

# **HELLER'S COLLATERAL DAMAGE: AS-APPLIED CHALLENGES TO THE FELON-IN-POSSESSION PROHIBITION**

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*A longstanding firearm regulation in the United States prohibits individual convicted of felonies and certain misdemeanors from possessing a firearm. Following the U.S. Supreme Court's decision in District of Columbia v. Heller, waves of litigation challenged, among other laws, the felon-in-possession prohibition. Due to the lack of clarity in Heller and the Court's refusal to address it, there is an unsettling circuit split over whether and how an individual can mount an as-applied challenge to the felon-in-possession prohibition.*

*A decade after Heller, the Third Circuit upheld the first successful as-applied challenge while four circuits have denied the permissibility of these challenges, creating an urgent need for clarification from the Court. Because the Court denied certiorari in the Third Circuit case, the present state of the law is that an individual's right to restore their Second Amendment rights is determined by where they live. The resulting issue cannot be relegated to the gun control debate and instead represents a constitutional dilemma that demands resolution by the Court. This Note argues that the Court is shirking its duties and should not continue to leave a fundamental right subject to an individual's residence.*

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## INTRODUCTION

Far more important are the unfortunate consequences that today’s decision is likely to spawn. Not least of these, as I have said, is the fact that the decision threatens to throw into doubt the constitutionality of gun laws throughout the United States.<sup>1</sup>

—Justice Breyer

One of the many collateral consequences of a felony conviction is the federal prohibition on possessing a firearm. Commonly known as the “felon-in-possession” law, this prohibition is one of the longstanding firearm regulations dating back to the nation’s founding.<sup>2</sup> Codified in 18 U.S.C § 922(g),<sup>3</sup> the statute’s first subsection expressly prohibits individuals who have been convicted of a felony or certain misdemeanors—along with other enumerated classes of individuals—from possessing, shipping, or receiving firearms or ammunition through any interstate commerce.<sup>4</sup> Among all of the subsections of the statute, § 922(g)(1) is the most prosecuted.<sup>5</sup> In fact, the felon-in-possession prohibition is the fifth-most charged offense in the federal system.<sup>6</sup> This is not surprising because as the Department of Justice (DOJ) has stated, § 922(g)(1) violations are “generally simple and quick to

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1. District of Columbia v. Heller, 554 U.S. 570, 722 (2008) (Breyer, J., dissenting).

2. See *infra* Part I.A.1.

3. 18 U.S.C. § 922(g) (2012).

4. *Id.* § 922(g)(1).

5. See, e.g., Daniel Reiss & Melissa A. Anderson, *Post-Heller Second Amendment Litigation: An Overview*, U.S. ATTORNEYS’ BULL., Nov. 2015, at 1, 8 (noting that “the relatively large number of persons prosecuted each year under either provision, particularly section 922(g)(1)”; *Federal Criminal Prosecutions Fall Under Trump*, TRACREPORTS (Sept. 1, 2017), <http://trac.syr.edu/tracreports/crim/480> [<https://perma.cc/CY88-TAFY>]).

6. *Federal Criminal Prosecutions Fall Under Trump*, *supra* note 5. Firearm provisions in the federal system are charged at a significantly lower rate than drug-related or immigration crimes, which collectively make up over 60 percent of individuals. U.S. SENTENCING COMM’N, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A, at S-11 (2016), <https://www.ussc.gov/research/sourcebook-2016> [<https://perma.cc/6WLG-2Z49>]. Firearm offenses are the third-most-charged category, but they make up about 10 percent of all individuals sentenced in the federal system. *Id.*

prove.”<sup>7</sup> To establish a § 922(g)(1) violation, federal prosecutors only need to prove (1) that the individual was convicted of a crime with a maximum possible sentence exceeding one year<sup>8</sup> and (2) his or her actual or constructive possession of a firearm.<sup>9</sup> Thus, the DOJ has advised federal prosecutors that firearm violations, like § 922(g)(1), “should be aggressively used.”<sup>10</sup>

Though § 922(g)(1) only made up about 8 percent of all federal charges filed in the last year,<sup>11</sup> the Trump administration has promised “aggressive enforcement of federal firearm laws against those persons prohibited from possessing firearms.”<sup>12</sup> In fact, U.S. Attorney General (AG) Jeff Sessions announced a “new and modernized” Project Safe Neighborhoods (PSN) program, which seeks to better coordinate gun violence reduction efforts on local, state, and federal levels—the DOJ’s centerpiece for crime reduction.<sup>13</sup> If the current iteration of PSN mirrors its 2001 counterpart, § 922(g)(1) charges will increase significantly in coming years.<sup>14</sup>

Though longstanding and aggressively enforced, the legality of § 922(g)(1) has been questioned following the U.S. Supreme Court’s decision in *District of Columbia v. Heller*<sup>15</sup> in 2008.<sup>16</sup> In fact, a “fractured” Third Circuit sitting en banc became the first circuit to uphold a successful as-applied challenge to the longstanding felon-in-possession prohibition in 2016,<sup>17</sup> largely due to *Heller*’s lack of guidance.<sup>18</sup>

In *Heller*, the Court undertook its first “in-depth examination of the Second Amendment”<sup>19</sup> and held that the Amendment protects the right of an

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7. U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 112, <https://www.justice.gov/usam/criminal-resource-manual> [<https://perma.cc/M9PP-VL34>].

8. For state misdemeanors, the maximum possible sentence must exceed two years. 18 U.S.C. § 921(a)(20)(b).

9. See, e.g., *Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

10. U.S. DEP’T OF JUSTICE, *supra* note 7, § 112.

11. *Quick Facts: Felon in Possession of a Firearm*, U.S. SENT’G COMMISSION, <https://www.ussc.gov/research/quick-facts/section-922g-firearms> [<https://perma.cc/V97M-82JW>].

12. *Project Safe Neighborhoods: An Overview of the Strategy*, U.S. ATTORNEYS’ BULL., Jan. 2002, at 1, 3.

13. Jeff Sessions, U.S. Attorney Gen., Remarks at the Major Cities Chiefs Association 2017 Fall Meeting About Project Safe Neighborhoods and Other Initiatives to Reduce Violent Crime (Oct. 21, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-major-cities-chiefs-association-2017-fall> [<https://perma.cc/Q4DN-YB8L>]. PSN was introduced by the DOJ in 2001 under President George W. Bush as a “comprehensive, strategic approach to reducing gun violence in America.” *Project Safe Neighborhoods: An Overview of the Strategy*, *supra* note 12, at 1.

14. Compare *Federal Criminal Prosecutions Fall Under Trump*, *supra* note 5, with *Ten Year Decline in Federal Weapons Convictions*, TRACREPORTS (Nov. 7, 2017), <http://trac.syr.edu/tracreports/crim/409/> (showing the highest number of weapons-related offenses from 2004 to 2008 during PSN) [<https://perma.cc/48K6-4BP9>].

15. 554 U.S. 570 (2008).

16. Reiss & Anderson, *supra* note 5, at 8.

17. *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

18. See *infra* Part I.C.2.

19. *Heller*, 554 U.S. at 635.

individual, in addition to militias, to keep and bear arms.<sup>20</sup> Groundbreaking though it was, *Heller* left large gaps in Second Amendment jurisprudence, as presciently noted by dissents written by Justices John Paul Stevens<sup>21</sup> and Breyer.<sup>22</sup> In addition to not prescribing which standard of constitutional scrutiny applies, the Court created confusion when it declared, nonchalantly, that certain longstanding prohibitions on Second Amendment rights were “presumptively lawful.”<sup>23</sup> The Court failed to provide any guidance on the full extent of the longstanding prohibitions or any justification for the lawfulness.<sup>24</sup> It stated that it would “expound” on these prohibitions “if and when” they are challenged before the Court.<sup>25</sup> Without any explanation of the basis for the presumption and whether it is rebuttable, federal courts were left without guidance in the waves of post-*Heller* challenges to firearm regulations—particularly the felon-in-possession prohibition.<sup>26</sup>

This Note explores how *Heller*’s confusing and limited guidance on Second Amendment challenges has resulted in federal courts sifting through *Heller*’s tea leaves. The circuits have speculated and sometimes disagreed about how *Heller* should be read to determine, for example, what level of constitutional scrutiny to use and whether longstanding prohibitions are constitutional on their face or as applied.<sup>27</sup> Despite some consensus among the circuits, there are multiple disagreements about what are permissible challenges and the scope and nature of the analysis.<sup>28</sup> For example, most circuits have adopted some variation of a two-prong test created by the Third Circuit in *United States v. Marzzarella*.<sup>29</sup> But among these circuits, the “precise formulation” of the test is not consistent.<sup>30</sup> In some instances, the circuits have applied their tests to the same law but have arrived at different results. For example, the Third Circuit upheld en banc the first successful as-applied challenge to § 922(g)(1) in *Binderup v. Attorney General*.<sup>31</sup> Four other circuits have “left the door open to a successful as-applied challenge” but have yet to uphold one, four circuits have rejected permissibility of the as-applied challenges, and three circuits have expressed concern about them.<sup>32</sup> With such a deep circuit split, the Court needs to provide clarity about whether as-applied challenges to § 922(g)(1) are permissible, and if so, what methods should be used to assess them.

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20. *See id.* at 580–81.

21. *See id.* at 679 (Stevens, J., dissenting) (stating that *Heller* “leaves for future cases the formidable task of defining the scope of permissible regulations”).

22. *See id.* at 719 (Breyer, J., dissenting) (stating that he “find[s] it difficult to understand the reasoning that seems to underlie certain conclusions [that the *Heller* Court] reaches”).

23. *Id.* at 627 & n.26 (majority opinion).

24. *See id.* at 721 (Breyer, J., dissenting).

25. *Id.* at 635 (majority opinion).

26. Reiss & Anderson, *supra* note 5, at 8.

27. *Id.* at 8–9.

28. *See id.* at 9.

29. 614 F.3d 85 (3d Cir. 2010).

30. Reiss & Anderson, *supra* note 5, at 5.

31. 836 F.3d 336 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

32. *Id.* at 381–85 (Fuentes, J., dissenting).

Indeed, the Court recently provided needed clarity for a different criminal statute by invalidating that statute's clause based on its vagueness and the lack of judicial consensus on how to determine whether predicate offenses fell under the clause.<sup>33</sup> That statute—the Armed Career Criminal Act (ACCA)—establishes a mandatory minimum for individuals charged under § 922(g)(1) who have three predicate drug offenses or violent felonies.<sup>34</sup> In addition to several enumerated felonies, the ACCA sets forth a residual clause, which states that an offense is a “violent felony” if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>35</sup> Before deciding *Johnson v. United States*<sup>36</sup> in 2015, the Court sought to clarify the residual clause in four different cases beginning in 2007.<sup>37</sup> Between 2007 and 2015, lower courts were confounded as evidenced by the “pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.”<sup>38</sup> In evaluating the residual clause’s constitutionality, the Court held that “[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.”<sup>39</sup>

The disagreement settled in *Johnson* is analogous to the disagreement among the circuits present in the post-*Heller* as-applied challenges to § 922(g)(1). Yet, in June 2017, the Court denied certiorari to the DOJ’s appeal of *Binderup*<sup>40</sup> despite stating in *Heller* that it would determine challenges to longstanding prohibitions—including the very statute at issue in *Binderup*, § 922(g)(1)—as they arose.<sup>41</sup> Notably, Justices Ginsburg and Sotomayor both stated their disagreement with the denial of certiorari in *Binderup*,<sup>42</sup> and this Note explains why they are correct.

The current hodgepodge system for addressing as-applied challenges to § 922(g)(1) is marked by splits among and within circuits and needs to be addressed by the Court. This Note addresses the need for a standardized system or guidelines for courts faced with as-applied challenges to § 922(g)(1). By applying the analysis in *Johnson*, this Note highlights the constitutional concerns of a shapeless system that evaluates and sometimes restores Second Amendment rights, which the Court held to be fundamental two years after *Heller* in *McDonald v. City of Chicago*.<sup>43</sup>

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33. See *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015).

34. 18 U.S.C. § 924(e) (2012); see also *Johnson*, 135 S. Ct. at 2555.

35. 18 U.S.C. § 924(e)(2)(B)(ii).

36. 135 S. Ct. 2551 (2015).

37. *Id.* at 2562 (noting the four previous cases: *James v. United States*, 550 U.S. 192 (2007), *Begay v. United States*, 553 U.S. 137 (2008), *Chambers v. United States*, 555 U.S. 122 (2009), and *Sykes v. United States*, 564 U.S. 1 (2011)).

38. *Id.* at 2559–60.

39. *Johnson*, 135 S. Ct. at 2560.

40. *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847).

41. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

42. *Sessions*, 137 S. Ct. 2323.

43. 561 U.S. 742 (2010).

Part I provides an overview of § 922(g)(1) and a summary of federal judicial responses to facial and as-applied challenges to the statute. It also provides an overview of *Heller* and *McDonald* as well as an examination of the Third Circuit’s two-prong test for post-*Heller* challenges to firearm regulations, including as-applied challenges to § 922(g)(1). Part II examines the void-for-vagueness doctrine and how the Court applied it in *Johnson*, which invalidated the residual clause of the ACCA. Part III then assesses the constitutionality of the Third Circuit’s *Binderup* test and uses the Court’s rationale in *Johnson* to analyze it. Finally, Part IV proposes potential legislative remedies to standardize the process for evaluating as-applied challenges to § 922(g)(1) and urges the Court to grant certiorari on the next case dealing with this issue due to the huge constitutional concerns of restoration of a fundamental right that varies based on where one lives.

## I. CHALLENGING THE FELON-IN-POSSESSION PROHIBITION

In *Binderup*, a fractured en banc Third Circuit upheld the first successful as-applied challenge to § 922(g)(1).<sup>44</sup> Before analyzing this decision, this Note explores the underlying statute and the legal challenges following *Heller*. Part I.A provides an analysis of § 922(g)(1), including its historical justification, its elements, and its options for rights restoration. Next, Part I.B explores how the Court failed to provide proper guidance in *Heller* and *McDonald* for federal courts on how to evaluate legal challenges to firearm regulations. Part I.C then analyzes how the circuits responded to post-*Heller* facial and as-applied challenges to § 922(g)(1), focusing primarily on the Third Circuit and its decision in *Binderup*.

### A. Felon-in-Possession Prohibition: 18 U.S.C. § 922(g)(1)

An understanding of § 922(g)(1) requires an historical analysis as well as an explanation of its elements and exceptions. Part I.A.1 provides an overview of § 922(g)(1), including a brief recitation of its historical background and its current codification. Part I.B.2 outlines the options provided by the statute for individuals impacted by § 922(g)(1) to have their Second Amendment rights restored.

#### 1. Section 922(g)(1) Overview

Prohibitions on individuals with felony convictions possessing firearms can be traced back to the nation’s founding. In assessing § 922(g)(1)’s historical justification, many circuits point to scholarly and historical sources asserting that the right to bear arms is tied to “virtuous citizenry” and, thus, allowing the government to disarm “unvirtuous citizens.”<sup>45</sup> Responding to Justice Stevens’s analysis of historical justification for the Second

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44. *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 399 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323.

45. See, e.g., *id.* at 348 (citing *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010)); *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012); *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010).

Amendment, the Court in *Heller* notes a “highly influential” report from the founding era,<sup>46</sup> which Stevens identifies as *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787*.<sup>47</sup> In an excerpt provided by Stevens, the “highly influential” report asserted that the right to bear arms resides in the individual “unless for crimes committed, or real danger of public injury.”<sup>48</sup>

The felon-in-possession law was first federally codified as part of the Federal Firearms Act of 1938,<sup>49</sup> which one scholar called “the most significant pre-1968 attempt to impose federal controls on the commerce and possession of a broad spectrum of firearms.”<sup>50</sup> The 1938 Act created a federal licensing system for firearm manufacturers, importers, and dealers, including a prohibition on licensees from knowingly shipping firearms to individuals convicted of a felony, “any person who is under indictment,” and other enumerated classes.<sup>51</sup> Thirty years later, the Gun Control Act of 1968 replaced portions of the 1938 Act by “extend[ing] . . . certain controls” on firearms<sup>52</sup> in response to the growing number of firearm deaths and recent assassinations.<sup>53</sup> One of the Gun Control Act’s purposes, as stated by the Senate Judiciary Committee, was “to keep firearms out of the hands of those not legally entitled to possess them,” including those with a “criminal background.”<sup>54</sup> Years later, the felon-in-possession prohibition is unchanged and vigorously enforced.<sup>55</sup>

The prohibition on firearm possession for individuals convicted of felonies and certain misdemeanors is codified at § 922(g)(1), among other prohibitions on enumerated classes of individuals from shipping, possessing or receiving firearms or ammunition via interstate commerce.<sup>56</sup> This Note only addresses the prohibition on individuals convicted of felonies.

The felon-in-possession nomenclature for § 922(g)(1) provides insight into the law’s elements. To violate the statute, an individual must have (1) been convicted of a “felony,” (2) possessed a firearm that affected interstate

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46. *Heller*, 554 U.S. at 604.

47. *Id.* at 658 (Stevens, J., dissenting) (noting a rejected proposal for the Pennsylvania Constitution, which was later included in a critique of the U.S. Constitution).

48. *Id.* (citing 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS 665 (1971)).

49. Federal Firearms Act of 1938, Pub. L. No. 75-785, 52 Stat. 1250 (codified at 15 U.S.C. §§ 901–910) (repealed 1968).

50. Franklin Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 139 (1975).

51. 15 U.S.C. § 902 (1964) (repealed 1968).

52. HARRY L. HOGAN, CONG. RESEARCH SERV., 85-166, GUN CONTROL ACT OF 1968, AS AMENDED: DIGEST OF MAJOR PROVISIONS, at iii (1985).

53. See, e.g., PRESIDENT LYNDON JOHNSON, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING PROPOSALS FOR GUN CONTROL LAWS, H.R. DOC. NO. 332, at 1–2 (1968); Zimring, *supra* note 50, at 146–47 (noting amendments created after the assassinations of President John F. Kennedy and his brother Robert F. Kennedy).

54. S. REP. NO. 90-1501, at 22 (1968).

55. See *supra* notes 5–6 and accompanying text.

56. 18 U.S.C. § 922(g) (2012).

commerce, and (3) had knowledge of the firearm possession.<sup>57</sup> The word “felony” is a misnomer because an offense can qualify as a “crime” under § 922(g)(1) even if not labeled as a felony. State misdemeanors are included under the statute if punishable by more than two years in prison.<sup>58</sup> Further, an offense qualifies as a “crime” under § 922(g)(1) based on the maximum possible punishment determined by the law, not the individual’s actual sentence.<sup>59</sup> Additionally, any federal or state offense related to regulation of business practices, such as antitrust or unfair trade violations, does not qualify as a “crime” under the statute based on a statutory exception.<sup>60</sup>

Under § 922(g)(1), a “firearm” is (1) any weapon “which will or is designed to or may readily be converted to expel a projectile by the action of an explosive,” (2) “the frame or receiver of any such weapon,” (3) a muffler or silencer, or (4) any “destructive device.”<sup>61</sup> The firearm need not be operable, and in fact, qualifies under the statute as long as it was designed to fire a projectile.<sup>62</sup>

A § 922(g)(1) violation generally is punishable by up to ten years of imprisonment and a \$250,000 fine.<sup>63</sup> In fiscal year 2016,<sup>64</sup> for example, the average sentence for individuals convicted under § 922(g), including felon-in-possession violations, was five years.<sup>65</sup> The overwhelming majority of those sentenced in fiscal year 2016 were male and over half were Black.<sup>66</sup>

## 2. Statutory Options for Rights Restoration

Once an individual is convicted of a qualifying offense, the felon-in-possession prohibition does not expire.<sup>67</sup> However, due to “legislative grace,” the statute includes certain instances where an individual can have their right to possess a firearm restored.<sup>68</sup> First, a prior conviction no longer

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57. Joseph O. Anderson, Jr., *What “Mens Rea Dilemma”? A Simple Solution to the 18 U.S.C. § 922(g)(1) Circuit Split*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 371, 373 (2011).

58. A “crime” under § 922(g)(1) does not include state misdemeanors “punishable by a term of imprisonment of two years or less.” 18 U.S.C. § 921(a)(20)(B).

59. See, e.g., *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 342 (3d Cir. 2016) (en banc) (stating that “subject to a maximum possible penalty of” is the correct reading of “punishable by” as used in § 921(a)(20)(b)), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

60. 18 U.S.C. § 921(a)(20).

61. *Id.* § 921(a)(3).

62. See, e.g., *United States v. Davis*, 668 F.3d 576, 577 (8th Cir. 2012) (noting that proof that the firearm is operable is not required by that court or its “sister circuits”).

63. 18 U.S.C. § 924(a)(2).

64. The U.S. Sentencing Guidelines (USSG) defined fiscal year 2016 as the period from October 1, 2015, to September 30, 2016. U.S. SENTENCING COMM’N, *supra* note 6, app. A, at S-159.

65. *Quick Facts: Felon in Possession of a Firearm*, *supra* note 11. The USSG provided information for the statute as a whole, not the particularly subsections such as § 922(g)(1).

66. In fiscal year 2016, 96.9 percent of all individuals convicted were male and 51.7 percent were Black. *Id.*

67. See *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 350 (3d Cir. 2016) (en banc) (stating that there is “no historical support for the view that the passage of time or evidence of rehabilitation can restore Second Amendment rights that were forfeited”), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

68. *See id.*

qualifies as a “crime” under § 922(g)(1) if (1) it was expunged or set aside or (2) the individual is pardoned or has his or her civil rights restored.<sup>69</sup> There is, however, an exception to this exception: the pardon, expungement, or restoration must not expressly state that the individual has not retained the right to “ship, transport, possess, or receive” firearms.<sup>70</sup>

Second, Congress provided a formalized application process for rights restoration under § 925(c), which allows the AG to provide “relief” for certain individuals.<sup>71</sup> An individual prohibited from firearm possession under § 922(g) can request “relief” from the AG by filing an application with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).<sup>72</sup> The application must establish that the applicant will not act in a “manner dangerous to public safety” nor will the relief be “contrary to the public interest.”<sup>73</sup> If satisfied by the individual’s showing, the AG is then enabled by the statute to grant the relief and restore that individual’s Second Amendment rights.<sup>74</sup>

In practice, however, this option has not been available for almost thirty years because Congress has consistently eliminated funding for this restoration process in its yearly appropriations starting in 1992.<sup>75</sup> Congress justified this funding elimination by explaining in 1992 that the restoration process was a “very difficult task” that requires “many hours [spent] investigating a particular applicant” and then venturing a “guess” whether he or she “can be entrusted with a firearm.”<sup>76</sup> The House concluded that the “\$3.75 million and the 40 man-years annually” is best used for “fighting violent crime” instead of “investigating and acting upon these applications.”<sup>77</sup> It again addressed the funding in 1996 and added that “too many” individuals with restored Second Amendment rights “went on to

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69. 18 U.S.C. § 921(a)(20) (2012).

70. *Id.*

71. *Id.* § 925(c).

72. In 2002, the AG was given authority to grant relief pursuant to § 925(c). Homeland Security Act of 2002, Pub. L. No. 107-296, § 1112(e), 116 Stat. 2135, 2276 (replacing “Secretary [of the Treasury]” with “Attorney General” in §§ 921 to 923, 925, and 926). Notably, the AG has delegated authority to the ATF to act on § 925(c), among other tasks. 28 C.F.R. § 0.13(a) (2017).

73. 18 U.S.C. § 925(c).

74. *Id.*

75. See WILLIAM J. KROUSE, CONG. RESEARCH SERV., R44686, GUN CONTROL: FY2017 APPROPRIATIONS FOR THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF) AND OTHER INITIATIVES 23 (2017) (“For FY1993 and every year thereafter, Congress included a proviso in the ATF S&E appropriations language that prevents that agency from using appropriations to consider applications for disabilities relief (i.e., reinstatement of an applicant’s right to gun ownership) from individuals who are otherwise ineligible to be transferred a firearm.”); *Is There a Way for a Prohibited Person to Restore His or Her Right to Receive or Possess Firearms and Ammunition?*, ATF (Nov. 5, 2017), <https://www.atf.gov/firearms/qa/there-way-prohibited-person-restore-his-or-her-right-receive-or-possess-firearms-and> [<https://perma.cc/MM8X-BG37>].

76. H.R. REP. NO. 102-618, at 14 (1992).

77. *Id.*

commit violent crimes with firearms.”<sup>78</sup> This prohibition on funding has meant that applications for relief under § 925(c) “cannot be acted upon.”<sup>79</sup>

Despite “legislative grace” only providing pardons, expungement, or the defunded application process, individuals have turned to courts post-*Heller* to restore their Second Amendment rights in as-applied challenges to § 922(g)(1).<sup>80</sup>

### B. Heller and McDonald: Chaos Created

In 2008, the Court undertook its first “in-depth examination of the Second Amendment” in *Heller*.<sup>81</sup> There, Dick Heller challenged<sup>82</sup> a thirty-two-year-old District of Columbia (D.C.) law banning handgun possession.<sup>83</sup> In a 5 to 4 decision, the Court held that the D.C. handgun ban violated the individual’s right to defend one’s home and that this right is at the Second Amendment’s “core.”<sup>84</sup> With self-defense at the Second Amendment’s core, the Court stated that certain policy issues, including an absolute handgun ban in the home, are not permissible.<sup>85</sup> The Court based its decision on a statutory and historical analysis of the Second Amendment.<sup>86</sup>

This Note does not assert an opinion on the Court’s analysis in *Heller* and instead focuses on what the decision lacks. The Court acknowledges that *Heller* is incomplete, noting that it does not “clarify the entire field” nor provide “utter certainty” for Second Amendment jurisprudence just as its first in-depth case concerning the Free Exercise Clause did not clarify all of First Amendment jurisprudence.<sup>87</sup>

Three portions of *Heller* are so vague that they have caused pervasive disagreement in the circuits. The first issue arises in the Court’s deferral of a complete analysis of Second Amendment jurisprudence on the ground that “there will be time enough to expound upon the historical justifications” for evaluating other firearm regulations.<sup>88</sup> Without providing guidance on how to evaluate firearm regulations, *Heller* left the “formidable task of defining the scope of permissible regulations” to the lower courts.<sup>89</sup> Federal courts

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78. H.R. REP. NO. 104-183, at 15 (1994).

79. *Is There a Way for a Prohibited Person to Restore His or Her Right to Receive or Possess Firearms and Ammunition?*, *supra* note 75; see also United States v. Bean, 537 U.S. 71, 75–76 (2002) (stating that inaction by the ATF on § 925(c) applications “does not invest a district court with independent jurisdiction to act on an application”).

80. See Reiss & Anderson, *supra* note 5, at 9.

81. District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

82. *Id.* at 575.

83. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 942 (4th ed. 2011).

84. See *Heller*, 554 U.S. at 630; see also McDonald v. City of Chicago, 561 U.S. 742, 767–68 (2010) (summarizing the Court’s analysis of the Second Amendment in *Heller*).

85. *Heller*, 554 U.S. at 602.

86. See *id.* at 576–627.

87. See *id.* at 635 (“[O]ne should not expect [*Heller*] to clarify the entire field [of Second Amendment jurisprudence], any more than . . . [the Court’s] first in-depth Free Exercise Clause case . . . left that area in a state of utter certainty.”).

88. *Id.*

89. *Id.* at 679 (Stevens, J., dissenting).

have tried to undertake this task, in part, by focusing on the phrase “historical justifications,” believing it provided a clue into how the Court would eventually evaluate other firearms regulations.<sup>90</sup>

*Heller*'s second problem is that it does not explicitly declare which standard of constitutional scrutiny to use when evaluating a Second Amendment challenge.<sup>91</sup> Such guidance is important because the three standards result in different levels of review and deference.<sup>92</sup> The rational basis test provides the greatest level of judicial deference and results in a law being upheld if it is “rationally related to a legitimate government purpose.”<sup>93</sup> Under the rational basis test, the challenger must prove that the law does not serve any conceivable legitimate purpose or is not a reasonable way to achieve that end.<sup>94</sup> The next analytical tier is intermediate scrutiny, which asks if the law is “substantially related to an important government purpose.”<sup>95</sup> Strict scrutiny is the most exacting level of review, which only allows a law to be upheld if “it is necessary to achieve a compelling government purpose.”<sup>96</sup> Here, the government must show that the law is the “least restrictive or least discriminatory alternative” to meet the necessary interest.<sup>97</sup> As this suggests, strict scrutiny is a difficult test to surmount, resulting in many laws examined under this test being deemed unconstitutional.<sup>98</sup> Not surprisingly, the standard chosen to evaluate the constitutionality of a law is likely outcome determinative—meaning the law is likely to be upheld under rational basis and likely not under strict scrutiny.<sup>99</sup>

In *Heller*, the Court held that the D.C. handgun ban failed constitutional muster “under any of the standards of scrutiny that we have applied to enumerated constitutional rights.”<sup>100</sup> However, this reference to “any” standard of scrutiny was particularly concerning to Justice Breyer, who devoted the third part of his dissent to a lack of guidance on the standards of scrutiny.<sup>101</sup> Breyer rejected the Court’s assertion that the D.C. law would be

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90. See, e.g., United States v. Barton, 633 F.3d 168, 173 (3d Cir. 2011) (“*Heller* does not catalogue the facts we must consider when reviewing a felon’s as-applied challenge. Rather, the Supreme Court has noted that it will ‘expound upon the historical justifications for exceptions [it] mentioned if and when those exceptions come before [it].’ Thus, to evaluate Barton’s as-applied challenge, we look to the historical pedigree of 18 U.S.C. § 922(g). . . .” (first and second alterations in original) (quoting *Heller*, 554 U.S. at 635)); see also *infra* Part III.C.

91. See *Heller*, 554 U.S. at 628–29 (stating that the D.C. handgun ban would “fail constitutional muster” under “any of the standards of scrutiny”).

92. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

93. CHEMERINSKY, *supra* note 83, at 552–53.

94. *See id.*

95. *Id.* at 553.

96. *Id.* at 554.

97. *Id.*

98. See *id.* (“Strict scrutiny, of course, is the most intensive type of judicial review, and laws generally are declared unconstitutional when it is applied. Professor Gerald Gunther said that it is ‘strict in theory and fatal in fact.’”).

99. *See id.*

100. District of Columbia v. Heller, 554 U.S. 570, 628 (2008).

101. See *id.* at 687–92 (Breyer, J., dissenting).

unconstitutional under *any* standard, pointing first to the law's "'legitimate' life-saving objective" as enough to survive the rational basis test.<sup>102</sup> Breyer next stated that strict scrutiny cannot be adopted because if it were, the constitutionality of many longstanding prohibitions—including "forfeiture by criminals of the Second Amendment right"—would be "far from clear."<sup>103</sup> Breyer ultimately suggested an interest balancing test,<sup>104</sup> which the Court rejected.<sup>105</sup> The Court did, however, agree with Breyer's concerns, stating in footnote twenty-seven that rational basis analysis is not the proper standard.<sup>106</sup> In fact, the Court noted that under rational basis, the Second Amendment would be ineffective and "redundant with the separate constitutional prohibitions on irrational laws."<sup>107</sup> Beyond that, the Court did not elaborate beyond stating that something more than rational basis is required.<sup>108</sup> Thus, federal courts in post-*Heller* challenges have largely settled on intermediate scrutiny since strict scrutiny and rational basis were questioned by Justice Breyer and the Court respectively.<sup>109</sup>

A third example of important yet unsubstantiated language in *Heller*—which is perhaps the most significant for this Note—is a footnote that states that certain longstanding prohibitions on firearms, including § 922(g)(1), are "presumptively lawful"<sup>110</sup> infringements on an individual's Second Amendment rights.<sup>111</sup> As noted, Justice Breyer cited examples of the laws that the Court had noted would be permissible—the same regulations called "presumptively lawful"<sup>112</sup>—as proof that the standard of review cannot be strict scrutiny.<sup>113</sup> Additionally, the Court stated that the laws that prohibit possession of certain weapons, such as sawed-off shotguns, are permissible.<sup>114</sup> These presumptively lawful prohibitions are affirmed again in the final paragraphs of the decision, which stated that D.C. must permit Heller to register his handgun and keep it in his home "assuming that [he] is not disqualified from the exercise of Second Amendment rights."<sup>115</sup> Yet, as Breyer noted, the Court did not provide reasons or justifications as to why

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102. *Id.* at 687–88.

103. *Id.* at 688.

104. *See id.* at 689.

105. *See id.* at 634–35 (majority opinion).

106. *See id.* at 628 n.27.

107. *See id.*

108. *Id.*

109. *See* Reiss & Anderson, *supra* note 5, at 6.

110. *Heller*, 554 U.S. at 627 n.26.

111. *Id.* at 626–27 (stating that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons"); *see also* United States v. Barton, 633 F.3d 168, 172 (3d Cir. 2011) ("[B]ecause *Heller* requires that we 'presume,' under most circumstances, that felon dispossession statutes regulate conduct which is unprotected by the Second Amendment, Barton's facial challenge [to § 922(g)(1)] must fail.").

112. *Heller*, 554 U.S. at 627 n.26.

113. *Id.* at 688–89 (Breyer, J., dissenting); *see also supra* note 102 and accompanying text.

114. *See* United States v. Miller, 307 U.S. 174, 178 (1939) (upholding a law prohibiting the possession of sawed-off shotguns).

115. *Heller*, 554 U.S. at 635 (majority opinion).

these “presumptively lawful” provisions would survive Second Amendment scrutiny.<sup>116</sup>

Two years after *Heller*, the Court held in *McDonald* that the Second Amendment is incorporated into the Fourteenth Amendment and, thus, applies to state and local governments.<sup>117</sup> The Court stated that its decisions in *Heller* and *McDonald* do not “imperil every law regulating firearms” or suggest that the Second Amendment is absolute, again noting the list of presumptively lawful prohibitions articulated in *Heller*.<sup>118</sup> However, the Court again failed to establish why these presumptively lawful regulations are permissible, with Justice Breyer again asking, “but why these rules and not others?”<sup>119</sup>

### C. Presumptively Lawful: Facial Challenges to § 922(g)(1)

In his *Heller* dissent, Justice Stevens lamented the Court’s “announcement of a new constitutional right,” which “upsets [the] settled understanding” of Second Amendment jurisprudence while “leav[ing] for future cases the formidable task of defining the scope of permissible regulations.”<sup>120</sup> As Stevens warned, “two ‘waves’ of litigations” followed *Heller* and *McDonald* that questioned “settled” laws.<sup>121</sup>

This Part examines how courts undertook the “formidable” task of addressing the “waves” of Second Amendment challenges. Part I.C.1 looks at the first wave of post-*Heller* litigation of facial challenges to longstanding prohibitions like § 922(g)(1), particularly in the Third Circuit. Part I.C.2 then analyzes the Third Circuit’s decision in *Binderup*, the first successful as-applied challenge to § 922(g)(1). This Part also highlights the pervasive disagreement among the circuits about as-applied challenges to the statute.

#### 1. Casting No Doubt: Unsuccessful Facial Challenges

The first wave of litigation post-*Heller* dealt primarily with facial challenges to sections of the Gun Control Act of 1968, including § 922(g)(1).<sup>122</sup> As noted, federal courts had little guidance from the Court on how to evaluate these challenges.<sup>123</sup> The Third Circuit is credited with creating the two-prong test in *Marzzarella* that has been largely used by courts to analyze challenged firearm regulations and was later applied to

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116. *Id.* at 721 (Breyer, J., dissenting) (stating that he was “puzzled” about the justifications for the Court’s presumptively lawful prohibitions).

117. See *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010).

118. *Id.* at 786.

119. *Id.* at 925 (Breyer, J., dissenting).

120. *Heller*, 554 U.S. at 679 (Stevens, J., dissenting).

121. Reiss & Anderson, *supra* note 5, at 4.

122. See *id.* at 4–8.

123. See, e.g., *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) (“*Heller* does not catalogue the facts we must consider when reviewing a felon’s as-applied challenge.”); *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) (“But *Heller* did not purport to fully define all the contours of the Second Amendment . . . and accordingly, much of the scope of the right remains unsettled.”); see also *supra* Part I.B.

challenges to § 922(g)(1).<sup>124</sup> The Third Circuit ultimately upheld Marzzarella's § 922(k) conviction,<sup>125</sup> which prohibits knowingly transporting, receiving, selling, or possessing any firearm with its serial number removed or altered.<sup>126</sup> The Third Circuit created its test for Second Amendment challenges by largely adopting tests similar to those used to determine free speech issues under the First Amendment.<sup>127</sup> It held that *Heller* suggested a two-pronged approach to Second Amendment challenges by (1) asking whether the challenged law imposes a burden on conduct that falls within the Second Amendment's scope, and if so, (2) evaluating it under "some form of means-end scrutiny."<sup>128</sup>

The first prong of the *Marzzarella* test deals with the scope of the Second Amendment. Looking to historical justification of the law based on the language of *Heller*,<sup>129</sup> the Third Circuit first asked whether possession of an "unmarked" firearm in the home—which is prohibited by § 922(k)—is protected by the Second Amendment.<sup>130</sup> While noting the assertions in *Heller* and *McDonald* that the Second Amendment's rights are not unlimited, the Third Circuit stated that the Second Amendment protects "the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home."<sup>131</sup> However, the Third Circuit held that unmarked firearms are possibly included under the lawful prohibition on dangerous and unusual weapons<sup>132</sup> after comparing the law's historical justifications to those presumptively lawful prohibitions named in *Heller*.<sup>133</sup> The Third Circuit found it difficult to make a final determination on whether possessing an unmarked firearm is protected by the Second Amendment,<sup>134</sup> citing the lack of guidance from *Heller*.<sup>135</sup> Therefore, the Third Circuit stated that it could not be certain whether possession of an unmarked firearm is protected and proceeded to analyze the law under the second prong.<sup>136</sup>

The test's second prong requires an analysis of the challenged law under a level of scrutiny. Citing the absence of a prescribed standard in *Heller*, the Third Circuit struggled to determine what level of scrutiny to use.<sup>137</sup> It first rejected the rational basis test based on footnote twenty-seven of *Heller*, which indicates that a higher scrutiny than rational basis is required for a

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124. Reiss & Anderson, *supra* note 5, at 4–5.

125. *Marzzarella*, 614 F.3d at 87.

126. 18 U.S.C. § 922(k) (2012).

127. *Marzzarella*, 614 F.3d at 89 n.4.

128. *Id.* at 89.

129. *See id.* at 92.

130. *See id.* at 89.

131. *Id.* at 92.

132. *See id.* at 95 ("Because a firearm with a serial number is equally effective as a firearm without one, there would appear to be no compelling reason why a law-abiding citizen would prefer an unmarked firearm.").

133. *Id.* at 93 ("Section 922(k)'s prohibition of the possession of firearms with 'removed, obliterated, or altered' serial numbers is one of those regulations unmentioned by *Heller*.").

134. *Id.* at 94 (stating that it is possible that "Marzzarella's conduct may still fall within the Second Amendment").

135. *Id.* at 92.

136. *Id.* at 95.

137. *See id.* at 95–97.

Second Amendment challenge.<sup>138</sup> It also rejected Marzzarella's argument that it should use strict scrutiny since the Second Amendment is a fundamental constitutional right.<sup>139</sup> Conceding that strict scrutiny likely applies in some Second Amendment challenges, the Third Circuit looked to First Amendment doctrine and explained that strict scrutiny does not necessarily "apply automatically any time an enumerated right is involved."<sup>140</sup> To underscore this point, the court cited examples of speech for which different levels of scrutiny apply.<sup>141</sup> Since the right to free speech is an "undeniably enumerated fundamental right" that is "susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue," the court found "no reason why the Second Amendment would be any different."<sup>142</sup> The court's reluctance to employ this analysis is clear, particularly in footnote fifteen, where it noted that the First Amendment is a useful tool but that a Second Amendment analysis could differ.<sup>143</sup>

The Third Circuit compared the limited prohibition of § 922(k) to the absolute prohibition from the D.C. handgun ban in *Heller* to establish that § 922(k) does not come close to the D.C. law's "level of infringement" since § 922(k) allows for a person to possess any other lawful firearm as long as it bears its original serial number.<sup>144</sup> Because of its limited impact, the Third Circuit believed that the law is a regulation rather than a prohibition; the court would, therefore, evaluate it less stringently than the D.C. handgun ban in *Heller*.<sup>145</sup> Thus, the court ultimately settled on evaluating § 922(k) with intermediate scrutiny, though it was "not free from doubt" about its decision.<sup>146</sup> Notably, it was so unsure of its decision to apply intermediate scrutiny that it also applied strict scrutiny,<sup>147</sup> which illustrates the judicial confusion caused by *Heller*'s vague standards. The Third Circuit looked to the historical justification and the legislative intent of the prohibition to find that § 922(k) passed constitutional muster.<sup>148</sup>

One year later, in *United States v. Barton*,<sup>149</sup> the Third Circuit heard a challenge to § 922(g)(1).<sup>150</sup> Unlike the law evaluated in *Marzzarella*,<sup>151</sup> the challenged statute in *Barton* was expressly enumerated as a "presumptively

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138. See *id.* at 95–96.

139. See *id.* at 96–97.

140. *Id.*

141. *Id.* at 96.

142. *Id.* at 96–97.

143. See *id.* at 96 n.15.

144. *Id.* at 97.

145. See *id.*

146. *Id.*

147. See *id.* at 99.

148. See *id.* at 100–01.

149. 633 F.3d 168 (3d Cir. 2011).

150. *Id.* at 169–70.

151. *Marzzarella*, 614 F.3d at 93 ("*Heller*'s identified exceptions all derived from historical regulations, but it is not clear that pre-ratification presence is the only avenue to a categorical exception. . . . Therefore, prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*").

lawful” regulation in *Heller* and *McDonald*.<sup>152</sup> As noted, the assertion of “presumptive lawfulness” was not substantiated in *Heller* or *McDonald*.<sup>153</sup> Agreeing with the Eleventh and Ninth Circuits,<sup>154</sup> the Third Circuit held that the “presumptive lawfulness” of § 922(g)(1) is not dicta.<sup>155</sup> Because the *Heller* decision was “made expressly contingent upon a determination that *Heller* was not ‘disqualified from the exercise of Second Amendment rights,’”<sup>156</sup> the Third Circuit held that the “presumptively lawful” language was outcome determinative and thus not mere dicta.<sup>157</sup> Therefore, the court denied the facial challenge to § 922(g)(1) based on *Heller*’s assertion that the federal courts “presume” that felon-in-possession prohibitions are valid under the Second Amendment.<sup>158</sup>

The Third Circuit is not alone in holding that § 922(g)(1), on its face, passes constitutional muster. In fact, ten other circuits have directly addressed this question and all have upheld the statute’s constitutionality.<sup>159</sup> Additionally, most circuits have adopted some variation of the *Marzzarella* two-prong test when evaluating Second Amendment challenges.<sup>160</sup> The nature and process of the test varies among the circuits, however.<sup>161</sup> For the first step, some circuits use historical analysis to determine whether the regulated conduct was within the scope of conduct anticipated by the

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152. *Barton*, 633 F.3d at 171.

153. See *supra* notes 109–18 and accompanying text.

154. See *United States v. Rozier*, 598 F.3d 768, 771 n.6 (11th Cir. 2010) (per curiam) (“[T]o the extent that this portion of *Heller* limits the Court’s opinion to possession of firearms by *law-abiding* and *qualified* individuals, it is not dicta.”); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (en banc) (“Courts often limit the scope of their holdings, and such limitations are integral to those holdings.”). The Third Circuit erred in *Barton* when it agreed with the Second and Ninth Circuits but had cited the Eleventh and Ninth Circuits. *Barton*, 633 F.3d at 171. Indeed, the Second Circuit did not address § 922(g)(1)’s constitutionality until two years later. *United States v. Bogle*, 717 F.3d 281, 281 (2d Cir. 2013) (per curiam).

155. *Barton*, 633 F.3d at 171.

156. *Id.* at 171–72 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 647 (2008)).

157. *Id.* at 172.

158. *Id.*

159. See *Bogle*, 717 F.3d at 281–82; *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013); *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012); *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Williams*, 616 F.3d 685, 691–94 (7th Cir. 2010); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010); *Rozier*, 598 F.3d at 770–71; *Vongxay*, 594 F.3d at 1114–15; *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 (5th Cir. 2009). The First Circuit has not directly addressed the question. However, it used the felon-in-possession prohibition to determine the constitutionality of prohibition on those convicted of misdemeanor domestic violence, which suggests that it does find the felon-possession prohibition to be constitutional. *United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011).

160. See *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 & n.49 (2d Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136–37 (9th Cir. 2013); *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194–96 (5th Cir. 2012); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 703–04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680–83 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–05 (10th Cir. 2010).

161. Reiss & Anderson, *supra* note 5, at 5.

Founders,<sup>162</sup> while others hold that “exclusions” from the Second Amendment scope “need not mirror limits that were on the books in 1791.”<sup>163</sup> Most circuits have “preferred to assume” that the challenged laws deal with conduct that is possibly protected by the Second Amendment, likely out of caution based on *Heller*'s failure to “explain precisely the nature of [the] conduct that fell within” the Second Amendment's scope.<sup>164</sup> Thus, regardless of its belief that the law may deal with unprotected conduct, most circuits proceed to step two, where they evaluate the law under a standard of scrutiny.<sup>165</sup> Like the Third Circuit, most circuits have applied intermediate scrutiny at this step, except for “rare” occasions when a different standard was used.<sup>166</sup>

## 2. *Binderup*: A Successful As-Applied Challenge

As previously noted, Second Amendment challenges have come in two “waves” of litigation.<sup>167</sup> The first wave dealt primarily with facial challenges to firearm regulations brought by individuals charged, including unsuccessful challenges to § 922(g)(1).<sup>168</sup> The second wave has dealt with as-applied challenges to firearm regulations, typically arising in civil actions brought by individuals seeking to have their Second Amendment rights restored.<sup>169</sup> An as-applied challenge “does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.”<sup>170</sup>

To better understand as-applied challenges, this Note briefly addresses the manner in which regulations prohibit firearm possession. The Court in *Heller* recognized at least two ways regulations can prohibit firearm possession: (1) on “who” and (2) on “what.”<sup>171</sup> In other words, the Court recognized the longstanding limitations on possession by individuals convicted of felonies, deemed mentally ill, or in sensitive places like schools—the “who”—and on “dangerous and unusual weapons”—the “what.”<sup>172</sup>

The handgun ban invalidated in *Heller* dealt with the reason the right was to be exercised, where the court ultimately found a fundamental right to defend one's home.<sup>173</sup> In *Barton*, the defendant argued that his “for what

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162. See, e.g., *Nat'l Rifle Ass'n*, 700 F.3d at 200–03; United States v. Rene E., 583 F.3d 8, 15–16 (1st Cir. 2009).

163. United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

164. Reiss & Anderson, *supra* note 5, at 6; see also United States v. Marzzarella, 614 F.3d 85, 101 (3d Cir. 2012) (“[W]e hesitate to say Marzzarella's possession of an unmarked firearm in his home is unprotected conduct.”).

165. Reiss & Anderson, *supra* note 5, at 6.

166. *Id.* at 6–7.

167. *Id.* at 4.

168. See *id.* at 4–8; see also *supra* note 160.

169. Reiss & Anderson, *supra* note 5, at 4; see also United States v. Barton, 633 F.3d 168, 173 (3d Cir. 2011).

170. United States v. Marcavage, 609 F.3d 264, 273 (3d Cir. 2010).

171. See District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008); see also *Barton*, 633 F.3d at 175.

172. See *Heller*, 554 U.S. at 626–27.

173. See *Barton*, 633 F.3d at 175.

reason” challenge overcame his “who” prohibition; in other words, he argued that § 922(g)(1) is unconstitutional because it stops him from exercising the right to defend his home.<sup>174</sup> However, the Third Circuit rejected this and foreclosed any “for what reason” challenges by an individual who qualifies for a “who” prohibition.<sup>175</sup>

Other circuits have also held that the first question to be asked in as-applied challenges is “whether one is *qualified* to possess a firearm,” not the individual’s reason for possessing the firearm.<sup>176</sup> Thus, to mount a successful as-applied challenge, an individual must show why the “who” prohibition does not apply by “adequately distinguish[ing] [her or] his circumstances from those of persons historically excluded from Second Amendment protections.”<sup>177</sup> In other words, in as-applied challenges, courts look to the “particular circumstances” that would remove the specific challenging individual from a statute’s “constitutional sweep.”<sup>178</sup>

As-applied challenges in the second wave of post-*Heller* litigation have “[i]ronically”—as noted by the DOJ—been most successful when challenging the statutes that the *Heller* Court considered presumptively lawful, including the felon-in-possession prohibition.<sup>179</sup> Though upholding these prohibitions on their face, the Third Circuit in *Barton* stated that these prohibitions, which were deemed “presumptively lawful,” seem to imply that “the presumption may be rebutted” and thus not foreclosing as-applied challenges.<sup>180</sup>

In *Binderup*, the Third Circuit became the first circuit—in a fractured decision<sup>181</sup>—to restore the Second Amendment rights to two individuals in as-applied challenges to an otherwise constitutional Second Amendment prohibition.<sup>182</sup> The two individuals—Daniel Binderup and Julio Suarez—filed separate complaints in federal district courts arguing that § 922(g)(1) did not apply to their convictions, and even if it did, that it was unconstitutional as applied to them.<sup>183</sup> The district courts found that

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174. *See id.* at 174.

175. *Id.* at 175 (“*Heller* forecloses any as-applied challenge based on the manner in which a felon wishes to exercise his Second Amendment rights.”).

176. United States v. Rozier, 598 F.3d 768, 770 (11th Cir. 2010) (per curiam); *see also* United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010).

177. *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

178. *Id.* at 346.

179. Reiss & Anderson, *supra* note 5, at 9 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 & n.26 (2008)).

180. *Barton*, 633 F.3d at 173 (citing *Heller*, 554 U.S. at 626–27 & n.26).

181. *See Binderup*, 836 F.3d at 339 n.1 (“Parts III.A–C.3.a preserve the *Marzzarella* framework for deciding Second Amendment challenges and overrule aspects of *Barton* that are inconsistent with it. Seven Judges join those Parts expressly. Chief Judge McKee and Judges Shwartz and Restrepo, who join Judge Fuentes’s opinion, agree that *Marzzarella* controls the Second Amendment analysis, but do not join any of Part III because they reject the notion that the *Marzzarella* framework can be reconciled with any aspect of *Barton*’s as-applied Second Amendment analysis, which they would overrule entirely.”).

182. *See id.* at 339, 379–80.

183. *Id.* at 340. *Binderup* filed his complaint in the Eastern District of Pennsylvania, and Suarez filed his complaint in the Middle District of Pennsylvania. *Id.*

§ 922(g)(1) was unconstitutional as applied but used different methods to support their rulings.<sup>184</sup> The government appealed and the Third Circuit sua sponte consolidated the cases for a hearing en banc.<sup>185</sup> The Third Circuit unanimously rejected Binderup and Suarez's argument that their predicate offenses—state misdemeanors—did not qualify as crimes for § 922(g)(1) purposes.<sup>186</sup> It noted that both predicate offenses are subject to a maximum possible penalty exceeding one year and, thus, qualify as a “crime” for the felon-in-possession prohibition.<sup>187</sup> More important here, the Third Circuit then established how an individual otherwise prohibited from firearm possession can “rebut the presumption that [she or] he lacks Second Amendment rights.”<sup>188</sup> A majority of the Third Circuit agreed that *Marzzarella*'s two-prong test should be used to guide the analysis, while a separate majority agreed about what factors constitute each prong.<sup>189</sup>

Characterizing the Third Circuit in *Binderup* as fractured is an understatement. First, only a slight majority concurred in judgment.<sup>190</sup> Of the fifteen judges, eight decided that § 922(g)(1) was unconstitutional as applied to Binderup and Suarez.<sup>191</sup> The remaining seven judges believed that § 922(g)(1) was constitutional as applied and further challenged the very premise that as-applied challenges to the longstanding “presumptively lawful” prohibitions, like § 922(g)(1), are even permissible.<sup>192</sup> Second, there was a split among the eight judges that upheld the as-applied challenge. Only three judges who upheld the as-applied challenge agreed that a determination of an offense’s seriousness dictates whether the challenge is successful, while the other five believed that the determination should depend upon the existence of “violence.”<sup>193</sup> Third, the judges were further split by what test to use in determining Second Amendment challenges. Seven judges held that the framework for deciding as-applied challenges came from reading *Marzzarella* and *Barton* together,<sup>194</sup> four judges held that *Barton* alone should be used,<sup>195</sup> and the remaining three judges would have only used *Marzzarella*.<sup>196</sup> It is not surprising, then, that Judge Julio Fuentes, who authored the dissent in judgment,<sup>197</sup> warned that this fractured decision

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184. See *id.* at 340–41.

185. See *id.* at 341.

186. Pursuant to § 922(g)(1), a “crime punishable by imprisonment for a term exceeding one year” does not include “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” 18 U.S.C. § 921(a)(20)(b) (2012).

187. See *Binderup*, 836 F.3d at 342.

188. *Id.* at 339.

189. See *id.* at 339 & n.1.

190. *Id.*

191. Petition for Writ of Certiorari at 5, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847).

192. *Binderup*, 836 F.3d at 380, 401–07; see also Petition for Writ of Certiorari, *supra* note 191, at 8.

193. *Binderup*, 836 F.3d at 356; *id.* at 357 (Hardiman, J., concurring in part).

194. See *id.* at 346–47 (majority opinion).

195. See *id.* at 365–66 (Hardiman, J., concurring in part).

196. See *id.* at 339 n.1 (majority opinion); *supra* note 181.

197. See *id.* at 380 (Fuentes, J., concurring in part and dissenting in part).

lacked “any workable standards that would make such a regime administratively feasible or doctrinally coherent” for district courts going forward.<sup>198</sup>

*Binderup* contains three written opinions: (1) the opinion of the court advocating a broad test, written by Judge Thomas L. Ambro, (2) a concurring opinion advocating a narrower test written by Judge Thomas Hardiman, and (3) a dissenting in judgment opinion, written by Judge Fuentes.<sup>199</sup> The Ambro opinion held that the framework for as-applied Second Amendment challenges came from a collective reading of *Marzzarella* and *Barton*<sup>200</sup> and noted that any aspects of *Barton* that conflicted with *Marzzarella* were overruled.<sup>201</sup> In other words, the Third Circuit upheld *Marzzarella*’s two-prong test, with step one supplemented by the hurdles provided by *Barton*.<sup>202</sup> At step one, the challenging individual must prove that the “presumptively lawful regulation burdens his [or her] Second Amendment rights,” which requires him or her to: (1) “identify the traditional justification for excluding . . . the class of which he [or she] appears to be a member” from Second Amendment protections and (2) “present facts about himself [or herself] and his [or her] background that distinguish his [or her] circumstances from those of persons in the historically barred class.”<sup>203</sup> Here, the challenger must “rebut the presumptive lawfulness of the exclusion,” which Ambro declared “no small task” and not “merely on [the challenger’s] say-so.”<sup>204</sup>

Ambro defined § 922(g)(1)’s “historically barred class” as individuals previously convicted of serious crimes.<sup>205</sup> Looking to historical justification for § 922(g)(1), Ambro found that the prohibition is “tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens,’” which is “broader than violent criminals.”<sup>206</sup> This analysis was a break from *Barton*, which stated in a footnote that § 922(g)(1) was meant to prohibit “criminals likely to commit a violent crime in the future.”<sup>207</sup> Ambro stated that this footnote from *Barton* “too narrowly” defined § 922(g)(1)’s justification, which resulted in it “too broadly” defining the class of potentially successful as-applied challenges to individuals convicted of nonviolent crimes.<sup>208</sup> Further, Ambro ruled against *Barton*’s assertion that evidence of rehabilitation or likelihood of recidivism could be used at step one and noted the difficulty in predicting whether an individual

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198. *Id.*

199. See *id.* at 336–39 (majority opinion). For convenience, each of these opinions will be referenced by name of the authoring judge.

200. See *id.* at 346–47.

201. See *id.* at 339 n.1.

202. See *id.* at 347.

203. *Id.* at 346–47.

204. *Id.* at 347.

205. *Id.* at 348–49.

206. *Id.* (citing United States v. Yancey, 621 F.3d 681, 684–85 (7th Cir. 2010)). Ambro noted that “several” circuits have endorsed this justification, including the First, Fourth, Seventh, and Ninth Circuits. *Id.* at 348.

207. *Id.* at 347 n.3.

208. *Id.*

is likely to commit a violent offense in the future.<sup>209</sup> Therefore, the first step is entirely an analysis of the “seriousness of the purportedly disqualifying offense,” without focusing on the violence associated with that offense or a consideration of the individual’s rehabilitation.<sup>210</sup>

The opinion does not cover how to determine “seriousness.” Instead, Ambro provided a number of possible factors to consider that are sufficient, but not necessary, such as maximum possible punishment,<sup>211</sup> whether the legislators enacted the offense as a misdemeanor,<sup>212</sup> the use or attempted use of force as an element,<sup>213</sup> the length of the challenger’s sentence,<sup>214</sup> and whether other states “consider” the offense to be serious.<sup>215</sup> If a court finds that the predicate offense is not serious, then the individual “adequately distinguished his circumstances from those of persons historically excluded from Second Amendment protections.”<sup>216</sup> The law is then evaluated under “heightened scrutiny at step two,”<sup>217</sup> settling on intermediate scrutiny.<sup>218</sup>

Hardiman—joined by four judges—agreed that § 922(g)(1) was unconstitutional as applied to Binderup and Suarez.<sup>219</sup> However, Hardiman argues that *Barton* was correct in determining that the historical justification for § 922(g)(1) was “tethered to the time-honored practice of keeping firearms out of the hands of those likely to commit violent crimes.”<sup>220</sup> As such, Hardiman believed that § 922(g)(1) was “categorically unconstitutional” when applied to “non-dangerous persons convicted of offenses unassociated with violence” because it “eviscerates the core of the[ir] Second Amendment right.”<sup>221</sup> Therefore, Hardiman differed from Ambro by asserting that challengers must distinguish themselves from those with a “propensity for violence,” who were the historical target of the felon-in-possession prohibition.<sup>222</sup> He argued that step one should, thus, largely look at whether the predicate offense involved “violence, force, or threat of force,”<sup>223</sup> in addition to considering the individual’s subsequent behavior since the offense, which could affirm or disprove his or her “membership

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209. *Id.* at 349–50.

210. *Id.* at 350.

211. *See id.*

212. *See id.* at 351–52 (“[A] state legislature’s classification of an offense as a misdemeanor is a powerful expression of its belief that the offense is not serious enough to be disqualifying . . . . This is not to say that state misdemeanors cannot be serious.”).

213. *See id.* at 352.

214. *See id.* (“[S]evere punishments are typically reserved for serious crimes . . . . With not a single day of jail time, the punishments here reflect the sentencing judges’ assessment of how minor the violations were.”).

215. *Id.* at 353 (“[B]ecause they have shown that there is no consensus regarding the seriousness of their crimes, their showing at step one is that much more compelling.”).

216. *Id.* at 347.

217. *Id.*

218. *Id.* at 356.

219. *See id.* at 357 (Hardiman, J., concurring in part).

220. *Id.* at 362 (citing *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011)).

221. *Id.* at 358.

222. *Id.* at 375–76.

223. *Id.* at 376.

among the class of responsible, law-abiding citizens” with Second Amendment rights.<sup>224</sup>

In his dissent, Fuentes—joined by six other judges—questioned the premise that as-applied challenges to § 922(g)(1) are permissible and argued that if permissible, Binderup or Suarez would not qualify.<sup>225</sup> Fuentes began his analysis by looking at how other circuits have applied the Court’s “limited guidance” from *Heller* to challenges of felon-in-possession prohibitions.<sup>226</sup> No other circuit had upheld an as-applied challenge to § 922(g)(1) and, in fact, four circuits had found them to be impermissible.<sup>227</sup>

After providing the status of as-applied challenges among the sister circuits, Fuentes concurred with Ambro about using the *Marzzarella* test and analyzing a crime’s “seriousness” at step one.<sup>228</sup> However, Fuentes stated that as-applied challenges to § 922(g)(1) would fail at step one of the test because all “crimes currently within § 922(g)(1)’s scope are serious by definition.”<sup>229</sup> Fuentes noted that Congress has the power to require individuals convicted of crimes to “forfeit any number of rights and privileges” and that the prohibition on firearm possession is “a consequence of [the individuals’] own unlawful conduct.”<sup>230</sup> Fuentes also stated that even if as-applied challenges could be permitted for some firearm regulations, there can be laws where “such challenges must fail in the face of reasonable deference to legislative judgments,” pointing to First Amendment jurisprudence.<sup>231</sup> Referring to *United Public Workers of America v. Mitchell*,<sup>232</sup> Fuentes pointed out that Congress does indeed have the power to “impose a complete ban on the exercise of a constitutional right by a category of persons who, in its reasonable estimation, pose a threat to the public,” thus supporting the complete ban on firearm possession for individuals convicted of felonies.<sup>233</sup>

Fuentes further opined that the problems with as-applied challenges are insurmountable because any bright-line analysis is “practically impossible” and the determination cannot be made “with any degree of confidence.”<sup>234</sup> To illustrate this, Fuentes pointed to Congress’s decision to defund the AG’s administrative regime for providing individualized exceptions to the

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224. *Id.*

225. See *id.* at 380–81 (Fuentes, J., concurring in part and dissenting in part).

226. *Id.* at 381.

227. See *id.* at 381–82. Part III.A further examines how other circuits have determined as-applied challenges in a discussion of *Binderup*’s constitutionality. See *infra* Part III.A.

228. *Binderup*, 836 F.3d at 387.

229. *Id.* at 388.

230. *Id.* at 380–81.

231. *Id.* at 403–04.

232. 330 U.S. 75 (1947). In *Mitchell*, the Court held that a mechanic at the U.S. Mint was not successful in an as-applied challenge to the Hatch Act, which bans government employees from engaging in certain kinds of partisan political activity. See *id.* at 101. The Court did not agree with the mechanic’s argument that he was different from “administrative workers” who “may be barred, constitutionally, from political management and political campaigns,” and further stated that these “matters of details” are “for Congress, not for the courts.” *Id.* at 102.

233. *Binderup*, 836 F.3d at 404.

234. *Id.* at 402.

prohibitions allowed under § 925(c).<sup>235</sup> Fuentes highlighted Congress's evaluation of "evidence from its prior regime" that these individual evaluations—which were "in effect, as-applied challenges"—were "unworkable."<sup>236</sup> Specifically, he cited a 1992 Senate report, which stated that the system was "too prone to error" and could result in "devastating consequences for innocent citizens if the wrong decision is made."<sup>237</sup> Fuentes concluded that Congress's decision to defund the application process shows that as-applied challenges are untenable due to the possibility of "potentially fatal" errors.<sup>238</sup>

Additionally, Fuentes pointed to a number of federal court cases brought after Congress stopped funding § 925(c),<sup>239</sup> including *United States v. Bean*.<sup>240</sup> In *Bean*, the Supreme Court held that the federal courts were not forced to review the individual applications after Congress ceased funding such review.<sup>241</sup> In its analysis, the Court stated that "an inquiry into that applicant's background" is "best performed by the Executive" because an agency, "unlike courts, is institutionally equipped for conducting a neutral, wide-ranging investigation."<sup>242</sup> Noting that this decision was pre-*Heller*,<sup>243</sup> Fuentes nonetheless implored the Third Circuit to heed *Bean*'s warnings of "pitfalls inherent in a regime of as-applied challenges."<sup>244</sup>

Fuentes's most significant—and concluding—concern echoed Justices Stevens and Breyer in their *Heller* and *McDonald* dissents. Fuentes warned that this decision will "saddle district court judges"<sup>245</sup> with an "extraordinary administrative burden"<sup>246</sup> without providing any "workable standards" for determining an as-applied challenge's constitutionality.<sup>247</sup> Echoing the Court in *Heller*, the Third Circuit leaves it to "future cases to explain more fully how to weigh and balance" factors in the *Binderup* test.<sup>248</sup> Fuentes warned that "it will only be a matter of time before void-for-vagueness challenges to § 922(g)(1) start to percolate throughout" the Third Circuit.<sup>249</sup> Thus, in addition to concerns over the permissibility of as-applied challenges, Fuentes expressed concern about the test itself.

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235. *Id.* at 402–03; *see also* Part I.A.2.

236. *Binderup*, 836 F.3d at 403.

237. *Id.* The House Report echoes similar concerns. *See H.R. REP. NO. 102-618*, at 14 (1992).

238. *Binderup*, 836 F.3d at 403.

239. *See id.* at 407–09.

240. 537 U.S. 71 (2002).

241. *Id.* at 77–78.

242. *Id.* at 77.

243. *See Binderup*, 836 F.3d at 408 n.209.

244. *Id.* at 408.

245. *Id.* at 380.

246. *Id.* at 409.

247. *Id.* at 380.

248. *Id.* at 411.

249. *Id.*

## II. UNCONSTITUTIONAL INVALIDITY: *JOHNSON V. UNITED STATES*

Fuentes's warning of void-for-vagueness challenges alluded to *Johnson*,<sup>250</sup> which settled a pervasive disagreement among the circuits concerning the residual clause of the ACCA.<sup>251</sup> That disagreement is similar to the issues present in the as-applied challenges to § 922(g)(1), including *Binderup*. Part II.A provides a brief overview of the void-for-vagueness doctrine. Part II.B analyzes *Johnson* with a focus on the similarities between the Court's issues with the residual clause and those with as-applied challenges.

### A. Void for Vagueness: Overview

Primarily used in First Amendment challenges, the void-for-vagueness doctrine has been described by the Court as assessing whether a statute "forbids or requires the doing of an act in terms so vague" that it necessitates a "guess at its meaning and differ[s] as to its application."<sup>252</sup> The Court has only used the doctrine to invalidate a criminal law five times since the 1960s.<sup>253</sup> The fifth and most recent is *Johnson*. Applying the void-for-vagueness doctrine in *Johnson*, the Court explained that a criminal law is unconstitutional if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."<sup>254</sup> Ambiguity in criminal law, particularly if it does not provide minimal guidelines for enforcement, can result in unjust punishment and selective prosecution.<sup>255</sup>

### B. *Johnson v. United States*

In *Johnson*, the Court held that the residual clause of the ACCA—called by a federal public defender as "the most contentious 14 words in a criminal statute in recent years"—was unconstitutionally vague.<sup>256</sup> The ACCA, which the DOJ called a longstanding tool to "achieve prolonged incarceration of armed violent offenders,"<sup>257</sup> increases the penalties for individuals convicted under § 922(g)(1) if they have had three or more earlier convictions for "serious drug offense[s]" or "violent felon[ies]."<sup>258</sup>

Under the ACCA, a predicate offense qualifies as a "violent felony" if it (1) falls within an element clause, which means it "has as an element the use, attempted use, or threatened use of physical force against the person of another";<sup>259</sup> (2) "is burglary, arson, extortion, or an offense involving the use

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250. *Id.*

251. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

252. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

253. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017).

254. *Johnson*, 135 S. Ct. at 2556.

255. CHEMERINSKY, *supra* note 83, at 970.

256. Katherine Menendez, *Johnson v. United States: Don't Go Away*, CRIM. JUST., Spring 2016, at 12, 13.

257. U.S. DEP'T OF JUSTICE, *supra* note 7, § 1032.

258. 18 U.S.C. § 924(e)(1) (2012).

259. *Id.* § 924(e)(2)(B)(i).

of explosives";<sup>260</sup> or (3) falls within the residual clause, which includes any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another."<sup>261</sup>

Should the predicate offenses qualify under the ACCA, there is a mandatory increase from a ten-year *maximum* sentence under § 922(g)(1) to a fifteen-year *minimum* sentence and a maximum sentence of life,<sup>262</sup> even if the judge finds the resulting sentence unjust or excessive.<sup>263</sup> In fiscal year 2016, 305 individuals received an ACCA enhancement and their average sentence was fifteen years;<sup>264</sup> this was ten years more than the average sentence for a § 922(g)(1) violation.<sup>265</sup> Thus, the determination of a "serious drug offense" or a "violent felony" is significant.

Prior to *Johnson*, the Court had undertaken multiple examinations of the ACCA, including in *Taylor v. United States*.<sup>266</sup> In *Taylor*, the Court addressed whether a particular state conviction for burglary qualified as a "burglary" pursuant to the ACCA.<sup>267</sup> To determine if a predicate offense qualifies under the ACCA, the Court endorsed the categorical approach, whereby courts look to the predicate offense's statutory elements as opposed to the particular individual's conduct underlying the conviction.<sup>268</sup> *Taylor*, thus, rejected "mini-trials" where sentencing judges undergo a fact-specific analysis for each individual.<sup>269</sup> This element-specific categorical approach was to be used in assessing predicate offenses for the ACCA, including under the residual clause.<sup>270</sup>

The Court also dealt specifically with the residual clause before *Johnson*, granting certiorari in four cases from 2007 to 2015.<sup>271</sup> In each case, the Court addressed the inclusion of different predicate offenses under the residual clause and applied a slightly different test each time.<sup>272</sup> Another feature of these four cases was the repeated objections of Justices Antonin Scalia and Alito over the lack of clarity and consistency in the residual clause analysis and the Court's previous decisions.<sup>273</sup>

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260. *Id.* § 924(e)(2)(B)(ii).

261. *Id.*

262. See *id.*; see also Carlton F. Gunn, *So Many Crimes, So Little Time: The Categorical Approach to the Characterization of a Prior Conviction Under the Armed Career Criminal Act*, 7 FED. SENTENCING REP. 66, 66 (1994).

263. Menendez, *supra* note 256, at 12.

264. *Quick Facts: Felon in Possession of a Firearm*, *supra* note 11.

265. *Id.*

266. 495 U.S. 575 (1990).

267. *Id.* at 600–01; see also 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

268. See *Taylor*, 495 U.S. at 600–01.

269. Gunn, *supra* note 262, at 66.

270. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

271. *Id.* at 2554 (citing *Sykes v. United States*, 564 U.S. 1 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007)).

272. *Id.* at 2558.

273. See *Sykes*, 564 U.S. at 28 (Scalia, J., dissenting) ("As was perhaps predictable, instead of producing a clarification of the Delphic residual clause, today's opinion produces a fourth ad hoc judgment that will sow further confusion. . . . We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness."); *Chambers*, 555 U.S. at 133

Ultimately, in 2015, the Court invalidated the residual clause in *Johnson* in an opinion written, unsurprisingly, by Justice Scalia.<sup>274</sup> The Court held that imposing an increased sentence under the residual clause was unconstitutional because of the “indeterminacy of the wide-ranging inquiry” required to determine if a predicate offense qualified as a “violent felony” under the clause.<sup>275</sup> In particular, the Court identified two features of the residual clause that “conspire to make it unconstitutionally vague.”<sup>276</sup> First, the categorical approach required that courts use a “judicially imagined ‘ordinary case’” to estimate the risk of the crime instead of “real-world facts or statutory elements.”<sup>277</sup> The Court expressed deep concern with the “grave uncertainty” about how the judges would estimate the risk of the crime, asking—perhaps sarcastically—if the judge should look to “statistical analysis,” “a survey,” “expert evidence,” “Google,” or “gut instinct.”<sup>278</sup> Second, the courts ask if the “judge-imagined abstraction” of the ordinary crime involved “serious potential risk,” which was an equally vague notion.<sup>279</sup> The Court held that these two features conspire to create “arbitrary enforcement by judges.”<sup>280</sup> Taken together, the Court held that the application of the residual clause to enhance one’s sentence denied due process.<sup>281</sup>

The Court was not persuaded that the residual clause was constitutional merely because there are “straightforward cases” in which a predicate offense “clearly pose[s] a serious potential risk of physical injury to another.”<sup>282</sup> Pointing to precedent, the Court rejected the argument that a statute is constitutional “merely because there is some conduct that clearly falls within the provision’s grasp.”<sup>283</sup> The Court did not accept that “some obviously risky crimes” establish that the residual clause is constitutional.<sup>284</sup> Further, the Court rejected the government’s argument that courts should look to the individual’s conduct rather than employ the categorical approach.<sup>285</sup> The Court affirmed the importance of *Taylor* and noted the “utter impracticability

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(Alito, J., concurring) (“ACCA’s residual clause is nearly impossible to apply consistently. Indeed, the ‘categorical approach’ to predicate offenses has created numerous splits among the lower federal courts . . . .”); *Begay*, 553 U.S. at 154 (Scalia, J., concurring) (“But I can do no more than guess as to whether drunk driving poses a more serious risk than burglary, and I will not condemn a man to a minimum of 15 years in prison on the basis of such speculation.”); *James*, 550 U.S. at 216 (Scalia, J., dissenting) (“Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of ACCA’s residual provision, yet its boundaries are ill defined.”).

274. *Johnson*, 135 S. Ct. at 2557.

275. *Id.*

276. *Id.*

277. *Id.*; see also *James*, 550 U.S. at 211.

278. *Johnson*, 135 S. Ct. at 2557 (citing *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009)).

279. *Id.* at 2558.

280. *Id.* at 2557.

281. *Id.*

282. *Id.* at 2560.

283. *Id.* at 2561.

284. *Id.* (emphasis omitted).

285. *Id.* at 2562.

of requiring” a court to “reconstruct” an individual’s conduct “long after the original conviction.”<sup>286</sup> Ultimately, the residual clause was doomed by the need to apply two vague standards—“serious potential risk” and “idealized ordinary case”—that the Court found resulted in “arbitrary enforcement.”<sup>287</sup>

The Court acknowledged its multiple past attempts to establish a standard test for the residual clause and cited these “persistent efforts” as proof of vagueness.<sup>288</sup> Pointing to inconsistencies and splits among the lower federal courts, the Court highlighted that “pervasive disagreement” in the lower court about “the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.”<sup>289</sup> The Court called the general confusion and lack of consistency unavoidable and inconsistent with due process: “Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.”<sup>290</sup>

### III. ASSESSING THE CONSTITUTIONALITY OF THE *BINDERUP* TEST

A decade after *Heller*, the Court has yet to “clarify the entire field” of Second Amendment jurisprudence or “expound upon the historical justifications” for the “presumptively lawful” prohibitions—as it said it would.<sup>291</sup> Two particular areas of concern have arisen as federal courts seek to respond to the post-*Heller* challenges: (1) the permissibility of as-applied challenges to the enumerated presumptively lawful prohibitions and (2) the constitutionality of the tests created by the circuits to respond to challenges. Part III.A addresses the permissibility of as-applied challenges, while Part III.B highlights the *Binderup* test to show constitutional concerns with the current state of as-applied challenges.

#### A. Are As-Applied Challenges Permissible?

As noted, the Court in *Heller* stated that the individual right to keep and bear arms is not unlimited, and certain “longstanding prohibitions” are “presumptively lawful.”<sup>292</sup> Two years later, the Court “repeat[ed] those assurances” that *Heller* does not “cast doubt” on the longstanding prohibitions.<sup>293</sup> This contention is not further elaborated on; instead, the Court noted that it will “expound upon the historical justifications for the exceptions” mentioned.<sup>294</sup> Federal courts, then, were forced to decide what “presumptively lawful” means. The three-judge panel of the Third Circuit in *Barton*, for example, understood “presumptively lawful” as an implication

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286. *Id.*

287. *Id.* at 2557–58.

288. *Id.* at 2558 (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)).

289. *Id.* at 2560.

290. *Id.*

291. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

292. *Id.* at 627 n.26.

293. *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

294. *Heller*, 554 U.S. at 635.

“that the presumption may be rebutted,” thus opening up the courts to as-applied challenges to the longstanding prohibitions enumerated in *Heller*.<sup>295</sup> The seven dissenting judges in *Binderup* were not in consensus with the *Barton* panel—or the eight judges upholding the as-applied challenge in *Binderup*—on this matter. They critiqued the treatment of the word “presumptively” in *Heller* “as though it requires courts to consider as-applied challenges to the felon-in-possession ban.”<sup>296</sup>

Five other circuits agreed with the *Binderup* dissenters and held that as-applied challenges to § 922(g)(1) are not permissible. Instead of focusing on the word “presumptively,” the Fifth,<sup>297</sup> Sixth,<sup>298</sup> Ninth,<sup>299</sup> Tenth,<sup>300</sup> and Eleventh<sup>301</sup> Circuits have focused on *Heller*’s assertion that it does not cast doubt on prohibitions like § 922(g)(1). Additionally, the Second Circuit did not expressly state whether as-applied challenges are permissible but did hold § 922(g)(1) constitutional in *United States v. Bogle*<sup>302</sup> without distinguishing between facial and as-applied challenges.<sup>303</sup>

The First Circuit has not expressly foreclosed as-applied challenges, but it has “expressed skepticism” about them.<sup>304</sup> In *United States v. Torres-Rosario*,<sup>305</sup> the First Circuit noted the potential for “serious problems of administration, consistency and fair warning” in as-applied challenges, but nonetheless stated that it may be open to them.<sup>306</sup>

The four remaining circuits—the Fourth, Seventh, Eighth, and D.C. Circuits<sup>307</sup>—have stated that as-applied challenges are permissible, but have not yet upheld any, citing the challenging individual’s failure to distinguish

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

296. *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 394 (3d Cir. 2016) (en banc) (Fuentes, J., concurring in part and dissenting in part) (emphasis omitted), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

297. See *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010).

298. See *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010). Notably, the Sixth Circuit recently remanded an as-applied challenge to § 922(g)(4), which prohibited possession of a firearm by individuals who have been committed to a mental institution. *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 681 (6th Cir. 2016). The district court was instructed to apply intermediate scrutiny to determine the statute’s constitutionality as applied. *Id.* at 699. It noted that it would not rely on *Heller*’s “presumptively lawful” language for § 922(g)(4), as it did in *Carey*, in a challenge to § 922(g)(1). *Id.* at 688. Thus, while *Tyler* is certainly relevant, the circuit did not suggest that the decision means any change to its view on as-applied challenges to § 922(g)(1).

299. See *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010) (en banc).

300. See *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).

301. See *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (per curiam).

302. 717 F.3d 281 (2d Cir. 2013) (per curiam).

303. See *id.* at 281–82.

304. *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 384 (3d Cir. 2015) (en banc) (Fuentes, J., concurring in part and dissenting in part) (describing the First Circuit’s position on as-applied challenges to § 922(g)(1)), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

305. 658 F.3d 110 (1st Cir. 2011).

306. *Id.* at 113.

307. See *United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014); *Schrader v. Holder*, 704 F.3d 980, 990–91 (D.C. Cir. 2013); *United States v. Moore*, 666 F.3d 313, 320 (4th Cir. 2012); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

his or herself to the court's satisfaction.<sup>308</sup> The Fourth Circuit, for example, acknowledged that there could be a successful as-applied challenge under the right circumstances but held that the fact that the predicate offense is nonviolent does not, alone, result in a successful as-applied challenge.<sup>309</sup>

Thus, in addition to disagreements about the test for evaluating post-*Heller* Second Amendment challenges,<sup>310</sup> there is a more troubling and deep split over whether as-applied challenges to the enumerated longstanding prohibitions like § 922(g)(1) are even allowed. The Court needs to keep the promise it made in *Heller* to evaluate presumptively lawful prohibitions like § 922(g)(1). In particular, it needs to clarify whether they are susceptible to as-applied challenges.

### B. The Problems with *Binderup*

Should the Court hold that as-applied challenges are permissible, it must evaluate the two-step test set forth in *Binderup*.<sup>311</sup> The question at step two is rather simple: what level of scrutiny should the courts apply when evaluating the challenged laws? There is consensus among the circuits that intermediate scrutiny is the proper level based on their reading of *Heller*;<sup>312</sup> the Court needs to confirm whether this consensus is correct.

Step one, however, has more to address. The Third Circuit used "historical justifications" because of the note in *Heller*, in which the Court stated it would "expound upon the historical justifications" for the longstanding prohibitions.<sup>313</sup> The federal courts have decided that this language—"historical justification"—dictates a key facet for evaluating Second Amendment restrictions.<sup>314</sup>

First, the Court needs to confirm that the examination of historical justification is, in fact, the test that courts should use. Second, the Court, as promised, should expound on the justification for § 922(g)(1) as a presumptively lawful regulation and in doing so create a standard rationale for why that prohibition is lawful. The Court promised that there would be time enough for it to undergo this analysis, and, now that a circuit has upheld the first successful as-applied challenge to § 922(g)(1), the issue is ripe for discussion.

*Binderup*, which upheld that first successful challenge, is itself susceptible to constitutional concerns. There are at least three significant similarities between the issues settled by *Johnson* and those present in *Binderup*: (1) the federal courts rightly are uncertain about how to apply the Court's decision,

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308. *Binderup*, 836 F.3d at 385 (Fuentes, J., dissenting) (describing the Fourth, Seventh, Eighth, and D.C. Circuits' positions on as-applied challenges to § 922(g)(1)).

309. See *United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) (stating that "application of the felon-in-possession prohibition to allegedly non-violent felons . . . does not violate the Second Amendment").

310. See *supra* Part I.C.2.

311. *Binderup*, 836 F.3d at 356; see *supra* notes 200–04.

312. See *supra* note 157 and accompanying text.

313. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

314. See *supra* notes 82–84 and accompanying text.

which has resulted in disagreement among and within the circuits; (2) due to no bright-line rules, judges must create abstraction of the ordinary crime to determine if the crime is violent pursuant to the ACCA, or serious pursuant to *Binderup*; and (3) a “shapeless” provision<sup>315</sup> is infringing on fundamental rights, particularly the right to bear arms and the constitutional prohibition on excessive punishment. Similar to *Johnson*, the vague standards of *Binderup* “conspire”<sup>316</sup> to make the test unconstitutional. In both the pre-*Johnson* cases and in *Binderup*, standards to assess whether a predicate offense qualifies under a statute largely rely on an individual judge’s interpretation, resulting in “indeterminacy of the wide-ranging inquiry.”<sup>317</sup> In *Binderup*, it is not clear how to determine whether a predicate offense constitutes a “serious” crime. As Judge Fuentes noted in his dissent, the absence of rules for determining a crime’s “seriousness” means that “the judge’s views about the offense and the offender” could determine the outcome of a case,<sup>318</sup> potentially resulting in different holdings for the same predicate offense. An evaluation of “seriousness” would likely fail under an application of *Johnson*’s reasoning to this test.

Further, the Court in *Johnson* found evidence of vagueness in “pervasive disagreement” among lower courts about the “nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.”<sup>319</sup> In as-applied challenges, the circuits are split over what factors to consider, what historical justification to rely on, what presumptions are rebuttable, what level of constitutional scrutiny to employ, and whether as-applied challenges are even permissible. This level of disagreement should warrant an examination of as-applied challenges by the Supreme Court.

The Court has already expressed its disdain for judges looking at the particular facts of a past criminal conviction in *Taylor*, where it required courts to evaluate predicate offenses under the categorical approach for the ACCA.<sup>320</sup> Without the categorical approach, courts risk undertaking “mini-trials” that “reconstruct” an individual’s conduct “long after the original conviction.”<sup>321</sup> Based on the limited guidance provided by the Third Circuit in *Binderup*, it seems possible that district judges will be forced to conduct these “mini-trials” since the analysis of the predicate offense is not limited to the elements of the underlying offense.<sup>322</sup> As the Court noted in *Johnson*, underlying *Taylor* is its belief that these “mini-trials” are tarnished by their “utter impracticability” and, thus, should not be permitted.<sup>323</sup> The *Binderup*

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315. See *supra* note 290 and accompanying text.

316. See *supra* note 276 and accompanying text.

317. See *supra* note 275 and accompanying text.

318. *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 410 (3d Cir. 2016) (en banc) (Fuentes, J., concurring in part and dissenting in part) (emphasis omitted), *cert. denied*, 137 S. Ct. 2323 (2017) (No. 16-847).

319. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

320. See *supra* notes 246–49 and accompanying text.

321. See *supra* notes 275–76 and accompanying text.

322. See *supra* Part I.C.2.

323. *Johnson*, 135 S. Ct. at 2562.

test, as it stands, potentially invalidates the belief underlying *Taylor* and should be addressed by the Court.

#### IV. RESOLUTION

To resolve the pervasive disagreement over the nature and permissibility of as-applied challenges to § 922(g)(1), there are two primary options: (1) a statutory fix or (2) a judicial fix. Part IV.A provides options for a statutory fix by Congress, should it choose to act. Part IV.B reiterates the need for the Supreme Court to address as-applied challenges to § 922(g)(1) and notes the potential equal protection issues resulting from a fundamental right that hinges on the circuit in which a person resides.

##### A. Statutory Fix

Should Congress agree with some circuits that there are predicate offenses that should no longer result in a prohibition under § 922(g)(1), it can amend § 921(a)(20) to provide more offense-specific clarification of what felonies and state misdemeanors fall within the meaning of “crime” in the statute. Currently, the statute states that offenses pertaining to “antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” do not result in the prohibition on possessing a firearm.<sup>324</sup> Thus, it is not unprecedented for Congress to exempt certain offenses from § 922(g)(1). Congress can either add other offenses that are exempted from the felon-in-possession prohibition or, alternatively, provide a list of offenses that should result in the prohibition. This option, however, could result in further questions about whether the lists of enumerated offenses are exhaustive and whether appeals are permitted for offenses not provided on any affirmative list. Additionally, this fix would be limited to the enumerated offenses, without addressing the test for those not listed.

Should Congress wish to limit as-applied challenges in the courts, it could amend the language about “what constitutes a conviction” under § 921(a)(20). Currently, the statute provides that any conviction that has been “expunged, or set aside or for which a person has been pardoned or has had civil rights restored” is not a conviction under the prohibition.<sup>325</sup> Congress could add an express declaration that other than these enumerated exceptions, an individual’s Second Amendment rights cannot be restored.

Additionally, but unlikely, Congress could begin providing funds to the AG to undertake individual evaluations for rights restoration under § 925(c). Congress stopped funding the program in 1992, concluding that it was a difficult and subjective task prone to errors.<sup>326</sup> Additionally, the Court in *Bean* questioned whether the judiciary had the ability to make individual evaluations of this nature.<sup>327</sup> Thus, Congress may decide to re-fund the AG’s

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324. 18 U.S.C. § 921(a)(20)(A) (2012).

325. *Id.* § 921(a)(20)(B).

326. See *supra* notes 71–74 and accompanying text.

327. See *supra* notes 74, 233–44 and accompanying text.

evaluation program if it shares the *Bean* Court's concerns about the judiciary making such decisions. Re-funding the program, however, still would require resolution about how the federal courts should handle these as-applied challenges since individuals denied by the AG are able to appeal the ruling to the district courts.<sup>328</sup> Yet Congress's consistent decision over thirty years to not fund the program means that a reversal on whether it should fund § 925(c) is unlikely.

#### B. Judicial Fix

Regardless of whether or how Congress acts, the Court needs to clarify issues regarding § 922(g)(1) as-applied challenges. Particularly, it needs to address two overarching concerns: (1) the permissibility of as-applied challenges to the enumerated presumptively lawful prohibitions and (2) the constitutionality of the tests created by the circuits to respond to challenges.

The Court can address the permissibility of as-applied challenges by granting certiorari in such a case and determining whether § 922(g)(1) falls within Congress's power to impose a complete ban on the exercise of a constitutional right by a class of individuals, as it did in *Mitchell*.<sup>329</sup> In other words, it can uphold a *per se* felon-in-possession prohibition. It also could hold that as-applied challenges are permitted.

A determination about the permissibility of an as-applied challenge is necessary based on the nature of the circuit split. Without the Court's interference, it currently stands that individuals previously convicted of an offense in the Third Circuit could potentially have their Second Amendment rights restored, while individuals who committed the same offense in the Fifth, Ninth, Tenth, or Eleventh Circuits cannot.<sup>330</sup> This gives rise to a potential equal protection problem, with a person's fundamental rights determined by where they live.

Should the Court uphold the possibility of as-applied challenges, it next needs to clarify the factors and test that federal courts should use in analyzing such challenges. The disparities among—and within—the circuits should be settled by the Court, particularly whether the challenges are limited to individuals with predicate offenses that are “non-violent” or “non-serious.”<sup>331</sup> For example, within the Third Circuit, there is a split among the judges over what factors are relevant to determine as-applied challenges, with seven judges pointing to “seriousness” of the predicate offense and five judges pointing to the “violence” associated with the predicate offense. The Court would then need to provide guidance on how to evaluate a predicate offense’s “seriousness” or level of violence, should it endorse either option.

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328. 18 U.S.C. § 925(c) (providing that anyone denied “relief” by the AG “may file a petition with the United States district court for the district in which he resides for a judicial review of such denial”).

329. See *supra* note 232 and accompanying text.

330. See *supra* note 297–303 and accompanying text.

331. See *supra* note 193 and accompanying text.

Despite the clear constitutional concerns, the Court denied certiorari on the DOJ's appeal of *Binderup* in June 2017.<sup>332</sup> For the Court to uphold its promise from *Heller* to expound upon the justification for § 922(g)(1) and clarify this facet of Second Amendment jurisprudence, it needs to accept the next petition dealing with this matter, which would likely come from an individual in a circuit that deemed as-applied challenges impermissible or from an individual in the Third Circuit whose challenge was denied under the *Binderup* test. Importantly, it is not enough for the Third Circuit to evaluate its *Binderup* test under the aforementioned analysis or any other. Unless the Court acts, the circuit split will remain and an individual's fundamental right to bear arms will continue to be determined by where he or she lives.

#### CONCLUSION

We teach our children that when we make promises, we must keep them. In *Heller*, the Court promised that it would clarify Second Amendment jurisprudence as the issues arose. Instead, it has consistently failed to keep its promise and allowed a deeply unsettling circuit split over the permissibility and application of as-applied challenges to the longstanding and aggressively enforced felon-in-possession prohibition. The Court cannot continue to side-step its responsibilities and must deal with the uncertainty and chaos created by its decision in *Heller*. Anything less than deciding this issue would result in the Court shirking its duties by allowing a troublesome circuit split—whether individuals can look to the courts to have a fundamental right restored—to continue. Regardless of one's position on guns, the determination of a fundamental right based on where you live is troubling.

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332. See *supra* notes 40–42 and accompanying text.