

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

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Lyle W. Cayce
Clerk

No. 25-40272

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

RAYMOND ANDREW LUNA,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:23-CR-518-1

Before WILLETT, ENGELHARDT, and DOUGLAS, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

Defendant-Appellee Raymond Luna was indicted under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm. His sole predicate felony is for possession of a controlled substance. The district court dismissed the indictment, holding that § 922(g)(1) violated the Second Amendment as applied to Luna. The Government then moved for reconsideration, arguing, among other things, that the court should consider evidence of Luna's conduct underlying his conviction. Specifically, it averred that the records from his felony conviction, which it provided for the first time, showed that Luna was dangerous and that he not only possessed drugs,

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but was also trafficking them. For example, the police report states that the officers considered the quantity of drugs found on Luna to be “consistent with the sale and distribution of narcotics.” The district court rejected the evidence, however, explaining that “these records were available to the Government prior to the Court’s [dismissal] order and [yet] were not offered” at the time, and it denied the motion for reconsideration.

The Government appeals, arguing that Luna can be convicted under § 922(g)(1) because the facts underlying his felony indicate that he was a drug trafficker. *See United States v. Kimble*, 142 F.4th 308, 318 (5th Cir. 2025) (“Congress can categorically disarm individuals convicted of violent felonies like drug trafficking.”). “The applicable standard of review of the denial of [a] motion to . . . reconsider is dependent on whether the district court considered the materials attached to the . . . motion, which were not previously provided to the court.” *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004). Here, our review is for abuse of discretion because the “district court refuse[d] to consider the materials.” *Id.*; *see also United States v. Jarman*, 847 F.3d 259, 264 (5th Cir. 2017) (“This Court generally reviews the denial of a motion to reconsider for abuse of discretion.” (citation modified)).

Putting aside any potential substantive issues with considering the Government’s proffered evidence, we procedurally cannot do so because the Government failed to argue in its opening brief that the district court abused its discretion in rejecting it—thereby forfeiting any argument that we may look at Luna’s criminal records. *See Smith v. Sch. Bd. of Concordia Par.*, 88 F.4th 588, 594 (5th Cir. 2023) (“A party forfeits an argument by failing to adequately brief the argument in its opening brief on appeal. To be adequate, a brief must address the district court’s analysis and explain how it erred.” (citation modified)).

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The Government avers that we can review the evidence regardless because our review is de novo and we can take judicial notice of the documents. But “ordinarily [we] should not take judicial notice of documents on an appeal which were available before the district court decided the case but nevertheless were not tendered to that court.” *Craig v. Bisignano*, 157 F.4th 773, 774 (5th Cir. 2025) (citation modified). Instead, we are “limited in our consideration to that information properly before the district court at the time of its decision.” *Palasota v. Haggard Clothing Co.*, 499 F.3d 474, 489 n.12 (5th Cir. 2007). The Government does not explain why we should deviate from these rules here.¹

Accordingly, all we are left with from Luna’s predicate offense is the fact that he was convicted of simple possession—which we have already said cannot support a § 922(g)(1) conviction. *United States v. Hembree*, 165 F.4th 909, 915–18 (5th Cir. 2026), *petition for cert. filed*, No. 25-1219 (U.S. Apr. 24, 2026).

The Government argues that *Hembree* does not control because it submitted a new historical analogue not considered in *Hembree*: Founding-era tobacco laws purportedly reflecting that the Government can “severely and indefinitely punish[] knowing participants in illicit marketplaces.” But we’ve rejected that same argument before, and we do so again here. *See United States v. Banuelos*, No. 23-50731, 2026 WL 1195824, at *2 (5th Cir. May 1,

¹ The Government notes that we “may look at the record amassed by the district court and the parties,” *United States v. Clark*, 148 F.4th 785, 790 (5th Cir. 2025) (citation modified), to argue that we can consider the evidence it submitted after the district court dismissed the indictment. But *Clark* is inapposite because the Government there “asserted Clark’s probation status”—the purported “new fact”—“in its response to Clark’s motion to dismiss,” *id.*, whereas here the Government not only failed to timely present the evidence to the district court, it did not even mention the facts it later relied on to argue that Luna was a drug trafficker.

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2026) (per curiam) (“[T]he government’s characterization that these statutes punish illegal *possession* is inaccurate. The statutes criminalize ‘embezzling,’ ‘delivering,’ ‘altering,’ ‘forging,’ and ‘smuggling.’ They do not criminalize the possession of tobacco, even tobacco that was the target of these enumerated acts.”).

Lastly, the Government contends that Luna can be disarmed because he was under indictment for possession of a firearm at the time he was alleged to violate § 922(g)(1). But under our precedents, that fact cannot justify a § 922(g)(1) conviction.² Instead, we consider only whether Luna’s predicate felony supports disarmament. *See, e.g., United States v. Diaz*, 116 F.4th 458, 467 (5th Cir. 2024) (“For the purposes of assessing [a defendant’s] predicate offenses under § 922(g)(1), we may consider prior convictions that are ‘punishable by imprisonment for a term exceeding one year.’” (quoting § 922(g)(1))); *United States v. Contreras*, 125 F.4th 725, 730 (5th Cir. 2025) (noting that, notwithstanding additional criminal offenses, “the only pertinent offense” for § 922(g)(1) purposes is a “felony conviction”); *United States v. Mitchell*, 160 F.4th 169, 187 (5th Cir. 2025) (“Against the government’s request to ‘account [for] [the defendant’s] entire record, which is necessary to properly assess the extent of his violent conduct,’ we reject such an invitation and instead confine our inquiry to [the defendant’s] § 922(g)(3) conviction—the only predicate § 922(g)(1) offense—based on the rule of orderliness.” (first alteration in original)).

² Notably, 18 U.S.C. § 922(n) makes it “unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” We have held that § 922(n) does not violate the Second Amendment. *United States v. Quiroz*, 125 F.4th 713, 725 (5th Cir. 2025). Luna was not charged under that provision.

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Accordingly, the Government's arguments are either foreclosed by *Hembree* or otherwise fail to establish that § 922(g)(1) can be applied to Luna.

AFFIRMED.

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DON R. WILLETT, *Circuit Judge*, concurring:

At common law, only a few grave crimes qualified as “felonies.”¹ Today, after generations of criminal-code expansion,² the label reaches conduct ranging from reading someone else’s email³ to “opening a bottle of ketchup at the supermarket and putting it back on the shelf.”⁴ (Gross, sure, but hardly the “murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny” of the common law.)⁵

The scale seems modern, but the concern is long-standing. JUSTICE ROBERT JACKSON warned nearly a century ago that, “[w]ith the law books filled with a great assortment of crimes,” a prosecutor stands a fair chance of finding “at least a technical violation of some act on the part of almost anyone.”⁶ JUSTICE GORSUCH has described the modern reality more pointedly: criminal laws have “grown so exuberantly and come to cover so

¹ See FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 1 (1846) (listing “murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny”); see also *Lange v. California*, 594 U.S. 295, 311 (2021) (“The felony category [in 1791] was a good deal narrower than now.”).

² See generally NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 105–10 (2024).

³ See Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 719 (2010).

⁴ *Folajtar v. Att’y Gen. of the U.S.*, 980 F.3d 897, 921 (3d Cir. 2020) (BIBAS, J., dissenting).

⁵ WHARTON, *supra*, at 1.

⁶ Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 19 (1940).

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much previously innocent conduct that almost anyone can be arrested for something.”⁷

The numbers bear out the scale of that transformation: “Almost twenty million Americans have felony convictions.”⁸ And for millions whose convictions fall within 18 U.S.C. § 922(g)(1), that status carries a sweeping consequence: possession of a firearm becomes a federal crime punishable by up to fifteen years in prison,⁹ so long as the firearm has crossed state lines.¹⁰

Section 922(g)(1) is no statutory backwater. It is among the most frequently prosecuted crimes in the federal code.¹¹ In Fiscal Year 2021—the most recent year for which the Sentencing Commission publishes § 922(g)(1)-specific data—the federal government obtained 7,454 convictions: nearly one every hour, 24/7/365.¹²

The statute matters especially in this circuit. Two of the five districts with the most § 922(g) convictions—the Northern and Western Districts of

⁷ *Nieves v. Bartlett*, 587 U.S. 391, 412 (2019) (GORSUCH, J., concurring in part and dissenting in part).

⁸ See *United States v. Cockerham*, 162 F.4th 500, 517 (5th Cir. 2025) (HIGGINSON, J., dissenting).

⁹ See 18 U.S.C. § 924(a)(8).

¹⁰ See *United States v. Rawls*, 85 F.3d 240, 243 (5th Cir. 1996) (per curiam).

¹¹ See *Santiago v. Streeval*, 36 F.4th 700, 720 (7th Cir. 2022) (WOOD, J., dissenting) (“Section 922(g) prosecutions occupy a considerable share of federal criminal dockets.”).

¹² See U.S. SENT’G COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (FISCAL YEAR 2021), <https://perma.cc/9MYC-CQBA>. While one might expect the number to decrease in the wake of the Supreme Court’s decision in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), the broader statistics that cover all of § 922(g)—not just paragraph (g)(1)—exhibit no clear downward trend since *Bruen*. See U.S. SENT’G COMM’N, QUICK FACTS: 18 U.S.C. § 922(G) FIREARMS OFFENSES (FISCAL YEAR 2025), <https://perma.cc/HMZ4-DZ47>.

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Texas—sit within our borders.¹³ So § 922(g)(1) appeals arrive here in volume, often carrying serious constitutional questions.¹⁴ That is hardly surprising. The statute sits at the intersection of two constitutional guarantees: Congress may legislate only pursuant to its enumerated powers,¹⁵ and the Second Amendment protects the right to keep and bear arms.¹⁶ Section 922(g)(1) thus regulates—on a vast scale—conduct lying unusually close to the constitutional bone.

With that volume, doctrinal friction was perhaps inevitable. I continue to harbor serious doubts about our precedent upholding § 922(g)(1) as a valid

¹³ See U.S. SENT’G COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM, *supra*; U.S. SENT’G COMM’N, QUICK FACTS: 18 U.S.C. § 922(G) FIREARMS OFFENSES, *supra*.

¹⁴ See, e.g., *United States v. Diaz*, 116 F.4th 458 (5th Cir. 2024); *United States v. Bullock*, 123 F.4th 183 (5th Cir. 2024) (per curiam); *United States v. Contreras*, 125 F.4th 725 (5th Cir. 2025); *United States v. Giglio*, 126 F.4th 1039 (5th Cir. 2025); *United States v. Schnur*, 132 F.4th 863 (5th Cir. 2025); *United States v. Russell*, 136 F.4th 606, 608 n.3 (5th Cir. 2025); *United States v. Betancourt*, 139 F.4th 480 (5th Cir. 2025); *United States v. Reyes*, 141 F.4th 682 (5th Cir. 2025) (per curiam); *United States v. Kimble*, 142 F.4th 308 (5th Cir. 2025); *United States v. Morgan*, 147 F.4th 522 (5th Cir. 2025). Second Amendment and enumerated-powers do not account for all constitutional challenges to § 922(g)(1). For example, we have also considered arguments that § 922(g)(1) violates the Fifth Amendment because it is unconstitutionally vague, see, e.g., *United States v. Branson*, 139 F.4th 475, 477–79 (5th Cir. 2025), or violates equal protection principles, see *United States v. Goody*, 143 F.4th 617, 619 (5th Cir. 2025) (per curiam).

¹⁵ As I have written before, § 922(g)(1) “rests uneasily alongside a bedrock principle: ‘Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.’” *United States v. Hembree*, 165 F.4th 909, 919 (5th Cir. 2026) (WILLETT, J., concurring) (quoting *United States v. Bonner*, 159 F.4th 338, 340 (5th Cir. 2025) (WILLETT, J., concurring)); see also *United States v. Williamson*, 170 F.4th 435, 437–38 (5th Cir. 2026) (WILLETT, J., concurring).

¹⁶ See *Williamson*, 170 F.4th at 438 n.10 (WILLETT, J., concurring) (“After all, ‘possess firearms’ is simply another way of saying ‘keep arms.’” (cleaned up)).

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exercise of Congress’s commerce power.¹⁷ And I am not alone: at least six active members of this court have similarly questioned whether the Commerce Clause can justify § 922(g)(1).¹⁸ Two others have expressed similar concerns with § 922(o), which bars machinegun possession but lacks § 922(g)’s “in or affecting commerce” element.¹⁹ JUSTICES THOMAS and ALITO—plus several judges on our sister circuits—have voiced similar unease.²⁰

My doubts extend beyond the Commerce Clause. Recently, I have also questioned whether our Second Amendment cases are faithful to the Amendment’s original meaning and to the Supreme Court’s instructions for applying that meaning.²¹ But there is a more immediate problem: our

¹⁷ See *Williamson*, 170 F.4th at 437–38 (WILLETT, J., concurring); *Hembree*, 165 F.4th at 919–20 (WILLETT, J., concurring); *Bonner*, 159 F.4th at 340–43 (WILLETT, J., concurring).

¹⁸ See *Williamson*, 170 F.4th at 437–38 (WILLETT, J., joined by WILSON, J., concurring); *Bonner*, 159 F.4th at 340–43 (WILLETT, J., joined by DUNCAN, J., concurring); *United States v. Seekins*, 52 F.4th 988, 989–92 (5th Cir. 2022) (HO, J., joined by SMITH, J., and ENGELHARDT, J., dissenting from denial of rehearing en banc).

¹⁹ See *United States v. Wilson*, 174 F.4th 474, 474–76 (5th Cir. 2026) (statement of WILLETT, J., joined by ELROD, C.J., and DUNCAN, J., respecting the denial of rehearing en banc); *United States v. Kirk*, 105 F.3d 997, 1005–17 (5th Cir. 1997) (opinion of JONES, J.).

²⁰ See *United States v. Hemani*, 146 S. Ct. 1677, 1694–98 (2026) (THOMAS, J., concurring); *Alderman v. United States*, 131 S. Ct. 700, 700–03 (2011) (THOMAS, J., dissenting from the denial of certiorari); *United States v. Rybar*, 103 F.3d 273, 287–94 (3d Cir. 1996) (ALITO, J., dissenting); see also *Hemani*, 146 S. Ct. at 1696 (THOMAS, J., concurring) (collecting authorities).

²¹ See *Bonner*, 159 F.4th at 343–45 (WILLETT, J., concurring).

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§ 922(g)(1) precedents do not always sit comfortably with one another.²² Other members of this court have noticed the same.²³

We recently granted rehearing en banc in *United States v. Squire*, a § 922(g)(1) case raising many of these questions.²⁴ *Squire* gives the full court a welcome chance to bring some order to this area. But en banc review takes time, and district courts cannot place their dockets on hold while they wait. Unless and until *Squire* changes the law, they must decide today's cases under today's precedent.

* * *

One recurring question has lately ripened into real confusion: May a court look beyond the fact of a qualifying conviction to the conduct underlying it? In *United States v. Diaz*—our foundational modern § 922(g)(1) case—we limited our analysis to a defendant's "prior convictions that are 'punishable by imprisonment for a term exceeding one year.'"²⁵ And in *United States v. Kimble*, we rejected the view (embraced by other circuits) "that courts should 'look beyond' a defendant's predicate conviction 'and assess whether the felon's history or characteristics make him likely to misuse firearms.'"²⁶ Yet a second line of cases, beginning with *United States v. Contreras*, looks not only to the predicate conviction but through it—to the

²² See *Williamson*, 170 F.4th at 438–39 (WILLET, J., concurring).

²³ See, e.g., *United States v. Cordova*, 176 F.4th 381, 383–84 (5th Cir. 2026) (HO, J., concurring in the judgment); *id.* at 384–99 (OLDHAM, J., concurring in the judgment); *Cockerham*, 162 F.4th at 512–18 (HIGGINSON, J., dissenting); *United States v. Mancilla*, 155 F.4th 449, 452–55 (5th Cir. 2025) (ELROD, C.J., concurring); *id.* at 455–56 (GRAVES, J., dissenting); *Kimble*, 142 F.4th at 318–22 (GRAVES, J., concurring in part and in the judgment).

²⁴ 182 F.4th 481 (5th Cir. 2026) (mem.).

²⁵ 116 F.4th at 467 (quoting 18 U.S.C. § 922(g)(1)).

²⁶ 142 F.4th at 318 (quoting *Pitsilides v. Barr*, 128 F.4th 203, 211–12 (3d Cir. 2025)).

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facts *underlying* that conviction.²⁷ As we put the point in *United States v. Morgan*, “account[s] of [the defendant’s] conduct underlying the predicate offense [are] both permissible and revealing.”²⁸

The two lines seem to point in opposite directions.²⁹ If *Diaz* and *Kimble* confine the inquiry to qualifying predicate convictions, how can *Contreras* and *Morgan* permit courts to look behind those convictions to conduct the statute itself does not require? The tension is no academic curiosity; it has already fractured at least one recent panel.³⁰ Today’s majority rightly sidesteps the issue because the Government did not properly present evidence of the facts underlying Luna’s drug-possession conviction.

District courts, however, still need an answer. To my mind, the conflict is more apparent than real. *Diaz/Kimble* and *Contreras/Morgan* can be reconciled because they answer different questions: the first line of cases determines which convictions may enter the analysis, and the second determines what a court may examine about a qualifying conviction once it

²⁷ See *Contreras*, 125 F.4th at 733 (upholding § 922(g)(1) conviction because the defendant was intoxicated at the time of his predicate conviction for possessing a firearm while an unlawful user of a controlled substance); *Betancourt*, 139 F.4th at 483–84 (“The details of Betancourt’s aggravated assault convictions show that his Second Amendment challenge must fail.”); *Morgan*, 147 F.4th at 528 (“Regardless of the Government’s mention of misdemeanors and other alleged conduct that did not result in qualifying convictions, its account of Morgan’s conduct underlying the predicate offense is both permissible and revealing.”); *United States v. Simpson*, 152 F.4th 611, 614 (5th Cir. 2025) (“Our review of the defendant’s conduct underlying the predicate offense is permissible.” (cleaned up)).

²⁸ 147 F.4th at 528.

²⁹ See, e.g., *Mancilla*, 155 F.4th at 455–56 (GRAVES, J., dissenting); *United States v. Debrow*, 183 F.4th 402, 405–06 (5th Cir. 2026) (opinion of HIGGINSON, J.); *United States v. Banuelos*, No. 23-50731, 2026 WL 1195824, at *1 n.1 (5th Cir. May 1, 2026) (per curiam).

³⁰ See *Debrow*, 183 F.4th at 402 n.1 (opinion of HIGGINSON, J.)

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does. That is the narrowest reconciliation I can divine—and, until the Supreme Court or our en banc court says otherwise, the one our rule of orderliness requires.

I. THE TWO LINES OF CASES ANSWER DIFFERENT QUESTIONS

When “two previous holdings or lines of precedent conflict, the earlier opinion controls.”³¹ That “rule of orderliness” prevents a later panel from silently overruling an earlier one.³² But the rule cuts both ways: Before a third panel discards the later decision, it must be sure the two truly are “irreconcilable.”³³ Otherwise the third panel would itself be overruling precedent. We therefore may not choose between the *Diaz/Kimble* line and *Contreras/Morgan* line just because some have urged us to do so.³⁴ Choosing between them is only permissible if the two cannot fairly be harmonized.

In my view, they can be. As explained below, the cases answer two different questions: which prior convictions enter the analysis, and what may a court consider about a qualifying conviction once it does enter the analysis. The Armed Career Criminal Act (ACCA) makes the distinction easy to see. ACCA and our § 922(g)(1) cases pose the same two questions, even though they answer the second question differently.

³¹ *United States v. Broussard*, 669 F.3d 537, 555 (5th Cir. 2012) (quoting *United States v. Wheeler*, 322 F.3d 823, 828 n.1 (5th Cir. 2003)).

³² *See In re Ultra Petroleum Corp.*, 28 F.4th 629, 639 (5th Cir. 2022) (“It is well-established in this circuit that one panel of this Court may not overrule another.” (quoting *United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014))).

³³ *Mullis v. Lumpkin*, 47 F.4th 380, 391 (5th Cir. 2022) (quoting *Thompson v. Dall. City Atty’s Off.*, 913 F.3d 464, 468 (5th Cir. 2019)).

³⁴ *See Debrow*, 183 F.4th at 405–06 (opinion of HIGGINSON, J.) (declining to apply *Contreras/Morgan* because they are inconsistent with *Diaz/Kimble*); *United States v. Allred*, 182 F.4th 448, 456 (5th Cir. 2026) (GRAVES, J., concurring in the judgment) (arguing that *Kimble* is not precedent under the rule of orderliness).

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ACCA imposes a fifteen-year mandatory minimum for § 922(g)(1) defendants with “three previous convictions” for “violent felon[ies]” or “serious drug offense[s].”³⁵ Applying it begins with a gatekeeping question: does this entry on the rap sheet count as a “previous conviction”? Convictions that postdate the charged possession do not.³⁶ Neither do arrests, indictments, or other incidents that never produced a conviction.

Passing that gate is only step one. “Not all convictions trigger the enhancement[.]”³⁷ The prior conviction must also be the right kind: “a ‘violent felony’ or a ‘serious drug offense,’” terms ACCA defines in detail.³⁸

That second step presents a methodological question: when applying those statutory definitions, should courts consider “the facts underlying” the previous convictions or focus solely on “the statutory definitions of the prior offenses”?³⁹ The Supreme Court chose the latter. Under the now-familiar “categorical approach,” courts look “to the elements of the statute of conviction, not to the facts of each defendant’s conduct.”⁴⁰

The structure is the point. Our § 922(g)(1) cases likewise ask two questions. What gets into the analysis? And once a conviction is in, what about it may the court examine?

³⁵ 18 U.S.C. § 924(e)(1).

³⁶ See *United States v. Pressley*, 359 F.3d 347, 349 (4th Cir. 2004).

³⁷ *United States v. Islas-Saucedo*, 903 F.3d 512, 515 n.1 (5th Cir. 2018).

³⁸ *Id.*; see 18 U.S.C. § 924(e)(2)(A), (B).

³⁹ *Taylor v. United States*, 495 U.S. 575, 600 (1990).

⁴⁰ *Id.* at 600–01.

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A. *Diaz* and *Kimble* Define Which Convictions May Be Considered

Diaz and *Kimble* answer the gatekeeping question. In *Diaz*, we held that the only “pertinent criminal history” is “prior convictions that are ‘punishable by imprisonment for a term exceeding one year.’”⁴¹ Everything else—misdemeanors, arrests, and conduct that produced no conviction—is “not relevant.”⁴² *Kimble* reiterated the point, emphatically rejecting the view “that courts should ‘look beyond’ a defendant’s predicate conviction[s]” to their more generalized “history or characteristics.”⁴³ So *Diaz* and *Kimble* draw the boundary: qualifying convictions are in; generalized criminal history is out.⁴⁴

B. *Contreras* and *Morgan* Define What May Be Considered About Those Convictions

Contreras and *Morgan* address the second question. To be sure, not every qualifying conviction supports disarmament.⁴⁵ And *Diaz* and *Kimble*

⁴¹ 116 F.4th at 467 (quoting 18 U.S.C. § 922(g)(1)).

⁴² *Id.*

⁴³ 142 F.4th at 318 (quoting *Pitsilides*, 128 F.4th at 211–12).

⁴⁴ In *United States v. Alaniz*, we stated that “a defendant’s entire criminal record” is relevant to the as-applied Second Amendment analysis. 146 F.4th 1240, 1242 (5th Cir. 2025) (per curiam). This statement has been cited as rejecting *Diaz/Kimble*’s felony-convictions-only rule. See *Allred*, 182 F.4th at 456 (GRAVES, J., concurring in the judgment). Read in context, however, *Alaniz* does not say that any incident can be considered, regardless of if it resulted in a felony conviction. Instead, it holds only that we can consider all of a defendant’s qualifying felony convictions, even if the Government did not rely on them to satisfy § 922(g)(1)’s predicate-conviction element. See *Alaniz*, 146 F.4th at 1242 (explaining that courts must disregard “misdemeanors irrelevant to § 922(g)(1)” but need not rely exclusively on “explicit predicates”).

⁴⁵ See *United States v. Landrum*, 168 F.4th 771, 774 (5th Cir. 2026) (“Since *Diaz*, we have analyzed a variety of felonies and found that some can support a § 922(g)(1) conviction while others cannot.”).

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do not say what a court may consider when deciding whether a conviction justifies disarmament.⁴⁶ May the court look beyond the statute of conviction and also consider how the defendant actually committed the offense? Here, our § 922(g)(1) cases part ways with ACCA: our precedent allows consideration of the underlying conduct.

Contreras supplied that answer almost immediately after *Diaz*. There, we held that a defendant’s conviction for possessing a firearm while an unlawful user of a controlled substance could provide a basis for disarmament—but only “because he was intoxicated while he possessed the gun” (a fact the statute of conviction did not require).⁴⁷ That is conduct-specific reasoning: *Contreras* looked beyond “the elements of the statute of conviction” to “the facts of [the] defendant’s conduct.”⁴⁸ We gave the same answer—again implicitly—in *United States v. Betancourt*, holding that an aggravated-assault conviction justified disarming the defendant because he “disregarded a flashing red light while driving at . . . 107 miles per hour, causing a major crash and serious injuries to two people.”⁴⁹

Morgan later made the point explicit. “Regardless of the Government’s mention of misdemeanors and other alleged conduct that did not result in qualifying convictions,” we explained, “its account of [the defendant’s] conduct underlying the predicate offense is both permissible

⁴⁶ It is sometimes argued that *Kimble* rules out reliance on conduct contemporaneous to the predicate offense. But that argument is based on a misreading of *Kimble*. Rather than ruling out reliance on conduct contemporaneous to the predicate offense, *Kimble* instead ruled out reliance on conduct contemporaneous to the § 922(g)(1) violation itself. See 142 F.4th at 318 (rejecting “unproven conduct charged contemporaneously with a defendant’s (g)(1) indictment”).

⁴⁷ 125 F.4th at 732 (emphasis omitted); see 18 U.S.C. § 922(g)(3).

⁴⁸ See *Taylor*, 495 U.S. at 601.

⁴⁹ 139 F.4th at 483–84.

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and revealing.”⁵⁰ We said much the same in *United States v. Simpson*, reiterating that “review of the conduct underlying the predicate offense is permissible.”⁵¹ *Morgan* and *Simpson* were the first to say so outright, but they only made explicit what *Contreras* and *Betancourt* had already made implicit.⁵²

Indeed, *Morgan* itself explained how its holding could be squared with *Diaz* and *Kimble*. It acknowledged that, under *Diaz* and *Kimble*, courts must “consider only those predicate offenses under § 922(g)(1) that are ‘punishable by imprisonment for a term exceeding one year.’”⁵³ Yet it relied on *Contreras* and *Betancourt* for the proposition that underlying conduct can be considered.⁵⁴ In short, *Diaz* and *Kimble* answer which incidents are in; *Contreras* and *Morgan* answer what about those incidents may be considered.⁵⁵

That does not mean that underlying facts are always necessary. As *Kimble* explained, some offenses—drug trafficking, for example—can justify disarmament for *anyone* convicted of them, without regard to the offense’s

⁵⁰ 147 F.4th at 528.

⁵¹ 152 F.4th at 614 (cleaned up).

⁵² *United States v. Reyes*, 141 F.4th 682, is also sometimes cited as an ancestor of *Contreras*, *Betancourt*, *Morgan* and *Simpson*. See, e.g., *Simpson*, 152 F.4th at 614 (relying in part on *Reyes*); *Allred*, 182 F.4th at 456 (GRAVES, J., concurring in the judgment) (discussing *Reyes* alongside *Betancourt* and *Morgan*).

⁵³ 147 F.4th at 528 (quoting *Kimble*, 142 F.4th at 310).

⁵⁴ See *id.* at 528 & n.25.

⁵⁵ See *id.*; see also *United States v. Mitchell*, 160 F.4th 169, 190–93 (5th Cir. 2025) (considering the facts underlying the predicate offense but rejecting the Government’s attempt to “fix its aim *beyond* [the] predicate offense” as contrary to *Diaz* and *Morgan*).

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individual circumstances.⁵⁶ In those cases, the conviction itself may do all the constitutional work. But that an offense alone can suffice does not mean the offense alone is all a court may consider.

Put simply, *Diaz* and *Kimble* tell us what gets through the door: convictions punishable by more than a year in prison. *Contreras*, *Betancourt*, *Morgan*, and *Simpson* tell us what we may examine once a conviction gets through—including how the defendant committed it. Read together, our cases do not import ACCA’s elements-only categorical methodology into the § 922(g)(1) inquiry.

II. THE LATER CASES DO NOT UPSET THAT RECONCILIATION

Four recent decisions might seem to unsettle that reading. None does. But each helps expose the confusion our cases have generated.

A. *Mancilla* Fits the Framework

In *United States v. Mancilla*, we held that the defendant’s as-applied challenge to § 922(g)(1) was foreclosed by *Kimble* because his predicate conviction was for drug trafficking.⁵⁷ We rejected the defendant’s argument that an “individualized assessment” of dangerousness is required, explaining that the defendant’s “drug-trafficking conviction establishes his dangerousness” by itself.⁵⁸ In a footnote, we noted the “differences in approach” between our cases, but held that “*Kimble* is directly on point” in cases involving drug trafficking.⁵⁹

⁵⁶ See 142 F.4th at 318 (“Congress can categorically disarm individuals convicted of violent felonies like drug trafficking.”).

⁵⁷ 155 F.4th at 451–52 (majority opinion).

⁵⁸ *Id.* at 452.

⁵⁹ *Id.* at 451 n.1.

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Mancilla is straightforward. It neither cabins *Contreras/Morgan* nor forbids consideration of underlying facts. It simply applies *Kimble*'s premise that some offenses—drug trafficking among them—justify disarmament without further factual inquiry.

B. *Hembree* Is Best Read Consistently with It

Hembree presents the harder question. As the majority explains, its primary holding was that a predicate offense of simple possession is insufficient, standing alone, to justify disarmament.⁶⁰ But *Hembree* also rejected two categories of additional facts on which the Government relied: (1) facts from the defendant's "charged § 922(g)(1) offense conduct," and (2) the fact that "both the lesser and greater charges"—*i.e.*, both simple possession and possession with intent to distribute—"were included in [the] indictment."⁶¹

The first category is easy. *Hembree* did not depart from this framework; it applied it. Its rejection of the facts underlying the § 922(g)(1) charge is a straightforward application of *Kimble*'s holding that "unproven conduct charged contemporaneously with a defendant's (g)(1) indictment" is off limits.⁶² That holding says nothing about conduct underlying the earlier predicate conviction.

The second category requires more explanation. One could read *Hembree* as rejecting the additional charges because underlying facts are irrelevant to § 922(g)(1) analysis. But that reading would directly contradict *Morgan*, and we ordinarily strain to avoid readings that put our precedents in

⁶⁰ See *Hembree*, 165 F.4th at 915–18 (majority opinion).

⁶¹ *Id.* at 917.

⁶² 142 F.4th at 318.

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conflict.⁶³ *Hembree*'s own reasoning points to a narrower—and harmonious—reading: the additional charges do not matter because an indictment does not provide an “account of [the] conduct underlying the predicate offense.”⁶⁴ As *Hembree* explained, including both greater and lesser charges is “a common occurrence in criminal indictments.”⁶⁵ And, as every criminal jury is told, “[a]n indictment is merely a charge and does not constitute evidence of guilt.”⁶⁶ An indictment accuses; it does not prove. That reading harmonizes *Hembree* with *Contreras* and *Morgan*; the categorical reading puts them in conflict. The rule of orderliness requires us to choose the harmonious reading.

C. *Banuelos* and *Debrow* Do Not Supply Contrary Precedent

Neither *Banuelos* nor *Debrow* changes the governing precedent. Their lead opinions rejected this reconciliation, but for different reasons neither supplied a precedential holding doing so.

Banuelos read *Hembree* as foreclosing “an examination of the facts underlying th[e] [predicate] conviction”—at least in the drug-possession/drug-trafficking context.⁶⁷ But *Banuelos* is unpublished and therefore binds neither district courts nor future panels.⁶⁸ Its reading of *Hembree* cannot displace *Contreras* and *Morgan*, which are precedential.

⁶³ See, e.g., *Brown v. Burmaster*, 181 F.4th 642, 648 (5th Cir. 2026).

⁶⁴ *Morgan*, 147 F.4th at 528.

⁶⁵ 165 F.4th at 917.

⁶⁶ *United States v. Williams*, 22 F.3d 580, 582 (5th Cir. 1994).

⁶⁷ 2026 WL 1195824, at *1 & n.1.

⁶⁸ See 5TH CIR. R. 47.5.4.

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Debrow is published, but the relevant reasoning of its lead opinion did not command a majority. It declined to apply *Contreras/Morgan*,⁶⁹ yet spoke for only one judge—not the panel.⁷⁰ The other judge in the majority concurred in the judgment only “for the reasons stated in *United States v. Cockerham*”—a prior § 922(g)(1) case that relied on the facts underlying the conviction.⁷¹ So *Debrow*’s lead opinion cannot authorize later panels to disregard precedential decisions that it lacked the votes to displace.

* * *

Taken together, the later cases leave the two-step framework intact. *Mancilla*, *Hembree*, *Banuelos*, and *Debrow* alter neither step.

III. UNTIL *SQUIRE*, THE TWO-STEP FRAMEWORK GOVERNS

The governing sequence is straightforward. First, identify the defendant’s qualifying convictions. Second, ask whether those convictions justify disarmament, considering—when properly presented—how the defendant committed them. The inquiry is narrower than a free-ranging dangerousness assessment but broader than ACCA’s elements-only categorical approach.

⁶⁹ See 183 F.4th at 405–06 (“declin[ing] to adopt the approach the government anchors on” while acknowledging that approach “stem[s] from a line of cases” including *Morgan* and *Simpson*).

⁷⁰ Cf. *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 n.1 (5th Cir. 1999) (WIENER, J., concurring) (“Because Judge Ferguson concurs only in the judgment of this case without concurring in Judge Jones’s opinion or mine, neither enjoys a quorum and thus neither writing constitutes precedent in this Circuit.”).

⁷¹ 183 F.4th at n.1; see also *Cockerham*, 162 F.4th at 507 (majority opinion) (finding “no historical justification to disarm [the defendant]” because, although he had been convicted of failing to pay child support, he “was no longer delinquent and had fully paid the child support debt for which he was convicted at the time he was found in possession of a firearm”).

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I continue to believe our § 922(g)(1) precedent has taken a wrong constitutional turn.⁷² *Squire* may soon give the en banc court an opportunity to reconsider the path. But unless and until it does, district courts must decide today's cases under today's law—and they should not have to guess how our decisions fit together. Qualifying convictions define the universe; properly established facts about those convictions may inform whether disarmament is constitutionally justified. That may not be the rule one would write on a blank slate. But it is the rule our precedents presently require.

⁷² See *Williamson*, 170 F.4th at 438–39 (WILLETT, J., concurring); *Bonner*, 159 F.4th at 343–45 (WILLETT, J., concurring).