] Aplt. App. Vol. 1 at 114.
[26] Aplt. App. Vol. 1 at 116.

is a landmark decision that dispenses with balancing tests and requires the Government to justify any contemporary firearm ban with a valid historical analog.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss for failure to state a claim.[27] In reviewing such a dismissal, "all well-pleaded allegations in the complaint must be accepted as true and viewed 'in the light most favorable to the plaintiff.'"[28]

SUMMARY OF ARGUMENT

The Second Amendment codified an individual and pre-existing right to bear firearms, which the Supreme Court has recognized protects a United States citizen's right to keep firearms in their home and to carry firearms in public. That individual, fundamental right can be subject to restriction by way of legitimate government regulation. However, as the Supreme Court clarified in *Bruen*, any such regulation must be "consistent with the Nation's historical tradition of firearm regulation."[29] The government bears the burden of demonstrating that the regulation meets that standard and must "affirmatively prove that its firearms

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[27] *See Sinclair Wyoming Refining Company v. A&B Builders, Ltd.*, 989 F.3d 747, 765 (10th Cir. 2021).
[28] *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021) (quoting *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007)).
[29] *Bruen*, 142 S. Ct. at 2130.

regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[30]

The government cannot meet that burden with regard to the felon dispossession laws set forth in § 922(g)(1) and § 76-10-503(3)(a) with regard to a non-violent, fully reformed, law-abiding citizen like Ms. Vincent. There are no federal or state statutes from the time of the Founding or the ratification of the Fourteenth Amendment categorically disarming citizens convicted of felonies and no laws disarming those convicted of financial offenses, whether minor or major. Colonial law explicitly prevented creditors from seizing the arms of a judgment debtor and allowed for the restoration of arms to those who had been temporarily dispossessed as a result of their participation in armed insurrection.

Although limitation of firearm possession and usage was permitted against those deemed to pose a danger to society or convicted of violent crimes, lifetime bans on firearm possession and use by non-violent individuals who had been convicted of any felony did not exist before World War I. The change to the Federal Firearms Act from firearm dispossession of those convicted of a "crime of violence" to those convicted of a "crime punishable by imprisonment for a term exceeding one year" did not occur until 1961. Prior to that time there was general animosity toward legislative attempts, both state and federal, to disarm citizens.

[30] *Id.* at 2127.

Ms. Vincent is a law-abiding citizen of the United States who made a serious mistake in attempting to pass a bad check in 2007. She has paid her debt to society and is fully reformed. She has dedicated her life and work to helping others, including the development and implementation of humane drug and criminal justice policies. Ms. Vincent seeks to exercise her fundamental, individual right as a citizen of the United States to possess a firearm for the purpose of protecting her home and family. This right is not a "second class right" [31] and should not be treated as such.

The government cannot meet its burden to justify the lifetime firearm bans set forth in § 922(g)(1) and § 76-10-503(3)(a) as applied to a non-violent, reformed, law-abiding citizen who was convicted of a minor financial crime of attempting to pass a false check worth less than $500. Following *Bruen*, the statutes are unconstitutional as applied to Ms. Vincent.

ARGUMENT

I. Ms. Vincent's Right to Possess a Firearm is Protected by the Text of the Second Amendment

In *District of Columbia v. Heller*, the Supreme Court explained that the Second Amendment codified the individual and pre-existing right to bear arms.[32] The Founders believed the individual right to carry arms was a component of the

[31] *Bruen*, 142 S. Ct. at 2156.
[32] *Heller*, 554 U.S. at 592.

natural right of self-defense.[33] Blackstone, whose writings exemplify the contemporary understanding, described the right to possess arms as part of "the natural right of resistance and self-preservation."[34] "By the time of the founding, the right to have arms had become fundamental for English subjects."[35]

As the Court in *Heller* recognized, "the Second Amendment right is exercised individually and belongs to all Americans."[36] Ms. Vincent is "part of 'the people' whom the Second Amendment protects."[37] Therefore Ms. Vincent's Second Amendment rights include the right to keep a firearm in the home[38] and also to carry a firearm in public,[39] and the district court erred in dismissing Ms. Vincent's claim that § 922(g)(1) and § 76-10-503(3)(a) unconstitutionally deprive her of her Second Amendment rights.[40]

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[33] *Heller*, 554 U.S. 570 at 584–85. *See also Kanter v. Barr*, 919 F.3d 437, 464 (7th. Cir. 2019) (Barrett, J., dissenting) ("The Second Amendment confers an individual right, intimately connected with the natural right of self-defense ….").
[34] *Heller*, 554 U.S. at 594.
[35] *Heller*, 554 U.S. at 593.
[36] *Heller*, 554 U.S. at 581. *See also Kanter*, 919 F.3d at 435 (Explaining felons are within the scope of the Second Amendment, "the question is whether the government has the power to disable the exercise of a right that they otherwise possess, rather than whether they possess the right at all").
[37] *Bruen*, 142 S. Ct. at 2134.
[38] *See Heller*, 554 U.S. at 635.
[39] *See Bruen*, 142 S. Ct. at 2122 ("[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.").
[40] Aplt. App. Vol. 1 at 116.

After *Bruen*, the only question in this case is whether the lifetime removal of Ms. Vincent's Second Amendment rights is consistent with the Nation's history of firearm regulation.

II. The Statutes Are Overbroad and Inconsistent with the Nation's Historical Tradition of Firearm Regulation

A. The Government Bears the Burden of Showing that the Restriction on Ms. Vincent's Second Amendment Rights is Part of the Historical Tradition

In *Bruen*, the Supreme Court established the test to evaluate Second Amendment challenges:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that an individual's conduct falls outside the Second Amendment's "unqualified command."[41]

The burden is heavy. The "government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[42]

[41] *Bruen*, 142 S. Ct. at 2129–30 (quoting *Konigsberg v. State Bar of Cal.*, 336 U.S. 36, 50 n.10 (1961)).
[42] *Id.* at 2127.

B. History and Tradition Permit a Lifetime Ban for Violent or Dangerous Conduct Only

The historical record establishes that when the People agreed to ratify the Second Amendment, there was no federal or state statute categorically disarming all felons. There was no federal or state statute disarming those convicted of financial offenses, minor or major. "The best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing—or explicitly authorizing the legislature to impose—such a ban. *But at least this far, scholars have not been able to identify any such laws*."[43]

Instead, history shows the Founding generation was only concerned with the possession of firearms by dangerous persons. There are numerous examples of laws governing the carrying of arms in a threatening manner. A 1736 Virginia statute authorized constables to "take away Arms from such who ride, or go offensively armed, in Terror of the People."[44] In the Massachusetts ratifying convention, Samuel Adams proposed the following language: "And that the said Constitution be never construed to authorize Congress to … prevent the people of

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[43] *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting) (emphasis added). *See also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J. LAW PUBLIC POLICY 695, 708 (2009) ("[B]ans on convicts possessing firearms were unknown before World War I.").

[44] GEORGE WEBB, THE OFFICE OF AUTHORITY OF A JUSTICE OF THE PEACE, 92–93 (1736).

the United States, *who are peaceable citizens*, from keeping their own arms."[45] The understanding and definition of "peaceable" at the time of the founding was not the same as law-abiding. Peaceable meant: "1. Free from war; free from tumult. 2. Quiet. Undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent."[46] Similarly, a minority in the Pennsylvania convention proposed:

> "That the people have a right to bear arms for the defense of themselves and their own State or the United States, or for the purposes of killing game; and no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals*."[47]

This proposal is correctly read as limited to individuals posing a danger to the public.[48]

The debates from the Massachusetts and Pennsylvania ratifying conventions were considered "highly influential" by the Supreme Court in *Heller*.[49] The historical record reveals "the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses."[50] Thus, "the best

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[45] *See Kanter,* 919 F.3d at 454 (Barrett, J., dissenting) (citing 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675, 681 (1971)).
[46] Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 266 (2020) (citing 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773)).
[47] *Kanter*, 919 F.3d at 455 (Barrett, J., dissenting).
[48] *Id.* at 456 (Barrett, J., dissenting).
[49] *Heller*, 554 U.S. at 604.
[50] *Binderup v. Attorney Gen. United States*, 836 F.3d 336, 368 (3d. Cir. 2016) (en banc) (Hardiman, J. concurring).

evidence we have indicates that the right to keep and bear arms was understood to exclude those who presented a danger to the public."[51]

C. There Is No Historical Basis to Permanently Disarm a Woman Convicted of a Minor Financial Offense

Adhering to *Bruen*, this Court must determine whether the lifetime firearms ban resulting from the crime for which Ms. Vincent was convicted—fraud for passing a $498.12 false check—finds support in the Nation's history and traditions of firearm regulation. *Bruen* provided guidance on how to determine whether a given modern law is consistent with history and tradition:

> [W]hen the challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.[52]

Applying this standard here, it is significant that in the founding era those convicted of fraud and financial crimes were not disarmed. Fraud in all its forms is as old as human society and was an offense well-known to the founders and to the Reconstruction Congress.[53] Yet the Founders and the Reconstruction Congress did not strip away Second Amendment rights from financial offenders.

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[51] *Id.*

[52] *Bruen*, 142 S. Ct. at 2131.

[53] *See id.* ("Accordingly, after considering 'founding-era precedent,' including 'various restrictive laws in the colonial period,' and finding that none was analogous to the District's ban, *Heller* concluded that the handgun ban was unconstitutional.").

Under the first federal criminal code, the Crimes Act of 1790, the punishment for larceny was corporal: 39 stripes.[54] The Crimes Act of 1790 did not include as a punishment for theft any limit on the right to possess and bear arms. The Founders who enacted the Judiciary Act of 1789 and the Crimes Act of 1790 could have enacted legislation to permanently disarm persons convicted of theft or fraud if they believed that the right to keep and bear arms was so easily defeasible. That they did not is compelling evidence that a person convicted of fraud retains the fundamental right of self-defense protected by the Second Amendment.

Like the federal criminal code, state criminal codes in the founding era did not disarm persons convicted of fraud-like offenses. The following table sets forth analogous statutes in the Thirteen Colonies, and shows the Colonies did not disarm offenders like Ms. Vincent:

STATE/YEAR	LAW	PUNISHMENT	DISARMED?
Connecticut 1784[55]	Law against "utter[ing], vend[ing] or pass[ing] any Bills or Notes …, which either have been, or … shall be struck, emitted or put out to be used … on the Fund or Credit" of any private person or company	Forfeit double the value of the bill, note, or currency: half to go to the injured party and half to go to the town treasury	No

[54] 1 Stat. 112; *U.S. v. Maloney*, 607 F.2d 222, 230 n. 13 (9th Cir. 1979).
[55] An Act to prevent counterfeiting Bills of Credit, Coins or Currencies, passing the same, and emitting and passing Bills on private Credit; and to prevent Injustice by passing counterfeit Bills, *in* ACTS AND LAWS OF THE STATE OF CONNECTICUT IN AMERICA 26 (1784).

STATE/YEAR	LAW	PUNISHMENT	DISARMED?
Delaware 1796[56]	Law against knowingly "forging or counterfeiting, or uttering, passing or attempting to utter or pass, any check or order on the Cashier" of the Bank of Delaware	Whipped at the public whipping post on the bare back with 39 lashes, left in the pillory for one hour, have the soft parts of the ears cut off, and pay double the amount of the bill or note forged[57]	No
Georgia 1817[58]	Laws prohibiting (a) making, signing, or printing a counterfeit bank note; (b) altering a genuine note, check, or draft; (c) knowingly passing or tendering in payment a counterfeit or altered note, or (d) possessing such a note with the intention to	For violations (a)–(c): Imprisonment in the penitentiary at hard labor or in solitude for up to 10 years For violation (d): Imprisonment at hard labor in the penitentiary for up to 15 years	No

[56] An Act to incorporate a bank in the Borough of Wilmington, in this State, Ch. XCVI(c) § 8, *in* LAWS OF THE STATE OF DELAWARE FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED, TO THE EIGHTEENTH DAY OF AUGUST, ONE THOUSAND SEVEN HUNDRED AND NINETY-SEVEN 1238 (1797).

[57] An Act for preventing and punishing the counterfeiting of the common seal, bank bills and bank notes of the President, Directors and Company of the Bank of North America, and for other purposes therein mentioned, Ch. XCVI(b) § 1, *in* LAWS OF THE STATE OF DELAWARE, *supra* note 56, at 773–74.

[58] DIGEST OF THE LAWS OF THE STATE OF GEORGIA §§ XLIX–LII, 357–58 (Oliver H. Prince compiler, 1822). Earlier laws in Georgia addressing the knowing passing of forged or counterfeit notes or bills carried the death penalty. *See* COMPILATION OF THE LAWS OF THE STATE OF GEORGIA, PASSED BY THE LEGISLATURE SINCE THE POLITICAL YEAR 1800, TO THE YEAR 1810, INCLUSIVE No. 492 § 9, 595 (Augustin Smith Clayton compiler, 1812).

	fraudulently pass the same		
STATE/YEAR	**LAW**	**PUNISHMENT**	**DISARMED?**
Maryland 1799[59]	Law prohibiting the altering, forging, or counterfeiting of bills of exchange, or drafts for the payment of money with intent to defraud	Punished according to the discretion of the court, but could not "extend to death, or more than 7 years servitude"	No
Massachusetts 1805[60]	Law prohibiting the knowing "utter[ing] or tender[ing] in payment as true" an altered, forged, or counterfeit bank note or promissory note with the intent to defraud	Solitary imprisonment for up to thirty days and confinement afterwards to hard labor up to three years, or a fine of up to $1000[61]	No
New Hampshire 1805[62]	Law prohibiting "wittingly and deceitfully" forging, uttering, or publishing as true of a promissory note, bill of exchange, or request for the	Sit in the pillory, imprisonment of up to three years, and/or a fine of up to £500	No

[59] An act for the more effectual preventing of forgery, and to make it felony to steal bonds, notes or other securities, for the payment of money, §§ 1-2, *in* THOMAS HERTY, DIGEST OF THE LAWS OF MARYLAND. BEING A COMPLETE SYSTEM (ALPHABETICALLY ARRANGED) OF ALL THE PUBLIC ACTS OF ASSEMBLY, NOW IN FORCE AND OF GENERAL USE. FROM THE FIRST SETTLEMENT OF THE STATE, TO THE END OF NOVEMBER SESSION, 1803, INCLUSIVE 51–52 (1804).

[60] An Act against Forgery and Counterfeiting, § 3, *in* LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, WITH THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA, AND OF THE COMMONWEALTH, PREFIXED 278 (1780–1807).

[61] A repeat offender would be punished by solitary imprisonment of up to one year and hard labor for a terms of between two and ten years. *Id.*

[62] An Act for punishment of certain crimes, *in* CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE; TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES 269 (1805).

	payment with the intention to defraud		
STATE/YEAR	**LAW**	**PUNISHMENT**	**DISARMED?**
New Jersey 1796[63]	Law prohibiting the making, altering, forging, or counterfeiting of any bank bill, check, draft, or bill of exchange, and the knowing "utter[ing] or publish[ing] as true" a false version of such a document with intent to injure or defraud	Guilty of high misdemeanor and punished by fine and/or solitary imprisonment at hard labor for up to 10 years	No
New York 1813[64]	Law prohibiting the making, altering, or forging or publishing as true of a false bill of exchange or promissory note for payment of money with the intent to defraud	Imprisonment for life in state prison or for a term determined at the discretion of the court[65]	No
North Carolina 1801[66]	Law prohibiting the forging or presenting of forged documents, including promissory notes and orders for the	Stand in pillory one hour and receive 39 lashes, up to 6 months in prison, and a fine[67]	No

[63] An Act for the punishment of crimes, § XLII, *in* WILLIAM PATERSON, LAWS OF THE STATE OF NEW-JERSEY 215–16 (1800).
[64] An Act to prevent Forgery and Counterfeiting, Ch. XLIV § 1, *in* WILLIAM PETER VAN NESS ET AL., LAWS OF THE STATE OF NEW-YORK, REVISED AND PASSED AT THE THIRTY-SIXTH SESSION OF THE LEGISLATURE, WITH MARGINAL NOTES AND REFERENCES 404–05 (1813).
[65] An Act declaring the Punishment of certain Crimes, Ch. XXIX, § IV, *in* VAN NESS, *supra* note 64, at 408.
[66] An act to prescribe the punishment for Forgery, in certain cases, Ch. 6 § 1, *in* JAMES IREDELL & FRANCOIS-XAVIER MARTIN, PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH-CAROLINA 173 (1804).
[67] A repeat offender would be subject to the death penalty. *Id.*

	payment of money, with the intent to defraud		
STATE/YEAR	**LAW**	**PUNISHMENT**	**DISARMED?**
Pennsylvania 1822[68]	Law prohibiting the signing, altering, publishing, or passing a counterfeit bank note or altering such a note or bill with intent to defraud	Imprisonment at hard labor for up to 10 years[69]	No
Rhode Island 1844[70]	Laws prohibiting the "making, forging, counterfeiting, or … altering" of a false bank note and the "uttering, publishing, passing, or tendering in payment as true" any such note	Imprisonment of between 2 and 10 years	No
South Carolina 1856[71]	Law prohibiting the issuing, uttering, or publishing of paper resembling a bank note	Fine and/or imprisonment at the discretion of the court	No

[68] An Act to extend the charter of the Bank of the Northern Liberties in the county of Philadelphia, Ch. 5387 § 5 art. XXIII, *in* LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED 129 (1842).

[69] In 1829 the punishment was changed to "solitary confinement at labour for a period not less than one nor more than seven years." *Id.*

[70] An Act Concerning Crime and Punishment, §§ 68–69, *in* PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS, AS REVISED BY A COMMITTEE, AND FINALLY ENACTED BY THE GENERAL ASSEMBLY AT THE SESSION IN JANUARY 1844, 389–90 (1844).

[71] Of Forgery and Offenses Against the Currency, Ch. CXXX § 2, *in* REVISED STATUTES OF THE STATE OF SOUTH CAROLINA 722–23 (1873). Earlier laws in South Carolina addressing the knowing passing of forged or counterfeit notes or bills carried the death penalty. *See* An Act to prevent the Forging, and uttering, knowing the same to be Forged, certain instruments in writing, therein mentioned, No. 1757 §2, *in* STATUTES AT LARGE OF SOUTH CAROLINA 398 (Thomas Cooper & David James McCord eds., 1836–1873).

STATE/YEAR	LAW	PUNISHMENT	DISARMED?
Virginia 1819[72]	Law prohibiting the making, forging, altering, or knowingly uttering or publishing as true post notes, checks, or orders on a bank	Imprisonment in public jail and penitentiary for two to ten years	No

In addition to the fact the Colonies did not disarm people convicted of financial offenses, colonial law prevented creditors from seizing the arms of a judgment debtor, who may very well have been a person who committed a fraudulent act. For example, a 1705 Virginia statute forbade arms for militia service "from being impressed upon any account whatsoever, and likewise from being seized or taken by any manner of distress, attachment, or writ of execution."[73] Thus, a person convicted of fraud could not have his militia arms seized by a judgment creditor.

[72] An act, reducing into one, the several acts for punishing persons guilty of certain thefts and forgeries, and the destruction or concealment of wills, Ch. 154 § 3, *in* REVISED CODE OF THE LAWS OF VIRGINIA: BEING A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE; WITH A GENERAL INDEX 579 (1819). Earlier laws in Virginia addressing the knowing passing of forged or counterfeit notes or bills carried the death penalty. *See* An Act reducing into one, the several Acts for punishing Persons guilty of certain Thefts and Forgeries, Ch. CXXXIII § 2, *in* COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE 249 (1803).

[73] Greenlee, *supra* note 46, at 283.

The historical record proves the People who ratified the Second Amendment did not intend that a person convicted of a minor financial offense could forever lose the natural right to keep and bear arms in self-defense. The complete absence of founding era legislation disarming persons convicted of fraud proves there is no historical basis justifying the all-encompassing ban on Ms. Vincent's right to possess a firearm in self-defense. Because a person like Ms. Vincent would never have been stripped of her right of self-defense in the founding era or immediately after the Civil War, the Government cannot meet its burden under *Bruen*.

D. Lifetime Bans Did Not Exist Until the Twentieth Century

Legislation that strips all felons of the right to possess arms is exclusively a twentieth century phenomenon. "[O]ne can with a good degree of confidence say that bans on convicts possessing weapons were unknown before World War I."[74] Legislation from the early twentieth century applied only to those convicted of violent crimes.[75] It was not until 1961, when the phrase "crime of violence" in the Federal Firearms Act was replaced with the term "crime punishable by

[74] Marshall, *supra* note 43, at 708.
[75] Marshall, *supra* note 43, at 699, 701.

imprisonment for a term exceeding one year,"[76] that non-violent offenses resulted in the loss of fundamental Second Amendment rights.

In 1961, Congress expanded the reach of dispossession laws from those violent offenses for which dispossession is grounded in history to any offense punishable by imprisonment of more than one year. Now, the fundamental protections of the Second Amendment are tied to the creativity and wisdom, or lack thereof, of the 50 state legislatures in setting terms of punishment for myriad non-violent offenses. In Utah for example, it is a felony to operate a recording device in a movie theater two times.[77] A comic book obsessive intent on making a personal bootleg collection of Marvel movies may be an eccentric nuisance, but the public has no legitimate interest in banning this person from exercising his fundamental rights to self-defense for the rest of his or her life. West Virginia punishes a three-time shoplifter with a felony, but a person who steals Big Gulps from 7-11 three times does not pose a genuine threat to public safety that overrides the fundamental right of self-defense enshrined in the Second Amendment.[78]

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[76] Federal Firearms Act of 1961, Pub. L. No. 87-342, 75 Stat. 757.
[77] *See* Utah Code Ann. § 13-10b-201(2)(b).
[78] *See* Greenlee, *supra* note 46, at 269 (citing W. Va. Code Ann. § 61-3A-3(c) (2020)).

There is no historical justification for disarming persons convicted of felonies of this nature.

To the contrary, courts have historically shown an animosity to legislative attempts to disarm citizens. In 1878, ten years after the Fourteenth Amendment was ratified, the Court of Appeals of Texas held unconstitutional a statute that required a person convicted of unlawfully carrying arms to forfeit the arms to the state. [79] The court stated:

> We believe that portion of the act which provides that, in case of conviction, the defendant shall forfeit to the county the weapon or weapons so found on or about his person is not within the scope of legislative authority. The Legislature has the power by law to regulate the wearing of arms, with a view to prevent crime, but it has not the power to enact a law the violation of which will work a forfeiture of defendant's arms. *While it has the power to regulate the wearing of arms, it has not the power by legislation to take a citizen's arms away from him*. One of his most sacred rights is that of having arms for his own defence and that of the State. This right is one of the surest safeguards of liberty and self-preservation.[80]

This 1878 Texas decision reveals the contemporary understanding of the sacrosanct nature of the right to bear arms. Nobody believed the fundamental right

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[79] 2 GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS Art. 6512, p. 1322 (1875), available at https://lrl.texas.gov/collections/paschal.cfm ("Any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slungshot, sword-cane, spear, brass-knuckles. bowie-knife, or any other kind of knife manufactured or sold for the purpose of offense or defense, unless he has reasonable grounds for fearing an unlawful attack on his person … shall forfeit to the county the weapon or weapons so found on or about his person…").

[80] *Jennings v. State*, 5 Tex. App. 298, 300–301 (Tex. Ct. App. 1878) (emphasis added). *See also*, Marshall, *supra* note 43, at 710–11.

of self-preservation enshrined in the Bill of Rights was subject to the whims of legislatures until the twentieth century. Instead of supporting Congress's 1961 blunderbuss ban, the historical record shows that legislatures "can take the right to bear arms away from a category of people that it deems dangerous" and they may not disarm people who do not threaten public safety.[81]

The historical record controls the outcome of this case. The record establishes Ms. Vincent is not dangerous. She has not been convicted of any violent offense. Ms. Vincent is a successful woman and a reputable and peaceable citizen who desires a firearm for self-protection. She has acknowledged her error, has paid her debt, and has proven through hard work that she is a valued citizen of Utah and the United States. She falls well outside the narrow historical justification that allows legislatures to take away her right to keep and bear arms.

E. The Nation's History and Tradition Envisions Restoration of Firearm Rights

Under § 922(g)(1) and § 76-10-503(3)(a), Ms. Vincent may not possess a firearm for the rest of her life. Although it seems commonplace under current law, the notion that a citizen may forever lose a Constitutional right should not be accepted without inquiry. History shows the 1961 lifetime ban is an historical anomaly, at odds with longstanding tradition. Not only is there no evidence of any

[81] *Kanter*, 919 F.3d at 464 (Barrett, J., dissenting). *See also* Greenlee, *supra* note 46, at 261–265.

lifetime ban in the founding era, there is evidence of previously disarmed persons regaining the right to possess arms.

Anne Hutchinson was a puritan in the Massachusetts Bay Colony who became embroiled in a religious controversy. Her supporters were disarmed. The very law that disarmed her supporters contained a provision allowing gun rights to be restored.[82] Shays' Rebellion was an armed uprising in Massachusetts in 1786, in which "[a]rmed bands attacked courthouses, the federal arsenal in Springfield, and other government properties, ultimately resulting in a military confrontation with a Massachusetts militia on February 2, 1787."[83] The armed insurrectionists were deprived of their right to possess arms for only three years.[84]

Compared to armed insurrectionists who had their rights restored after only three years, Ms. Vincent, who has never threatened public safety, suffers a lifetime disability. Ms. Vincent's lifetime ban finds no corollary in the Nation's history of

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[82] 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 211–12 (Nathaniel B. Shurtleff ed. 1853) ("It was ordered, that if any that are to bee disarmed acknowledge their siun in subscribing the seditious libell, or do not justify it, but acknowledg it evill to two magistrates, they shalbee thereby freed from delivering in their armes according to the former order."), https://www.sec.state.ma.us/arc/arcdigitalrecords/mbcolony.htm. *See also*, Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW AND CONTEMPORARY PROBLEMS 55, 72 (2017); Greenlee, *supra* note 46, at 263, 268.

[83] Greenlee, *supra* note 46, at 268.

[84] *Id.* at 269.

firearm regulation. The lifetime ban is excessive, unfair, and offensive to the fundamental rights protected by the Second Amendment.

The Supreme Court has instructed courts that the Second Amendment is not a "second class right."[85] We don't impose a lifetime ban on the exercise of Free Speech, simply because someone has abused speech rights in committing wire or mail fraud. We don't impose a lifetime ban on the Free Exercise of religion, simply because someone has committed a serious crime under the throes of religious conviction. We don't subject someone's person or property to a lifetime of warrantless searches simply because a prior search located contraband. How bizarre then that these statutes permanently remove Constitutional rights from a woman who has never abused her right to possess a firearm, who has never posed the slightest threat to public safety, and who is now a public servant providing important benefits to the public as a social worker. Ms. Vincent has redeemed herself and is entitled to regain full admission to the fold. The lifetime ban is not supported by the Nation's history. After *Bruen*, the ban cannot stand.

CONCLUSION

The Court should declare 18 U.S.C. §922(g)(1) and Utah Code Ann. § 76-10-503(3)(a) violate the Second Amendment, as applied to Ms. Vincent.

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[85] *See Bruen*, 142 S. Ct. at 2156 (citing *McDonald v. Chicago*, 561 U.S. 742, 780 (2010)).

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The Appellant requests oral argument in this matter so that counsel may address the Court's questions, if any, regarding the record below and the issues of law in this appeal.

DATED: September 29, 2022

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,253 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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DATED: September 29, 2022

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I hereby certify that with respect to the foregoing:

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2022, I electronically filed the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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