CASE NO. 23-1843

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DIONTAI MOORE,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Pennsylvania
Hon. Robert J. Colville, J., Presiding
District Court Case No.: 2-21-cr-00121-001

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF REHEARING EN BANC

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Dated: September 23, 2024

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Among other rights the Institute seeks to protect is the right of armed self-defense, and in that regard the Institute has represented parties and appeared as amicus in several cases involving this fundamental right. *See*, *e.g.*, *Marszalek v. Kelley*, No. 20-CV-4270, 2022 WL 225882 (N.D. Ill. Jan. 26, 2022); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Korwin v. Cotton*, 323 P.3d 1200 (Ariz. 2014). Institute scholars have also published important research on the right to possess firearms. *See, e.g.*, TIMOTHY SANDEFUR, THE PERMISSION SOCIETY ch. 7 (2016).

[1] Amicus affirms that no publicly held corporation owns stock in them. No counsel for either party authored this brief in whole or in part. And no party, party's counsel, person, or other entity contributed money to preparing this brief.

INTRODUCTION

The panel's reliance on limited historical provisions to support the universal disarmament of people on supervised release is belied by an aggressive, decades-long trend in American politics: overcriminalization.[2] Over the last fifty years, a tidal wave of new criminal laws has swept the country, drawing bipartisan criticism and alarm. Tens of thousands of offenses—many of them *malum prohibitum* regulatory crimes—have been added to the books since § 922(g)(1)'s passage. Many of these offenses are neither particularly serious nor indicative of danger with a firearm. And there is no mechanism for limiting the conduct felonies can cover; legislatures have virtually unlimited power to define crimes and punishments. Overcriminalization therefore bears out a commonly held fear about the government's bid for "extreme deference": that instead of tethering the Second Amendment to the dangers motivating our regulatory traditions, the government would "give[] legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Range v. Att'y Gen.*, 69 F.4th 96, 102–03 (3d Cir. 2023), *cert. granted, judgment vacated sub nom. Garland v. Range*, No. 23-374, 144 S. Ct. 2706 (U.S. July 2, 2024) (quoting *Folajtar v. Att'y Gen.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting)).

[2] The panel relies on the total forfeiture of *all* property imposed on robbers, burglars, and sex offenders. (Op. at 7–9.) It cites a provision pressing counterfeiters into unpaid maritime service for up to seven years. (Op. at 9.) It points to two measures temporarily disarming armed insurgents and requiring forfeiture of those guns used to intimidate courts. (Op. at 10–11.) The comparability of these laws to § 922(g)(1) is also questionable given their sweeping punishments and the connection of gun-specific provisions to anti-government violence.

Exceptions to individual rights do not move with the political winds. When it comes to individual rights, history—not legislatures—determines exceptions' existence and scope. That means that courts may not simply assume that the Second Amendment will expand or contract to fit any crime labeled a felony. Rather, courts must confront the reality of what modern felonies look like, and compare that reality to the government's proposed historical analogues. Applying history's lessons to today's sprawling criminal codes, the Court can only conclude that the government has not met its burden to square the universal disarmament of people on supervised release with our regulatory traditions.

ARGUMENT

In recent decades, actors across the political spectrum have converged on a disquieting conclusion: Federal law exhibits a "deep[ ] pathology" of "overcriminalization and excessive punishment." *Yates v. United States*, 574 U.S. 528, 569–70 (2015) (Kagan, J., dissenting). Year after year, "Congress . . . puts forth an ever-increasing volume of laws in general, and of criminal laws in particular." *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting), *overruled by Johnson v. United States*, 576 U.S. 591 (2015).

It is not just judges who have sounded the alarm. In 2013, the U.S. House of Representatives convened a task force on overcriminalization. *See, e.g.*, *United States v. Valdovinos*, 760 F.3d 322, 339 (4th Cir. 2014) (Davis, J., dissenting). "[G]roups who . . . testified in support of reform include[d] the American Bar Association, the Heritage Foundation, and . . . the Judicial Conference of the United

States and the Sentencing Commission." *Id*. Since then, reports, studies, and op-eds targeting the problem have proliferated. *E.g.*, Tim Lynch, *Overcriminalization*, *in* CATO HANDBOOK FOR POLICYMAKERS 193–199 (8th ed. 2017);[3] *Overcriminalization*, HERITAGE FOUND.;[4] James R. Copland & Rafael Mangual, *Overcriminalizing America*, MANHATTAN INST. (Aug. 8, 2018);[5] Charles G. Koch & Mark V. Holden, *The Overcriminalization of America*, POLITICO (Jan. 7, 2015).[6]

Viewed through the lens of this well-established trend, three major claims about modern felony offenses found in recent government Second Amendment briefing do not withstand scrutiny. First and foremost, the government contends that Congress had the power in 1968 to make a judgment that all existing *and future* offenses punishable by imprisonment exceeding one year are serious crimes indicative of danger. Suppl. Br. of Appellees at 25, Range v. Att'y Gen., 69 F.4th 96 (3d Cir. 2023) (No. 21-2835), ECF No. 119. But the sheer number and variety of modern felonies belie the assertion that felonies are invariably grave or associated with risk.

Federal law perhaps best exemplifies this problem, because agency rulemaking amplifies it by orders of magnitude. Congress has defined by statute at least 4,450 separate federal crimes. *See* HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 202 (2009). A large proportion of

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[3] Available at https://tinyurl.com/5n73bwmy.

[4] Available at https://tinyurl.com/yc89dh98.

[5] Available at https://tinyurl.com/3z5cc56t.

[6] Available at https://tinyurl.com/3vnz9trj.

these offenses post-date § 922(g)(1)'s enactment: "[O]f the federal criminal provisions passed into law during the 132-year period from the end of the Civil War to 1996, fully 40 percent were enacted in the 26 years from 1970 to 1996." Brian W. Walsh & Tiffany M. Joslyn, *Without Intent*: *How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUND. & NAT'L ASS'N CRIM. DEF. LAWS. (2010)[7] (citing CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998)).

Those, however, are just the crimes spelled out in the federal code. Others lurk in regulations, which federal statutes incorporate by reference. "In contemporary America virtually every regulatory scheme, particularly in federal law, includes felony criminal enforcement provisions to add 'teeth' to the costs of noncompliance, covering such diverse areas as environmental safety, securities markets, employment practices, consumer protection, public benefits, and international trade." Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 (1995). Include regulatory crimes in the count, and the estimate of federal crimes balloons to 300,000 potential separate federal crimes. Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 729 (2013). These grounds for criminal liability continue to snowball year by year, as the agencies add between "three thousand to five thousand final rules" annually. *West Virginia v. E.P.A.*, 597 U.S. 697, 741 n.7 (2022) (Gorsuch, J., concurring) (quoting Ronald A. Cass,

[7] Available at https://tinyurl.com/3y9z9ac3.

Rulemaking Then and Now: From Management to Lawmaking, 28 GEO. MASON L. REV. 683, 694 (2021)).

Parallel processes play out in the 50 states. A recent five-state survey reviewed criminal statutes enacted over six-year periods. Copland & Mangual, *supra*, at 7. The study found that, on average, those states enacted 42 new crimes each year. *Id*. at 7. All five states created a substantial number of new felonies during the study period. *Id*. In fact, in Oklahoma, Michigan, and North Carolina, between one-third and one-half of all new criminal laws carried a felony designation. *Id*.; *see also* Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1942 (2014) (finding that North Carolina's General Assembly had enacted 101 new felonies and reclassified 8 misdemeanors as felonies between 2008 and 2013).

As in the federal system, "[m]any state crimes are codified not in penal codes but in other parts of the broader statutory code, in the vast array of agency-created regulation, and even in private licensing-board rules that have de facto criminal effect through 'catchall' statutory delegations of criminal lawmaking power." Copland & Mangual, *supra*, at 7. A majority of new crimes in all five surveyed states fell outside the criminal code, and in three states, the proportion of such crimes exceeded 80%. *Id*.

"[F]elonies include a wide swath of crimes, some of which seem minor." *Range v. Att'y Gen.*, 69 F.4th at 102. The offenses encompassed in § 922(g)(1) "include[] everything from . . . mail fraud, to selling pigs without a license in Massachusetts, redeeming large quantities of out-of-state bottle deposits in Michigan, and countless other state and federal offenses." *Kanter v. Barr*, 919 F.3d

437, 466 (7th Cir. 2019) (Barrett, J., dissenting), *overruled by N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

These observations doubly undermine the suggestion that courts defer to the congressional "judgment" embodied in § 922(g)(1). Suppl. Br. of Appellees, Range v. Att'y Gen., *supra*, at 25. The problem is not just that some felonies are, objectively, neither "serious" nor suggestive of future "risk." *Id*. It is also fanciful to think that the 1968 Congress made a genuine "judgment" to that effect. Felony offenses are so numerous that legislators could not have surveyed them all. And even if they had, the following decades' explosion of criminal laws would make that survey obsolete.

Second, the government claims that there is a sound basis to link even minor felonies to disarmament, because anyone "who commits a felony offense 'has shown manifest disregard for the rights of others.'" *Id*. at 21 (quoting *United States v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004)). But again, that assertion does not match modern realities. Today, one need not disregard others' rights in order to transgress the law.

Once more, this is in part a function of the sheer number of crimes on the books. "There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes." Larkin, Jr., *supra*, at 726. Add to this the complexity of many such laws, and it becomes easy to see how "even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 166 (3d ed. 2001).

Yet, ordinarily, "ignorance of the law is no excuse." *Elonis v. United States*, 575 U.S. 723, 734–35 (2015) (cleaned up). Indeed, the requisite mental state to become a convicted felon can be shockingly low. One bipartisan study undertaken by the Heritage Foundation and the National Association of Criminal Defense Lawyers evaluated a year's worth of federal legislation, which included "446 criminal offenses that did not involve violence, firearms, drugs and drug trafficking, pornography, or immigration violations." Walsh & Joslyn, *supra*, at ix. The analysis revealed that "[o]f these 446 proposed non-violent criminal offenses, 57 percent lacked an adequate mens rea requirement." *Id*. In Senator Orrin Hatch's view, that was no anomaly: "In recent years, Congress and federal agencies have increasingly created crimes with vague or unclear criminal intent requirements or with no criminal intent requirement at all." Press Release, Sen. Mike Lee, Senators Hatch, Lee, Cruz, Perdue, and Paul Introduce Bill to Strengthen Criminal Intent Protections (Oct. 7, 2017).[8]

The mens rea problem intersects with the growth of regulatory malum prohibitum offenses. Such offenses "shift[] [the] ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books." Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the*

[8] Available at https://tinyurl.com/mrysax9k.

Unfathomable "Honest Services Fraud," 2009–2010 CATO SUP. CT. REV. 201, 220 (2010) (cleaned up).

In short, in the age of overcriminalization, criminal liability is not reserved for scofflaws. To the contrary, it is entirely possible for "honest, hardworking Americans [to become] swept up in the criminal justice system for doing things they didn't know were against the law." Press Release, *supra* (quoting Sen. Hatch).

Finally, the government claims that the maximum authorized penalty for any offense is a dispositive indicator of that crime's seriousness and the danger it poses. Again, this simply is not the reality on the ground.

As an initial matter, there is little basis for supposing that a crime's maximum penalty reflects the crime's seriousness in most cases. For instance, growing 50 marijuana plants is punishable by the same maximum sentence under federal law—20 years in prison—as assaulting someone with the intent to commit murder. 18 U.S.C. § 113(a)(1); 21 U.S.C. § 841 (b)(1)(C). When the legislature provides for a range of possible punishments, it stands to reason that it believes the offense's gravity lies on a spectrum as well. Accordingly, "courts . . . [will] generally reserve sentences at or near the statutory maximum for the worst offenders." *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017). Most will receive sentences far below the cap. Indeed, one Bureau of Justice Statistics study found that 3 in 10 convicted felons were not sentenced to prison at all. BUREAU OF JUST. STATS., FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES (Dec. 2009).

Given the scope and variety of criminal laws, the Court simply cannot draw the conclusion that all felonies that result in supervised release can constitutionally

trigger disarmament. The Court must instead conduct that inquiry on an as-applied basis.

CONCLUSION

This Court should reject universal disarmament of people on supervised release and instead conduct a careful as-applied comparison between Mr. Moore's prior offenses and the government's proffered historical comparators.

Respectfully submitted,

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Dated: September 23, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word.

2. This brief also complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by Fed. R. App. P. 29(d), because this brief contains 2,345 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. The text of the electronic version of this brief filed on ECF is identical to the text of the paper copies filed with the Court.

4. The electronic version of this brief filed on ECF was virus-checked using the latest ESET Cyber Security, and no virus was detected.

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Cato Institute

Dated: September 23, 2024

LOCAL RULE 28.3(D) CERTIFICATION

I hereby certify that at least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court.

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Dated: September 23, 2024

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2024 I caused to be filed the foregoing document with the United States Court of Appeals for the Third Circuit, via the CM/ECF system, which will provide notice to all counsel of record.

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Dated: September 23, 2024