LONG-RANGE ANALOGIZING AFTER *BRUEN*: HOW TO RESOLVE THE CIRCUIT SPLIT ON THE FEDERAL FELON-IN-POSSESSION BAN

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In 2023, over the course of one week, two U.S. courts of appeals ruled on Second Amendment challenges to 18 U.S.C. § 922(g)(1), the federal statute prohibiting firearm possession for those convicted of felonies. Both courts applied the U.S. Supreme Court's "history and tradition" test from New York State Rifle & Pistol Ass'n v. Bruen*. In the U.S. Court of Appeals for the Eighth Circuit, criminal defendant Edell Jackson did not succeed. There, the court found that the nation's history and tradition supported the validity of a law banning firearm possession by felons, regardless of the details of their felony or propensity for violence. In the U.S. Court of Appeals for the Third Circuit, Bryan Range, who was convicted of welfare fraud in 1995, brought a civil suit seeking injunctive relief so that he could again lawfully possess firearms. The Third Circuit ruled for Range and held that the nation's history and tradition did not support disarming someone like Range. The circuit thus held that Range's entire disarmament under § 922(g)(1), including at the time of his 1995 conviction, was unconstitutional.*

This Note proposes that the U.S. Supreme Court resolve this split on § 922(g)(1) by ruling that history and tradition support § 922(g)(1)'s categorical disarmament of felons. In particular, this Note argues that the Eighth Circuit more accurately applied step two of Bruen*, which asks whether a challenged firearm law is sufficiently analogous to, and thus supported by, firearm laws from earlier periods in American history. This is particularly noteworthy as both courts considered and decided their cases with the same historical examples of disarmament in mind. Next, this Note argues that § 922(g)(1)'s validity under* Bruen *supports closing off Second Amendment challenges to § 922(g)(1) in criminal proceedings, but that courts can permit such challenges to seek prospective, declaratory relief in civil proceedings. This Note concludes by arguing that structuring the relief*

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in this way appropriately permits rearmament only for those who can demonstrate their law-abiding, responsible status.

INTRODUCTION

In March of 2021, Aduqre Quailes was arrested and charged with violating the federal Gun Control Act of 1968,[1] which, among other things, prohibits felons from possessing firearms.[2] Quailes's felon status arose from four previous convictions in Pennsylvania for possession of heroin and cocaine with the intent to distribute.[3] Less than two years later, in an unrelated incident, Joshua Reichenbach was also arrested and charged with violating the same law.[4] Reichenbach's felon status arose from five previous drug convictions.[5] Both defendants challenged the law as applied to them,[6] arguing that it violated their Second Amendment rights as interpreted by the U.S. Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*.[7] Despite both cases unfolding in the same federal district court and the significant factual similarities of the defendants' past felonies, there was no similarity in their outcomes.[8] The federal felon-in-possession charge was dismissed as unconstitutional as applied to Quailes, but it was upheld as constitutional as applied to Reichenbach.[9]

Though this pair of cases may seem discordant, together they encapsulate one federal circuit's approach to Second Amendment challenges to 18 U.S.C. § 922(g)(1) (the "felon-in-possession law").[10] In other federal circuits, both Quailes's and Reichenbach's challenges to § 922(g)(1) would have quickly been dismissed.[11] In the Third Circuit, however, these challenges hinge on the historical findings and interpretations of the district court judge hearing the case.[12] As Quailes and Reichenbach discovered, that historical method does not guarantee consistency.[13] Both the circuit split between the U.S. Courts of Appeals for the Eighth and Third Circuits[14] and the intradistrict court split described above reflect the immense difficulty that courts face

1. Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).
2. United States v. Quailes, No. 21-CR-0176, 2023 WL 3689406, at *1 (M.D. Pa. May 6, 2023).
3. *Id.* at *7.
4. United States v. Reichenbach, No. 22-CR-00057, 2023 WL 5916467, at *1 (M.D. Pa. Sept. 11, 2023).
5. *See id.* (noting this includes four counts for delivery of, or possession with the intent to deliver, controlled substances and one count for conspiracy to possess a controlled substance).
6. *See id.*; *Quailes*, 2023 WL 5401733, at *1.
7. 142 S. Ct. 2111 (2022).
8. *See Reichenbach*, 2023 WL 5916467, at *10; *Quailes*, 2023 WL 5401733, at *12.
9. *See Reichenbach*, 2023 WL 5916467, at *10; *Quailes*, 2023 WL 5401733, at *12.
10. *See infra* Part II.A.2; 18 U.S.C. § 922(g)(1).
11. *See, e.g.*, *infra* Part II.B.1.
12. *See Reichenbach*, 2023 WL 5916467, at *10 n.93 (acknowledging that based on different historical findings, the court reached a result contrary to *Quailes*).
13. *See id.*
14. *See infra* Part II.

when applying *Bruen* and its historical method to the felon-in-possession law.[15]

More broadly, these cases represent the reality that over the last several decades, guns and gun laws have, respectively, become increasingly controversial and indefinite in the United States.[16] Some see the prevalence of gun violence in the Unites States as a public health crisis,[17] with the frequency of mass shootings rising steadily since 2000,[18] the annual number of suicides and homicides via firearm reaching a historic peak in 2021,[19] and recent data suggesting that the introduction of right-to-carry handgun regimes in cities increases violent crime in such cities by up to 20 percent.[20]

Others argue that the picture is more complicated. First, the Supreme Court held that the potential public safety dangers around gun rights do not permit the Second Amendment to be treated as lesser than other constitutionally guaranteed rights.[21] Second, not all agree on the import of the public health statistics above. For instance, some worry that stricter firearm laws disproportionately affect groups whose elevated risk of harm is actually a credible reason to exercise their Second Amendment rights for self-defense, rather than a reason to pass more gun control legislation.[22] Third, the empirical data on the public health effects of firearms does not all point in one direction.[23] For instance, some data suggests that when citizens exercise their Second Amendment rights, there is a strong deterrent effect on

15. *See infra* Part II.

16. *See* Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2023), https://www.pewresearch.org/short-reads/2023/09/13/key-facts-about-americans-and-guns/ [https://perma.cc/K7EZ-EA6Q] (analyzing opinion data that shows that a majority of Americans view gun violence as a major problem and that a majority of Democrats view gun ownership as likely to decrease safety, whereas a majority of Republicans view gun ownership as likely to increase safety).

17. *Gun Violence*, AM. PUB. HEALTH ASS'N, https://www.apha.org/topics-and-issues/gun-violence [https://perma.cc/9WY2-HBUU] (last visited Mar. 3, 2024).

18. John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ [https://perma.cc/J6VF-75ZP].

19. *Id.*

20. John J. Donohue, Samuel V. Cai, Matthew V. Bondy & Philip J. Cook, *Why Does Right-to-Carry Cause Violent Crime to Increase?* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30190, 2022), https://www.nber.org/system/files/working_papers/w30190/w30190.pdf [https://perma.cc/D4EK-EXP6]. *But see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2158 n.1 (2022) (Alito, J., dissenting) (emphasizing that other studies find right-to-carry regimes may have a neutral or even deterrent effect on rates of violent crime).

21. *See Bruen*, 142 S. Ct. at 2156; *see also* McDonald v. City of Chicago, 561 U.S. 742, 783 (2010) ("The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications.").

22. *See* Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in a Post*-Heller *World*, 70 DUKE L.J. 1429, 1465 (2021) (arguing that "the felon-in-possession ban disproportionately disarms the very people who are most likely to find themselves needing to defend their hearth and home").

23. *See* Alessandro Acquisti & Catherine Tucker, *Guns, Privacy, and Crime* 2–3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29940, 2022), https://www.nber.org/system/files/working_papers/w29940/w29940.pdf [https://perma.cc/T6JN-L2EZ] (finding that when a Memphis newspaper published a database with the names and zip codes of those in Tennessee with handgun carry permits, burglaries decreased in zip codes with more gun permits).

crime.[24] Lastly, the efficacy of firearm laws varies by metric. Although concealed-carry regimes might correlate with violent crime generally, few firearms policies seem to have a measurable effect on the frequency of particularly disturbing events such as mass shootings.[25] Layered on top of this debate is *Bruen*, in which the Supreme Court drastically altered the calculus concerning which gun laws are constitutionally permitted.[26]

In *Bruen*, the Court clarified the test for deciding Second Amendment challenges made against firearm laws,[27] holding that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[28] If the Constitution presumptively protects the conduct at issue, the government bears the burden of demonstrating that the law at issue is "consistent with this Nation's historical tradition of firearm regulation."[29] This second step requires courts to consider whether a modern firearms law being challenged is sufficiently similar or analogous to laws of earlier periods in American history (the "history and tradition" test).[30]

The enormity of *Bruen* is hard to overstate. The Court's broader holding—the clarification of the history and tradition test for Second Amendment challenges—has resulted in drastic changes to gun laws around the country.[31] By one estimate, within one year of the *Bruen* decision in June of 2022, litigants brought 375 Second Amendment challenges to a wide range of laws; forty-four of those challenges successfully invalidated the law at issue.[32] Chief among the laws facing Second Amendment challenges were the provisions of the federal statute prohibiting possession of a firearm, mostly found in 18 U.S.C. § 922(g).[33] Within that statute is § 922(g)(1), the federal felon-in-possession law. Here is what it says:

> It shall be unlawful for any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess

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24. *See generally* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed. 2010).

25. *See* Samuel Peterson, *Effects of Concealed-Carry Laws on Mass Shootings*, GUN POL'Y AM. (Mar. 2, 2018), https://www.rand.org/research/gun-policy/analysis/concealed-carry/mass-shootings.html [https://perma.cc/KD42-GWQL]; *How Gun Policies Affect Mass Shootings*, GUN POL'Y AM. (Mar. 2, 2018), https://www.rand.org/research/gun-policy/analysis/mass-shootings.html [https://perma.cc/M8U3-43WE].

26. *See* Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 101, 155 (2023).

27. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

28. *Id.*

29. *Id.*

30. *See id.* at 2136 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." (quoting District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008))).

31. Matt Valentine, *Clarence Thomas Created a Confusing New Rule That's Gutting Gun Laws*, POLITICO (July 28, 2023, 4:31 AM), https://www.politico.com/news/magazine/2023/07/28/bruen-supreme-court-rahimi-00108285 [https://perma.cc/HFZ5-UJG2].

32. *See* Charles, *supra* note 26, at 155.

33. *See, e.g.*, United States v. Rahimi, 61 F.4th 443, 449 (5th Cir. 2023), *argued,* No. 22-915 (U.S. Nov. 7, 2023).

> in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[34]

Over the past year, a circuit split has emerged concerning whether that law violates the Second Amendment.[35]

At least four U.S. courts of appeals have considered Second Amendment challenges to § 922(g)(1) as applied to a particular individual.[36] In the Third Circuit, Bryan Range, whose status as a felon arose from his conviction for a single count of welfare fraud in 1995, brought a civil suit challenging § 922(g)(1) as applied to him, seeking a declaration and an injunction so that he could lawfully purchase firearms for hunting and self-defense.[37] In the Eighth Circuit, Edell Jackson appealed a conviction for possessing a firearm in violation of § 922(g)(1), which applied to him due to his past convictions for sales of controlled substances.[38] Although three other federal courts of appeals—the U.S. Courts of Appeals for the Seventh, Tenth, and Eleventh Circuits—have also heard such challenges,[39] the Third and Eighth Circuits' decisions most concisely illustrate the divide on the issue of § 922(g)(1)'s constitutionality.[40] Whereas the Third Circuit held that Range's disarmament under § 922(g)(1), as applied to him, violated Range's Second Amendment rights, the Eighth Circuit found that § 922(g)(1), as applied to Jackson, did not violate Jackson's Second Amendment rights.[41] Crucially, the Third Circuit held not merely that § 922(g)(1) could no longer constitutionally disarm Range, whose felony conviction was over twenty years old, but that § 922(g)(1)'s *initial* disarmament of Range in 1995 itself violated the Second Amendment.[42]

The fact-specific nature of as-applied challenges and *Bruen*'s history and tradition test has resulted in ambiguity as to the precise point of disagreement. The Eighth Circuit upheld § 922(g)(1) on the grounds that "legislatures traditionally employed status-based restrictions to disqualify categories of

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34. *See* 18 U.S.C. § 922(g)(1).

35. *See infra* Part II.

36. *See* Atkinson v. Garland, 70 F.4th 1018, 1036 (7th Cir. 2023) (Wood, J., dissenting) (noting that "considering only the question raised by section 922(g)(1), four [circuit] courts have come out four different ways on its constitutionality"); United States v. Jackson, 69 F.4th 495 (8th Cir. 2023); Range v. Att'y Gen. (*Range II*), 69 F.4th 96 (3d Cir. 2023); Range v. Att'y Gen. (*Range I*), 53 F.4th 262 (3d Cir. 2022) (per curiam), *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023).

37. *See Range II*, 69 F.4th at 99.

38. *See Jackson*, 69 F.4th at 498.

39. *See generally Atkinson*, 70 F.4th 1018 (remanding the case to the lower court for a more comprehensive historical analysis); Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023) (finding § 922(g)(1)'s constitutionality supported by Tenth Circuit precedent such that no historical analysis was necessary).

40. *See infra* Part II.

41. *See Range II*, 69 F.4th at 106; *Jackson*, 69 F.4th at 506.

42. *See Range II*, 69 F.4th at 135 (Krause, J., dissenting). Seven months prior, a panel of the Third Circuit upheld § 922(g)(1) as-applied to Range. *See Range I*, 53 F.4th 262 (3d Cir. 2022) (per curiam), *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023).

persons from possessing firearms."[43] Relying on language from *Bruen* and prior Supreme Court precedent that such decisions did not jeopardize the constitutionality of a felon-in-possession ban, the Eighth Circuit concluded that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)."[44]

The Third Circuit, in sharp contrast, found § 922(g)(1) unconstitutional as applied to Range.[45] In conducting the first step of *Bruen*'s test, the Third Circuit found that the Second Amendment covered Range and his proposed conduct.[46] In reaching this conclusion in step one, the court rejected the argument that *Bruen* limited Second Amendment rights to "law-abiding, responsible citizens."[47] In the second step of *Bruen*'s test, the Third Circuit found that the government had not met its burden of demonstrating that § 922(g)(1), as applied to Range, was consistent with the "Nation's historical tradition of firearm regulation."[48] In elaborating on this step of *Bruen*'s test, the Third Circuit noted that the government could meet its burden by identifying a "well-established and representative historical analogue."[49] In particular, the Third Circuit reiterated that when analogizing between historical and modern firearm laws, the two key metrics are "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[50] Here, the Third Circuit acknowledged language in *District of Columbia v. Heller*,[51] *McDonald v. City of Chicago*,[52] and Justice Kavanaugh's *Bruen* concurrence stating that felon-in-possession bans were not jeopardized by any of those decisions but proceeded with the historical analysis, treating such language as dicta.[53]

The courts' analysis of historical analogues illustrates a core aspect of the disagreement between the two circuits. Although the cases considered various historical arguments, one strand of historical evidence emerged as particularly relevant. That is the historical evidence that founding-era legislatures had traditionally employed status-based bans to disarm specific

43. *Jackson*, 69 F.4th at 505.

44. *See id.* at 502. *But see id.* at 505 n.3 (explaining that the "presumptively lawful" language from the Supreme Court could mean either that such laws had a presumption of constitutionality that was rebuttable on a case-by-case basis or, more likely, that the felon-in-possession laws are concretely constitutional, but they were merely not at issue in those cases).

45. *See Range II*, 69 F.4th at 106.

46. *See id.* at 103.

47. *See id.* at 101 (explaining that the use of the phrase "law-abiding, responsible citizens" in those three opinions was dicta, and that interpreting the phrase as a limit on who is among "the people" would conflict with how "the people" is used in other provisions of the Constitution).

48. *See id.* at 103 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022)).

49. *See Range II*, 69 F.4th at 103.

50. *See id.* at 103 (quoting *Bruen*, 142 S. Ct. at 2133).

51. 554 U.S. 570 (2008).

52. 561 U.S. 742 (2010).

53. *See Range II*, 69 F.4th at 103.

groups.[54] The Third Circuit was unmoved by that evidence and noted that the mere fact that legislatures "disarmed groups they distrusted like [l]oyalists, Native Americans, Quakers, Catholics, and [African Americans] does nothing to prove that Range is part of a similar group today."[55] The Third Circuit thus found the historical evidence insufficient, at least absent an analogy explaining how Range was "part of a similar group today."[56] For the Eighth Circuit, however, this same history and tradition proved sufficient to uphold § 922(g)(1).[57]

This Note examines the conflict among the U.S. courts of appeals regarding the constitutionality of § 922(g)(1), and it argues that the Supreme Court should uphold that law's categorical disarmament of felons as rooted in the Nation's history and tradition and permit only prospective, declaratory relief for citizens who have proven themselves law-abiding and responsible. Part I lays out the legal background for this conflict by tracing the various controlling Supreme Court decisions for Second Amendment challenges, summarizing the evolution of § 922(g)(1) and examining two successful Second Amendment challenges in the U.S. Court of Appeals for the Fifth Circuit.[58] Part II then summarizes the decisions of the U.S. Courts of Appeals for the Third, Eighth, Tenth, Eleventh, and Seventh Circuits on the constitutionality of § 922(g)(1) and documents the circuit split on this issue.[59] Lastly, Part III advocates for the adoption of the Eighth Circuit's approach regarding the validity of disarmament and convictions under § 922(g)(1) and for the adoption of Judge Cheryl Ann Krause's proposed narrow approach for providing relief,[60] which permits the possibility of prospective relief in civil, but not criminal, proceedings.[61]

I. THE EVOLVING SECOND AMENDMENT DOCTRINE AND FEDERAL FIREARMS LAW

The Second Amendment, in notoriously cryptic prose,[62] provides that "[a] well regulated Militia, being necessary to the security of a free State, the right

54. *See id.* at 104.
55. *See id.*
56. *See id.*
57. United States v. Jackson, 69 F.4th 495, 505–06 (8th Cir. 2023).
58. *See infra* Part I.
59. *See infra* Part II.
60. *See Range II*, 69 F.4th at 135 (Krause, J., dissenting). Although Judge Krause may not herself prefer the narrow approach, she articulately explains how such a narrow approach would allay the majority's skepticism of § 922(g)(1)'s constitutionality while avoiding the destabilizing effects of the majority's approach. *Id.*
61. *See infra* Part III.
62. *See* James C. Phillips & Josh Blackman, *The Mysterious Meaning of the Second Amendment*, ATLANTIC (Feb. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/02/big-data-second-amendment/607186/ [https://perma.cc/8JW6-SPWZ]; *see also* David Thomas Konig, *Why the Second Amendment Has a Preamble*, 56 UCLA L. REV. 1295, 1331 (2009); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998) (arguing that the use of such a prefatory clause was not at all uncommon at the time of ratification).

of the people to keep and bear Arms, shall not be infringed."[63] Throughout the twentieth century, the Supreme Court ruled on only a few Second Amendment issues.[64] However, in the past two decades, the Court has become more willing to issue opinions on the meaning of the amendment. In 2008, the Court held that those covered by the Second Amendment's right to bear arms included individuals seeking to keep and use handguns for self-defense in their homes.[65] In 2010, the Court held that the Second Amendment right to bear arms also applies as an individual right against state governments.[66] Most recently, in 2022, the Court held that the Second Amendment protects an individual's right to carry a handgun in public for self-defense and defined the Second Amendment's limits according to the nation's historical tradition.[67] Since the Court's 2022 ruling, litigants have brought scores of challenges to federal and state gun statutes.[68]

Part I.A provides background on the Court's twenty-first century Second Amendment precedent leading up to *Bruen*.[69] Next, Part I.B summarizes the Court's decision in *Bruen*, addressing both the specific facts of the case and the test adopted by the Court to determine Second Amendment challenges.[70] Part I.C then discusses the legal background of 18 U.S.C. § 922(g) and Second Amendment challenges to its provisions in lower courts following *Bruen*.[71]

A. The Supreme Court's Second Amendment Revitalization: Heller *and* McDonald

In the past two decades, the Court's Second Amendment jurisprudence has rapidly evolved.[72] *Heller* represented a marked shift from the then–status quo of many judges upholding any firearm law so long as it constituted a "reasonable regulation" by the government.[73] The pre-*Heller* reasonable standard had been described as similar to, but ever so slightly more scrutinizing than, rational basis review.[74] In *Heller*, the Court considered the

63. U.S. CONST. amend. II. *But see* David B. Kopel, *The Supreme Court's Thirty-Five Other Gun Cases: What the Supreme Court Has Said About the Second Amendment*, 18 ST. LOUIS PUB. L. REV. 99 (1999).

64. *See* Michael R. Ulrich, *Second Amendment Realism*, 43 CARDOZO L. REV. 1379, 1380 (2022); *see also* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari) ("[A]s evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court.").

65. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

66. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

67. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022).

68. *See* Charles, *supra* note 26, at 155.

69. *See infra* Part I.A.

70. *See infra* Part I.B.

71. *See infra* Part I.C.

72. *See infra* note 73 and accompanying text.

73. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 687 (2007); *see* District of Columbia v. Heller, 554 U.S. 570, 629 (2008).

74. Note, Bruen*'s Ricochet: Why Scored Live-Fire Requirements Violate the Second Amendment*, 136 HARV. L. REV. 1412, 1416 (2023). To pass rational basis review, a government need only demonstrate that there is a "rational relationship" between its action

meaning of the Second Amendment's right to keep and bear arms.[75] There, the Court held that the Second Amendment applies not only to militia members, but also to individuals seeking to keep a firearm for self-defense within their homes.[76] In turn, the Court held unconstitutional a Washington, D.C. statute that had prevented Heller, a special police officer, from lawfully keeping a firearm in his home.[77] Justice Antonin Scalia's majority opinion in *Heller* signaled a sharp turn from the "reasonable regulation" standard for firearm laws.[78] Without laying out an express framework for Second Amendment scrutiny, Justice Scalia made clear that the scope of the Second Amendment right derived from historical understanding.[79] And in *McDonald*, just two years after *Heller*, the Court held that the "Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."[80] As a result, the Second Amendment protects the right to keep and bear arms from both federal and state regulations.[81]

In the years following *Heller* and *McDonald*, the U.S. courts of appeals largely assessed Second Amendment challenges with a two-step test that relied on both history and means-end scrutiny.[82] First, any challenge had to pass the threshold question of whether the law at issue burdened conduct that fell within the Second Amendment's "guarantee."[83] Second, if the conduct fell within that "guarantee," the court would assess the law's constitutionality through a mix of interest-balancing and means-end scrutiny.[84] The level of scrutiny would depend on the court's determination of just how close the law was to the Second Amendment right's core and how severe the burden on that right was.[85] This often, but not always, resulted in intermediate scrutiny and courts upholding firearm laws.[86] Indeed, the U.S. Court of Appeals for the Second Circuit decision that *Bruen* reversed had invoked intermediate scrutiny when evaluating the New York law at issue.[87]

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and any "legitimate government purpose." Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

75. *Heller*, 540 U.S. at 576.

76. *Id.* at 635.

77. *Id.*

78. *See id.* at 681 (Breyer, J., dissenting).

79. *See id.* at 634 (majority opinion) (explaining that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them").

80. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

81. *Id.*

82. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125 (2022); *see also* Bruen*'s Ricochet: Why Scored Live-Fire Requirements Violate the Second Amendment*, *supra* note 74, at 1416.

83. Bruen*'s Ricochet: Why Scored Live-Fire Requirements Violate the Second Amendment*, *supra* note 74, at 1416.

84. *Id.*

85. *Id.*

86. *See* Lauren Devendorf, Note, *Second-Class Citizens Under the Second Amendment: The Case for Applying Strict Scrutiny to Lifetime Firearm Bans for Individuals Previously Committed to Mental Institutions*, 106 CORNELL L. REV. 501, 510–11 (2021).

87. *Bruen*, 142 S. Ct. at 2129.

B. The Supreme Court's Reorientation to History and Tradition in Bruen

Though nominally and substantively the decision may have simply followed precedent, *Bruen* has been enormously influential.[88] In *Bruen*, the Court decided both the scope of the Second Amendment and the test for determining when a law unconstitutionally infringes on the amendment's protections.[89] Regarding scope, the Court held that citizens have a right "to carry handguns publicly for their self-defense."[90] Regarding the inquiry into whether a law infringes on that right, the Court excluded any "means-end test such as strict or intermediate scrutiny" from the analysis.[91]

This part explains the differing and important aspects of *Bruen*. Part 1.B.1 details the facts of *Bruen*.[92] Next, Part 1.B.2 provides a summary of *Bruen*'s two-part test. Further, it notes the elements of the test that have generated disagreement in the lower courts.[93] Finally, Part I.B.3 discusses how the Court in *Bruen* applied the history and tradition test to the specific facts of that case.[94]

1. The Facts of *Bruen*

The two petitioners in *Bruen*, Brandon Koch and Robert Nash, both applied for licenses to carry a handgun in public in New York, based only on a general self-defense interest.[95] Although both Koch and Nash were adults and law-abiding New York residents, their applications were denied due to the state's proper cause requirement,[96] which required applicants to demonstrate a "unique need for self-defense."[97] After the denial of their applications, Koch and Nash sued the state officials responsible for licensing, alleging that the proper cause requirement violated the Second and Fourteenth Amendments and requesting injunctive and declaratory relief.[98] Both lower courts dismissed Koch and Nash's claims, relying on Second Circuit precedent that the proper cause requirement was "substantially related to . . . an important governmental interest."[99]

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88. *See generally* Charles, *supra* note 26.
89. *Bruen*, 142 S. Ct. at 2134.
90. *Id.* at 2122.
91. *Id.* at 2129; *see also* Morgan Band, Note, *Don't Pull the Trigger on New York's Concealed Carry Improvement Act: Addressing First and Second Amendment Concerns*, 91 FORDHAM L. REV. 1943, 1950 (2023).
92. *See infra* Part I.B.1.
93. *See infra* Part I.B.2.
94. *See infra* Part I.B.3.
95. *Bruen*, 142 S. Ct. at 2125.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 2125 (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)); *see supra* Part I.A.

2. The Supreme Court's *Bruen* Test

In *Bruen*, the Supreme Court rejected the Second Circuit's approach and held that the test for Second Amendment challenges is grounded in *Heller*'s textual and historical inquiry.[100] First, if the "Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[101] Second, if the Constitution protects the conduct, then the government must "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[102] If the Government does not meet that burden, then the law unconstitutionally infringes on the Second Amendment.[103]

There remains uncertainty around the first step of *Bruen*'s test. In particular, there is notable disagreement on whether one must be "law-abiding" to be covered by the Second Amendment at all.[104] On the one hand, the Court's past cases do explicitly and repeatedly refer to the Second Amendment as a right that extends to law-abiding citizens.[105] However, those who contest that the Second Amendment right extends only to the law-abiding assert three primary points in response: the law-abiding issue was simply not before the Court in past cases, the Court has never explicitly held the Second Amendment to apply only to law-abiding individuals, and limiting the Second Amendment right in this way would be incongruent with the reach of other Constitutional rights.[106] Indeed, at oral argument in a recent Second Amendment case, the Justices themselves grappled with the difficulty of defining "law-abiding" in the Second Amendment context; in response to the government's argument framing "law-abiding" as a limiting principle on Second Amendment rights, Chief Justice Roberts asked whether someone who drives five miles per hour over the speed limit is not "law-abiding" for Second Amendment purposes.[107]

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100. *Bruen*, 142 S. Ct. at 2126; *see supra* Part I.A.

101. *Bruen*, 142 S. Ct. at 2126.

102. *Id.*

103. *Id.*

104. *Compare infra* Part I.C.2, *with infra* Part II.B.

105. *See Bruen*, 142 S. Ct. at 2159 (Alito, J., concurring) (noting "[a]ll that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense"); *id.* at 2162 (Kavanaugh, J., concurring) (quoting and reiterating language from *Heller* and *McDonald* that those opinions do not "cast doubt on the longstanding prohibitions on the possession of firearms by felons"); *see also Range II*, 69 F.4th 96, 110 (3d Cir. 2023) (Ambro, J., concurring) ("[I]t fits within our Nation's history and tradition of disarming those persons who legislatures believed would, if armed, pose a threat to the orderly functioning of society."). *But see* Jeff Campbell, *There Is No* Bruen *Step Zero: The Law-Abiding Citizen and the Second Amendment*, 26 U. DIST. COLUM. L. REV. 71, 81 (2023) (arguing that some lower courts misconstrue *Bruen* by adding the determination of whether a citizen is law-abiding as a threshold question to Second Amendment challenges).

106. *See* Campbell, *supra* note 105, at 77, 83 (noting that First and Fourth Amendment rights do not extend only to the law-abiding).

107. *See* Transcript of Oral Argument at 8, United States v. Rahimi, 143 S. Ct. 2688 (2023) (No. 22-915), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-915_986b.pdf [https://perma.cc/K5EN-NU35]; *see also infra* Part I.C.2.

In comparison to the first step, the second step of *Bruen*'s test is unambiguously critical and scrutinizing, as "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[108] Writing for the majority, Justice Thomas elaborated on the different sorts of reasoning this history-based examination might require.[109] For instance, he noted that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[110] However, Justice Thomas also noted that some modern firearm laws might exist to address new or "unprecedented" social issues.[111] In that context, he said, *Bruen*'s test requires courts to employ analogical reasoning in applying the Second Amendment's original meaning to new circumstances.[112] In particular, in such cases, the proffered historical laws should be similar to a challenged modern firearm law by "at least two metrics: *how* and *why* the regulations burden a law-abiding citizen's right to armed self-defense."[113] In an attempt to clarify the government's burden in the history and tradition test, the Court reiterated that the Second Amendment requires only that the "government identify a well-established and representative historical analogue, *not a historical twin*."[114]

3. Applying the *Bruen* Test

The Court in *Bruen* dedicated relatively little space to the first step of this test, noting "[i]t is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects."[115] And the Court easily concluded based on *Heller* that handguns are weapons "in common use" today for self-defense.[116]

Next, the Court examined whether the petitioners' proposed conduct—carrying handguns in public for self-defense—fell within the Second Amendment's plain text.[117] In a brief reexamination of *Heller*'s interpretation of the Second Amendment, the Court found that the Second Amendment covers the right to public carry for self-defense.[118]

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108. *Bruen*, 142 S. Ct. at 2127.
109. *Id.* at 2131.
110. *Id.*
111. *Id.* at 2132.
112. *Id.*
113. *Id.* at 2133 (emphasis added); *see also* Leo Bernabei, Note, *Taking Aim at New York's Concealed Carry Improvement Act*, 92 FORDHAM L. REV. 103, 112 (2023).
114. *Bruen*, 142 S. Ct. at 2133 (emphasis added).
115. *Id.* at 2134.
116. *Id.*
117. *Id.*
118. *Id.*; *see supra* Part I.A.

In the second part of the analysis under the new test, the Court examined the considerable historical evidence put forth by the government.[119] This history included laws from five time periods that stretched from medieval England through the late nineteenth and early twentieth centuries in America.[120]

The Court first considered the Statute of Northampton, a law from medieval England that ostensibly prohibited riding armed.[121] The Court found this evidence insufficient to justify the challenged New York law due to (1) the statute's predating the Constitution by over four hundred years; (2) the statute's predating the prevalence of handguns in Europe; (3) evidence that this law prohibited lances while permitting daggers, whose use by civilians for self-defense appears analogous to handguns; and (4) evidence that this statute may have only applied to those who went armed with the intent to "terrify people."[122]

Next, the Court considered colonial-era laws that regulated public carry.[123] In response to evidence of two states with colonial-era laws that allowed for the arrest of "all Affrayers, Rioters, Disturbers, or Breakers of the Peace, and such as shall ride or go armed Offensively . . . by Night or by Day, in Fear or Affray of Their Majesties Liege People," the Court noted that, like the Statute of Northampton, the quoted law had an intent requirement.[124] Because the laws only restricted carrying arms with an intent "to terrorize," they did not constitute a simple ban of bearing arms altogether, and thus did not support a ban of all handguns.[125] Further, Justice Thomas added that even if those laws applied to handguns, they failed to justify New York's modern law, as the Second Amendment protects the right to bear arms that are in common use.[126] Thus, even if handguns were rare and dangerous in colonial times, that rationale does not support banning handguns today, given the present ubiquity of handgun ownership for self-defense.[127] Similarly, the Court found a New Jersey colonial-era statute restricting concealed carry of pocket pistols unpersuasive, noting that (1) it dealt only with concealed carry, not public carry more generally; (2) it restricted only a certain type of pistol, not all pistols; and (3) a law that existed for ten years in one state did not establish enough of a tradition to satisfy the Court's new test.[128]

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119. *See Bruen*, 142 S. Ct. at 2136. Before taking up the actual historical inquiry, the Court acknowledged the unresolved debate on whether the Second Amendment is best understood with reference to 1791, the year of the amendment's original ratification, or 1868, when the Fourteenth Amendment was ratified. *Id.* at 2138. However, because the Court saw public carry laws in 1791 and 1868 as similar enough, the Court did not decide the issue. *Id.*

120. *Id.* at 2135.

121. *Id.* at 2139.

122. *See id.* at 2142.

123. *See id.*

124. *See id.* (alteration in original).

125. *Id.* at 2143.

126. *Id.*

127. *See id.*

128. *See id.*

The Court then considered the public carry restriction laws that followed the ratification of the Second Amendment in 1791.[129] Regarding common law offenses for public carry, the Court explained that these too had an "intent" element like the Statute of Northampton, and thus such laws did not prohibit mere public carrying of a firearm, but only public carry with a malicious intent.[130] Regarding statutes enacted by states to restrict public carry, the Court noted that, excluding one or two outlier states, the consensus was that laws prohibiting only concealed carry were valid, but laws prohibiting both open and concealed carry were invalid.[131] The Court did not itself endorse that conclusion, but did find it sufficient to hold that such statutes did not justify New York's public carry law.[132] Similarly, the Court found surety statutes—statutes requiring persons found by a court to be dangerous to post bond "before carrying a weapon"[133]—unpersuasive, noting that such statutes might prohibit public carry only after a number of steps and that such statutes, unlike New York's, began with a presumption of permitting public carry.[134]

In analyzing the Reconstruction-era laws, the Court found that most laws—like the Statute of Northampton or common-law offenses of the colonial era—went no further than to prohibit carrying firearms with a malicious intent.[135] And though the Court conceded that during this time Texas had public carry prohibition laws that were sufficiently analogous to New York's, it rejected the idea that one outlier could be dispositive.[136]

Lastly, the Court considered the gun laws of the late 1800s, specifically in the western territories.[137] Those territories employed restrictive gun laws that arguably resembled New York's, but the Court found many flaws with that analogical reasoning.[138] According to the Court, these territorial laws were too isolated, temporally and geographically, to establish a genuine tradition.[139] Additionally, the lack of judicial scrutiny of the territories' laws further weakened their authority for the Court.[140] As a result, after this lengthy historical analysis, the Court held that New York's proper-cause law violated the Second Amendment.[141]

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129. *See id.* at 2145.
130. *See id.*
131. *See id.* at 2147.
132. *See id.* at 2150.
133. *See* DARRELL A.H. MILLER, ANDREW R. MORRAL & ROSANNA SMART, STATE FIREARM LAWS AFTER *BRUEN* 9 (2022), https://www.rand.org/content/dam/rand/pubs/perspectives/PEA200/PEA243-1/RAND_PEA243-1.pdf [https://perma.cc/UVT7-LS3Q]; *see also infra* note 188 and accompanying text.
134. *See Bruen*, 142 S. Ct. at 2148.
135. *See id.* at 2152.
136. *See id.* at 2153.
137. *See id.* at 2154.
138. *See id.*
139. *See id.*; *cf.* George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341, 360 (2021) ("One fourteen-year period excepted, Wyoming followed the Western tradition of public carry from before its inception.").
140. *See Bruen*, 142 S. Ct. at 2155.
141. *See id.* at 2156.

*C. Federal Firearms Laws and Post-*Bruen *Challenges to 18 U.S.C. § 922(g)*

Following *Bruen*, federal courts began hearing both preemptive civil challenges and criminal defensive challenges to various provisions of 18 U.S.C. § 922(g), the federal statute that prohibits certain groups from possessing firearms.[142] In light of *Bruen*'s focus on history and the underlying purpose of both historical and modern firearm laws, this part first provides background on federal firearms law and then details two high-profile applications of *Bruen* to § 922(g) provisions by the Fifth Circuit. Part I.C.1 summarizes the twentieth century development of federal firearms laws and notes the emergence of 18 U.S.C. § 922(g)(1). Part I.C.2 then briefly describes a pair of successful Second Amendment challenges, in which the Fifth Circuit held one § 922(g) provision unconstitutional as-applied to a criminal defendant and another unconstitutional on its face.

1. A Brief History of Federal Firearms Law and 18 U.S.C. § 922(g)(1)

Understanding the development, context, and history of federal firearms laws is particularly relevant given the importance that *Bruen*'s test places on the "how" and "why" of firearm laws that are subject to Second Amendment challenges. The recent history of such laws can be divided into three eras: the first major federal gun legislation in the 1930s, followed by the possession-centric federal gun legislation of the 1960s, and finally the most recent slate of legislation that focuses on regulatory issues.[143]

The National Firearms Act of 1934[144] (NFA) was the first major piece of federal legislation to regulate firearms.[145] The NFA required the registration of certain firearms, including short-barreled rifles, shotguns, and machine guns, but did not require the registration of either pistols or revolvers.[146] The NFA also applied taxes to the transfer of weapons subject to national registration.[147]

Soon after the NFA, in 1938 the Federal Firearms Act[148] (FFA) expanded the federal gun regulation regime.[149] The FFA required manufacturers or dealers of firearms who shipped or received firearms (including pistols and revolvers) in interstate commerce to obtain a license from the government.[150]

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142. *See* Charles, *supra* note 26, at 154–55.

143. Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 645–46 (2021); *see also* Brandon E. Beck, *The Federal War on Guns: A Story in Four-and-a Half Acts*, 26 U. PA. J. CONST. L. 53 (2024).

144. Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended in scattered sections of 18 and 26 U.S.C.).

145. *See* Charles & Garrett, *supra* note 143, at 645–46.

146. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 707 n.65 (2009).

147. *See id.*

148. Pub. L. No. 75-785, 52 Stat. 1250 (codified at 15 U.S.C. §§ 901–910) (repealed 1968).

149. *See* Charles & Garrett, *supra* note 143, at 649–50.

150. *See id.* at 649.

The FFA prohibited such licensed dealers and manufacturers from transferring firearms to several classes of people: (1) anyone who did not have their state's required purchase license; (2) anyone whom the dealer knew was indicted for, or convicted of, a crime of violence; and (3) fugitives.[151] Although the FFA also prohibited fugitives and those convicted of or indicted for a crime of violence from receiving or shipping firearms in interstate commerce, it did not go as far as to criminalize their mere possession of firearms.[152]

One view describes the NFA and FFA as responses to both the attempted assassination of President Franklin D. Roosevelt and the infamous activity of high-profile criminals like Al Capone, John Dillinger, and Bonnie and Clyde.[153] Those events, combined with the New Deal Era's tendency toward expansive federal legislation,[154] resulted in the first major attempts at federal gun control.[155] Following the NFA and FFA, however, the issue of gun control fell out of the public and political focus for several decades, perhaps due to falling crime rates.[156] In 1961, the FFA was amended to remove the "crime of violence" qualifier on its prohibition of felons' receiving or shipping firearms.[157] Section 922(g)(1) as it exists today came into being in 1968 when Congress, in addition to the existing ban on felons receiving or shipping firearms in interstate commerce, prohibited felons from mere possession of firearms.[158]

Thus, since 1968, § 922(g)(1) has prohibited those with a felony or felony-equivalent conviction from possessing firearms that have traveled in interstate commerce.[159] Among other elements, for any § 922(g)(1) conviction the government must prove that "the defendant sustained a previous conviction for a crime punishable by a term of imprisonment exceeding one year."[160] Additionally, the government must prove that when violating § 922(g)(1), the defendant knew that "he had th[at] . . . status."[161] It is worth pausing to note the import of those two elements. Anyone who

151. *See id.* at 650.

152. *Id.* at 651.

153. *See* Oliver Krawczyk, Comment, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 DICK. L. REV. 273, 277 (2022).

154. *See* Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (noting that beginning in the 1930s, "the federal government began to grow explosively").

155. *See* Krawczyk, *supra* note 153, at 277–78.

156. *See* Charles & Garrett, *supra* note 143, at 652.

157. *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, § 2, 75 Stat. 757, 757 (1961); *see also* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 274 (2020).

158. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236; Gun Control Act of 1968, Pub. L. No. 90-618, § 102, § 922(g)(1), 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(g)(1)).

159. 18 U.S.C. § 922(g)(1).

160. United States v. Jackson, 69 F.4th 495, 499 (8th Cir. 2023) (noting that the government must prove that the firearm traveled in interstate commerce and that the defendant must have knowingly possessed the firearm).

161. Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

violates § 922(g)(1), by definition, has previously committed a serious crime and was aware of that past conviction when the violation occurred.[162]

In addition to the elements needed for a § 922(g)(1) conviction, two other details of § 922(g)(1)'s statutory scheme deserve attention. First, despite § 922(g)(1)'s oft-used moniker, the felon-in-possession ban, the ban does not cover *all* felons, as it exempts those whose previous crime "pertain[ed] to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices."[163] Second, federal law ostensibly offers potential relief from § 922(g)(1)'s disarmament, as 18 U.S.C. § 925(c) permits the U.S. Attorney General to grant relief from § 922(g)(1) to felons who apply and satisfactorily pass the Attorney General's individualized review.[164] However, since 1992, Congress stopped funding that provision, and it has remained defunct.[165] Taken together, the above two points suggest that the length of § 922(g)(1)'s ban is exactly as permanent as it sounds, whereas the law's reach is slightly less absolute than the felon-in-possession nickname implies.

Section 922(g)(1)'s importance, efficacy, and impact stems from its role both in criminal prosecutions and gun-related background checks. In 2022 alone, there were around 7,000 convictions under § 922(g)(1).[166] Further, in 2020 and 2021, the leading reason for denying a firearm transaction under the Federal Bureau of Investigation's National Instant Criminal Background Check System was the system's rule applying § 922(g)(1), which denies a purchase of a firearm to anyone previously convicted of a felony.[167] In both years, over 75,000 transactions were denied because the proposed purchaser had a prior felony conviction or a misdemeanor punishable by more than two years in prison.[168] Further, in both 2020 and 2021, those denials constituted almost half of all federal denials in firearm purchaser background checks.[169]

2. *Bruen* in the Fifth Circuit: *Daniels* and *Rahimi*

Since *Bruen*, hundreds of courts have heard challenges to various federal, state, and local gun regulations.[170] This section details two recent successful challenges in the Fifth Circuit against two different provisions of § 922(g), each of which prohibit firearm possession by certain classes of people. In

162. *See id.*

163. 18 U.S.C. § 921(a)(20)(A). The dubious nature of this specific exemption for white-collar crimes amid an otherwise harsh and sweeping ban has not gone unnoticed. *See* Sherwood, *supra* note 22, at 1453.

164. 18 U.S.C. § 925(c).

165. *See Range II*, 69 F.4th 96, 136 & n.163 (3d Cir. 2023) (Krause, J., dissenting).

166. U.S. SENT'G COMM'N, QUICK FACTS: 18 U.S.C. § 922(G) FIREARM OFFENSES (2022), https://www.ussc.gov/research/quick-facts/section-922g-firearms [https://perma.cc/SW3U-QABB] (showing that in 2022 there were over 7,000 convictions under § 922(g)(1)).

167. FED. BUREAU INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM OPERATIONAL REPORT 2020–2021, at 18 (2022), https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view [https://perma.cc/D6Q4-97HY].

168. *Id.* at 19.

169. *Id.*

170. Charles, *supra* note 26, at 123.

United States v. Rahimi,[171] the Fifth Circuit heard a facial constitutional challenge to § 922(g)(8), the federal statute prohibiting firearm possession for anyone subject to a domestic violence restraining order.[172] The Fifth Circuit found that the statute violated the Second Amendment, and the court's analysis portends the sweeping change that *Bruen* is likely to bring in future Second Amendment cases.

Zackey Rahimi's arrest followed a police investigation, which identified Rahimi as a suspect in five shootings that occurred between December 2020 and January 2021.[173] Rahimi also admitted that he was subject to a domestic violence restraining order issued by a state court judge after Rahimi allegedly assaulted his ex-girlfriend.[174] Following the government's discovery of his firearms and the domestic violence restraining order against him, Rahimi was indicted under § 922(g)(8).[175]

Following the Supreme Court's framework in *Bruen*, the Fifth Circuit considered whether Rahimi was "among those citizens entitled to the Second Amendment's protections."[176] In particular, the court considered the government's argument that Rahimi fell outside the scope of the Second Amendment, as the Court in *Heller* and *Bruen*, respectively, spoke only of a Second Amendment right for "law-abiding, responsible citizens" and "ordinary, law-abiding citizens."[177] The Fifth Circuit rejected the government's argument, noting that the "law-abiding" language of those opinions was merely "meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights."[178] Such groups, the court noted, included *convicted* felons.[179] But Rahimi was not a *convicted* felon at the time of his prosecution under § 922(g)(8); instead, he was subject to a domestic violence restraining order—the product of a civil proceeding—and was only suspected of other felony offenses.[180] Subsequently, the court concluded that Rahimi and his conduct (i.e., his

171. 61 F.4th 443 (5th Cir. 2023), *argued,* No. 22-915 (U.S. Nov. 7, 2023).

172. *Id.* at 455; *see also* 18 U.S.C. § 922(g)(8) ("It shall be unlawful for any person . . . who is subject to a court order that (A) was issued after a hearing of which such person received actual notice . . . ; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (C)(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.").

173. *Rahimi*, 61 F.4th at 448–49.

174. *Id.*

175. *Id.* at 449.

176. *Id.* at 451.

177. *Id.* (first quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008); then quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022)).

178. *Id.* at 452 (explaining how § 922(g)(1) was the target of the law-abiding language).

179. *Id.*

180. *Id.*

possession of a pistol and rifle in the home) fell within the scope of the Second Amendment.[181]

Moving to the second part of the *Bruen* analysis, the Fifth Circuit considered whether the government had met its burden of proving that § 922(g)(8) had analogues in founding-era gun regulations.[182] In doing so, the court analyzed the government's proffered historical analogues, and rejected each in turn.[183] In response to the government's argument that early American laws permitted the disarmament of dangerous people, the court rejected such examples, holding those laws not analogous to the underlying goal (in *Bruen*'s words, the "why") of § 922(g)(8).[184] The court contrasted the goal of the historical laws, to preserve social and political order, with the goal of § 922(g)(8), to protect an identified person from the threat of domestic gun violence.[185]

Next, the court considered and rejected comparisons to founding-era surety laws, which permitted an individual who proved that they had reason to fear that another would injure them to "demand surety of the peace" before the other person had committed a crime.[186] The Fifth Circuit found surety laws not sufficiently analogous to justify § 922(g)(8).[187] In particular, the court found the surety laws' mechanism of disarmament too dissimilar to those of § 922(g)(8); whereas § 922(g)(8) imposes the automatic effect of disarmament, surety laws only prohibited public carry and possession of firearms if the surety bond was not posted.[188] In deciding that the government failed to prove the historical justification required by *Bruen*'s test, the Fifth Circuit held § 922(g)(8) unconstitutional on its face.[189] Soon after, in June 2023, the Supreme Court granted certiorari to review *Rahimi*[190] and heard argument on November 7, 2023.[191]

The other major Fifth Circuit case applying *Bruen*'s test is *United States v. Daniels*,[192] in which the court heard a Second Amendment

181. *Id.* at 454.
182. *Id.* at 456–61.
183. *Id.* at 456–57.
184. *Id.*
185. *Id.* at 457.
186. *Id.* at 459. If that fear of injury proved to be legitimate, the other party was required to post a surety bond. And if the feared party refused, they would be prohibited from publicly carrying a gun. *Id.*
187. *Id.* at 459–60.
188. *Id.* at 460 (explaining that "[w]here the surety laws imposed a conditional, partial restriction on the Second Amendment right, § 922(g)(8) works an absolute deprivation of the right").
189. *Id.* at 460–61.
190. *See* United States v. Rahimi, 143 S. Ct. 2688 (2023); *see also* Amy Howe, *Justices Take Up Major Second Amendment Dispute*, SCOTUSBLOG (June 30, 2023, 1:03 PM), https://www.scotusblog.com/2023/06/justices-take-up-major-second-amendment-dispute/ [https://perma.cc/8MZU-Y35K].
191. *See* Transcript of Oral Argument, *supra* note 107, at 1; Adam Liptak, *Supreme Court Seems Likely to Uphold Law Disarming Domestic Abusers*, N.Y. TIMES (Nov. 7, 2023), https://www.nytimes.com/2023/11/07/us/politics/supreme-court-gun-rights-domestic-violence.html [https://perma.cc/K8EX-TDGB].
192. 77 F.4th 337 (5th Cir. 2023).

challenge to § 922(g)(3), the federal statute prohibiting firearm possession for anyone who is "an unlawful user of or addicted to any controlled substance."[193] There, law enforcement officers had pulled over Patrick Daniels for driving without a license plate, and, after smelling marijuana, the officers searched Daniels's car, finding one pistol and one rifle.[194] The Fifth Circuit held § 922(g)(3) unconstitutional as applied to Daniels.[195] The arguments raised by the government, and the Fifth Circuit's response, unsurprisingly resembled those in *Rahimi*.

First, the court found that Daniels was among those entitled to the Second Amendment's protections.[196] Again, the Fifth Circuit acknowledged that *Bruen* and *Heller*'s holdings included the "law-abiding" qualifier in many instances.[197] But the Fifth Circuit explained that it interpreted the "law-abiding" phrase to be "short-hand" meant to exclude "the mentally ill and felons, people who were historically 'stripped of their Second Amendment rights.'"[198] Thus, as Daniels was also not a convicted felon at the time of his arrest, the court found that he presumptively was among those covered by the Second Amendment.[199]

The Fifth Circuit proceeded to *Bruen*'s second step and found that the Government failed to show that § 922(g)(3) was consistent with the nation's "history and tradition."[200] First, the court found that Reconstruction-era laws prohibiting carrying a gun while intoxicated were insufficiently analogous.[201] Similarly, the court rejected the argument that § 922(g)(3) was no different from laws that prohibited mentally ill individuals from possessing firearms.[202] Although the court acknowledged that intoxication might be characterized as a form of temporary mental illness, it found that analogy insufficient, as § 922(g)(3) disarms people like Daniels at all times, not merely during their period of intoxication.[203] Lastly, the court rejected the Government's argument that § 922(g)(3) was justified on the grounds that Daniels's drug use makes him "presumptively dangerous."[204] As such, the Fifth Circuit found § 922(g)(3) unconstitutional as applied to Daniels.[205] Although neither *Rahimi* nor *Daniels* concern the felon-in-possession ban, § 922(g)(1), both cases usefully demonstrate how U.S. courts of appeals have begun to apply *Bruen*'s two-part test.

193. *See id.* at 340.
194. *Id.*
195. *Id.*
196. *Id.* at 342.
197. *Id.* (noting that *Bruen* mentions the phrase "law-abiding" fourteen times in defining the right).
198. *Id.* at 343 (quoting United States v. Rahimi, 61 F.4th 443, 452 (5th Cir. 2023), *argued,* No. 22-915 (U.S. Nov. 7, 2023)).
199. *Id.*
200. *Id.* at 344, 355.
201. *Id.* at 347 (finding that historical laws that prohibited carrying a firearm *only* while under the influence were far less burdensome than § 922(g)(3)).
202. *Id.* at 348–49.
203. *Id.* at 349–50.
204. *Id.* at 355.
205. *Id.*

II. FEDERAL COURTS' VARYING APPLICATIONS OF *BRUEN* TO 18 U.S.C. § 922(G)(1)

As with the federal statutes above, the *Bruen* test has put § 922(g)(1)'s validity into question. Federal circuit courts currently disagree on how to evaluate as-applied Second Amendment challenges to § 922(g)(1), the federal prohibition of firearm possession by people previously convicted of felonies.[206] Specifically, the Third and Eighth Circuits have taken vastly different approaches when applying *Bruen*'s test to § 922(g)(1).[207] Further, more circuit courts have ruled on the issue in recent months,[208] and the frequency of § 922(g)(1) charges will likely require other circuits to rule on the issue in short order.[209]

This part describes the various court decisions forming the circuit split on § 922(g)(1). Part II.A describes the Third Circuit's approach—covering both the initial decision upholding § 922(g)(1) in Part II.A.1 and the subsequent rehearing en banc holding § 922(g)(1) to be unconstitutional as applied in Part II.A.2.[210] Part II.B then discusses the rulings in the Eighth, Tenth, and Eleventh Circuits that upheld § 922(g)(1).[211] Last, Part II.C identifies a Seventh Circuit decision that ultimately remanded the challenge against § 922(g)(1) to the district court, even though it still provided thoughtful observations on the issue.[212]

A. The Third Circuit's Application of Bruen *to 18 U.S.C. § 922(g)(1)*

In *Range v. Attorney General*[213] (Range II), the Third Circuit held § 922(g)(1) unconstitutional as applied to Bryan Range, who was previously convicted of a state misdemeanor.[214] In doing so, the Third Circuit reversed its earlier decision in *Range v. Attorney General*[215] (Range I).

Range was never charged under § 922(g)(1). Rather, he sued in the U.S. District Court for the Eastern District of Pennsylvania, requesting both a declaration that the statute violated the Second Amendment as applied to him and an injunction prohibiting the law's enforcement against him, which would allow him to purchase a firearm for self-defense.[216] He claimed that, "but for § 922(g)(1), he would 'for sure' purchase" at least a hunting rifle, if

206. *See* Atkinson v. Garland, 70 F.4th 1018, 1036 (7th Cir. 2023) (Wood, J., dissenting).
207. *See Daniels*, 77 F.4th at 357 n.7 (Higginson, J., concurring) (observing that the Third Circuit's finding § 922(g)(1) unconstitutional as-applied conflicts with the Eighth Circuit decision that upheld the same provision and dismissed the need for felony-by-felony litigation).
208. *See, e.g.*, *infra* Part II.C.
209. U.S. SENT'G COMM'N, *supra* note 166.
210. *See infra* Part II.A.
211. *See infra* Part II.B.
212. *See infra* Part II.C.
213. 69 F.4th 96 (3d Cir. 2023).
214. *See id.* at 106.
215. 53 F.4th 262 (3d Cir. 2022) (per curiam), *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023).
216. *Range II*, 69 F.4th at 99.

not also a shotgun for self-defense.[217] Range's felon status (for the purposes of § 922(g)(1)) arose solely from a decades-old conviction of welfare fraud.[218] In 1995, Range pleaded guilty to making a false statement to obtain food stamps in violation of Pennsylvania law.[219] Range's conviction was considered a Pennsylvania misdemeanor "punishable by up to five years' imprisonment."[220] Thus, his conviction fell within § 922(g)(1)'s scope, which makes firearm possession unlawful for any person convicted of a crime "punishable by imprisonment for a term exceeding one year."[221]

1. The Third Circuit's Panel Decision Upholding 18 U.S.C. § 922(g)(1) as Applied

When Range's case first arrived at the Third Circuit, a three-judge panel ruled for the Government, upholding § 922(g)(1) as constitutional.[222] Although the Third Circuit later reversed that decision when rehearing the case en banc, the Third Circuit panel's decision provides important background and is largely consistent with the approaches of other circuits.[223]

In *Range I*, the three-judge panel applied *Bruen*'s test to Bryan Range.[224] First, the panel found that Range did not fall within "the people" entitled to bear arms, and accordingly that Range was not covered by the Second Amendment.[225] To reach this conclusion, the court surveyed the historical evidence submitted, and made three important observations: (1) "legislatures traditionally used status-based restrictions to disqualify categories of persons from possessing firearms"; (2) they did so based not on individualized determinations of dangerousness, but on the threat posed by certain groups altogether; and (3) legislatures had considerable discretion in determining when a certain group posed a threat to society.[226] Citing this history, as well as the Supreme Court's description of Second Amendment rights as belonging to "law-abiding" citizens,[227] the panel held that "individuals convicted of felony-equivalent crimes, like Range, fall outside 'the people' entitled to keep and bear arms."[228]

Second, the court held that, even if Range was covered by the Second Amendment, the government had met its burden under *Bruen*'s second step by showing that § 922(g)(1) was consistent with the nation's historical

217. *Id.*
218. *Id.* at 98.
219. *Id.*
220. *Id.*
221. 18 U.S.C. § 922(g)(1).
222. *Range I*, 53 F.4th 262, 266 (3d Cir. 2022) (per curiam), *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023).
223. *See, e.g.*, *infra* Part II.B.
224. *See Range I*, 53 F.4th at 266.
225. *See id.*
226. *See id.* at 282.
227. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 625 (2008); *see also supra* Part I.A.
228. *See Range I*, 53 F.4th at 284.

tradition.[229] However, two months after this decision, a majority of Third Circuit judges voted to rehear the case en banc and vacated the panel's decision.[230]

2. The Third Circuit's En Banc Decision Finding 18 U.S.C. § 922(g)(1) Unconstitutional as Applied

Although the analysis in the rehearing of *Range* also employed the steps outlined by *Bruen*'s test, the en banc court reached a sharply different result. First, like the panel before it, the full Third Circuit considered "whether the text of the Second Amendment applie[d] to" Range "and his proposed conduct," which required first determining whether Range was among "the people" entitled to Second Amendment protection.[231] In line with its previous arguments before the circuit's panel, the Government argued that, as the right to bear arms extends only to law-abiding, responsible citizens, the Second Amendment did not apply to Range.[232] In direct conflict with the initial panel ruling on this issue, the Third Circuit rejected the Government's argument and held that *Heller*'s interpretation of "the people . . . unambiguously refer[ed] to all members of the political community, not an unspecified subset."[233] In particular, the Third Circuit interpreted *Heller*'s description of "the people" to mean that the Second Amendment right, as a presumption, "belongs to all Americans."[234] Further, as criminal status was not an issue in *Heller*, *McDonald*, or *Bruen*, the Third Circuit deemed the law-abiding citizen language in those opinions to be dicta.[235] The court also noted the unworkable broadness and vagueness of using "law-abiding" citizens as the guide of whom the Second Amendment covered.[236]

After concluding that the Second Amendment covered Range, the court considered whether the Second Amendment covered Range's proposed conduct (i.e., the possession of a rifle for hunting and a shotgun for self-defense at home).[237] Reasoning that *Heller* (1) deemed the Second Amendment to cover all instruments constituting bearable arms and (2) held hunting and self-defense as conduct covered by the Second Amendment, the court found that Range's proposed conduct was also covered by the Second Amendment.[238]

The court then proceeded to the second step, where it evaluated whether the Government had "justified applying § 922(g)(1) to Range 'by

229. *See id.* at 266.
230. *See* Range v. Att'y Gen., 56 F.4th 992 (3d Cir. 2023).
231. *Range II*, 69 F.4th 96, 101 (3d Cir. 2023).
232. *Id.*
233. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 580 (2008)).
234. *Id.*
235. *Id.*; *see also* Campbell, *supra* note 105, at 81 (explaining that *Heller* and *Bruen* do say that the Second Amendment right applies to the law-abiding but never expressly say that it applies *only* to the law-abiding); *supra* Part I.A.
236. *Range II*, 69 F.4th at 101–02.
237. *Id.* at 103.
238. *Id.*

demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.'"[239] Here, the Government had argued that § 922(g)(1)'s lawfulness was reaffirmed in *Heller*, in which the Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[240] The Government also noted that a plurality of the Court used this language in *McDonald*, and that Justice Kavanaugh's *Bruen* concurrence, joined by Chief Justice Roberts, deemed such statutes "presumptively lawful."[241] Rejecting the Government's argument, the Third Circuit noted that in none of those cases did the Supreme Court actually conduct an extensive historical analysis of the felon-in-possession ban—as required by *Bruen* itself.[242] Thus, finding no binding precedent to support the government's argument, the Third Circuit considered the fact that the federal felon-in-possession ban had existed only since 1938, and that it only extended to nonviolent criminals such as Range beginning in the 1960s.[243] The court thus concluded that a law passed roughly sixty years earlier did not prove that this authority was grounded in the nation's history and tradition.[244]

The Third Circuit also addressed the argument, which the circuit panel had previously endorsed,[245] that "'legislatures traditionally used status-based restrictions' to disarm certain groups of people."[246] The historical evidence demonstrated that indeed the founding-era governments had disarmed plenty of groups, such as African Americans, Native Americans, and groups of Catholic and Quaker citizens.[247] The Third Circuit noted that such restrictions would not only now violate several constitutional rights, but also that any analogy to those laws would be "far too broad."[248] On this point, the court did not explain precisely why an analogy to those laws would be too broad. However, the court likened the issue to one raised in *Bruen*, in which the Supreme Court held that the historical authority to restrict firearms in sensitive places does not permit legislatures to simply deem all of Manhattan a sensitive place where firearms are prohibited.[249] Similarly, the court rejected arguments attempting to justify § 922(g)(1) on the basis that historically many felonies were punishable by death and that most felonies resulted in an at least temporary forfeiture of arms.[250]

The Third Circuit thus ruled that the government failed to identify a history and tradition of disarming people like Range, and that § 922(g)(1) as applied

239. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022)).
240. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).
241. *Id.*
242. *Id.* at 103–04 n.7.
243. *Id.* at 104.
244. *Id.*
245. *See supra* Part II.A.1.
246. *Range II*, 69 F.4th at 104 (quoting *Range I*, 53 F.4th 262, 282 (3d Cir. 2022) (per curiam)).
247. *Id.* at 105.
248. *Id.* (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2134 (2022)).
249. *Id.*
250. *Id.*

to him was unconstitutional.[251] Notably, the Third Circuit declined to opine on what status-based restriction legislatures might permissibly use to disarm specific groups.[252] In a footnote, the court stated that, as the Government did not carry its burden of showing the historical authority to disarm someone like Range, the court did not need to decide whether dangerousness or violence should be the touchstone for permissible disarmament.[253] However, *Range II* included two concurrences and three dissenting opinions. Judge Krause's dissenting opinion, which included insightful analysis of the majority opinion and useful discussion on the issue of status-based bans, is analyzed below.

3. Judge Krause's Dissent in *Range II*: Relief for the Law-Abiding

In her *Range II* dissent, Judge Krause argued for § 922(g)(1)'s validity based on the historical analysis under step two of *Bruen* and separately argued that the majority could have ruled for Range in a strictly prospective, and thus narrower, way.[254] Judge Krause focused primarily on step two of *Bruen*'s test, the history and tradition inquiry, as opposed to step one, whether the Second Amendment's plain text covers Range.[255]

First, Judge Krause applied the historical analysis required by step two of *Bruen*.[256] Although acknowledging that past Supreme Court opinions routinely included language purporting to support § 922(g)(1)'s disarmament of felons, Judge Krause conceded that such language was never accompanied by the full historical analysis required by *Bruen*, and thus it was not yet binding precedent.[257]

Judge Krause's own historical analysis examined evidence from roughly three periods: seventeenth-century England, colonial America, and founding-era America.[258] Judge Krause noted that in seventeenth-century England, the English government disarmed nonconforming Protestants, including pacifist groups such as Quakers, on the basis of their refusal to participate in the Anglican Church or take loyalty oaths.[259] Also in seventeenth-century England, the English government later disarmed Catholics who refused to take oaths renouncing their faith.[260] Judge Krause

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251. *Id.*
252. *Id.* at 104.
253. *Id.* at 104 n.9.
254. *Id.* at 119, 135 (Krause, J., dissenting).
255. *Id.* at 119. This choice may reflect then-Judge Barrett's observation: "There are competing ways of approaching . . . gun dispossession laws . . . . [O]ne uses history and tradition to identify the scope of the [Second Amendment], and the other uses that same body of evidence to identify the scope of the legislature's power to take [that right] away." Kanter v. Barr, 919 F.3d 437, 451–52 (7th Cir. 2019) (Barrett, J., dissenting). *Bruen*'s two-part test, at least in theory, makes both approaches a necessary part of the inquiry.
256. *Range II*, 69 F.4th at 119.
257. *See id.* at 120; *see supra* Part I.A.
258. *Range II*, 69 F.4th at 119–28 (Krause, J., dissenting).
259. *See id.* at 121.
260. *See id.* at 122.

argued that both examples demonstrated the English government disarming a group not because of the group's propensity for violence, but because the group could not be trusted to follow the law (in these cases because the groups were perceived to place religion over the law).[261]

In colonial America, Judge Krause noted, various colonies similarly disarmed Catholics from 1756 to 1763, despite the lack of widespread violence.[262] Similarly, New Jersey disarmed Moravians—another pacifist religious group—during the same time period, despite a lack of violence.[263] Judge Krause argued that these examples from colonial America once again displayed that colonial legislatures routinely disarmed groups merely based on a determination that the group could not be trusted to follow authority.[264]

Judge Krause argued that in the founding era several states, including Connecticut, Pennsylvania, and Virginia, disarmed those who would not recognize the new nation's authority.[265] Such disarmament laws often conditioned bearing arms on taking oaths, and thus they disarmed groups like Quakers and Mennonites who did not take oaths simply because of their religious beliefs.[266] Judge Krause again interpreted those laws as confirming that legislatures traditionally had the power to disarm non-law-abiding citizens, regardless of their propensity for violence.[267] From this inquiry, Judge Krause concluded that "history demonstrate[d] that legislatures repeatedly exercised their discretion to impose 'status-based restrictions' disarming entire 'categories of persons,' who were presumed, based on past conduct, unwilling to obey the law."[268] Thus, Judge Krause found that § 922(g)(1)'s constitutionality should have safely passed through step two of *Bruen*.[269]

In addition to arguing for § 922(g)(1)'s validity, Judge Krause noted that the majority in *Range II* could have opted for a narrower ruling.[270] She argued that the majority could have held that although Range's initial disarmament under § 922(g)(1) was constitutional, any further disarmament of Range under § 922(g)(1) would be unconstitutional.[271] However, Judge Krause noted, the majority held that Range's disarmament under § 922(g)(1) was never constitutional, including at the time of his conviction in 1995.[272]

Judge Krause provided several points in arguing for this narrower holding. First, she argued that it more faithfully adhered to judicial restraint.[273]

261. *See id.* at 121–22.
262. *See id.* at 123 (noting that the Governor of Maryland described Catholics in Maryland as peaceful and "good subjects").
263. *See id.* at 124.
264. *See id.*
265. *See id.* at 125.
266. *See id.* at 125–26.
267. *See id.*
268. *See id.* at 128.
269. *Id.*
270. *See id*. at 135.
271. *See id*.
272. *See id.*
273. *See id.*

Additionally, she noted that such a holding would match how historical disarmament laws often functioned.[274] For instance, when a citizen came forward to swear a loyalty oath, they were rearmed, but only because they had then signified their willingness to obey the law, not because their past disarmament was impermissible.[275] Third, Judge Krause argued that structuring relief in this way might faithfully embody the Supreme Court's language deeming the felon-in-possession ban presumptively lawful.[276] That is because, in a case like *Range II*, once the Government has proven that the individual at issue is a felon and thereby not law-abiding, the burden should shift to the felon to rebut that presumption by establishing themselves as a law-abiding, responsible citizen.[277]

Lastly, Judge Krause noted that this mode of relief would avoid disrupting § 922(g)(1)'s critical role as a law enforcement tool.[278] Specifically, Judge Krause found troublesome implications in the majority's ruling that § 922(g)(1)'s past disarmament of a felon like Range was unconstitutional.[279] Indeed, without more clear direction from the majority regarding who is and is not like Range, defendants could argue that they lacked notice of whether § 922(g)(1) applied to them and thus bring "void-for-vagueness challenges" to § 922(g)(1) prosecutions.[280] Similarly, law enforcement would struggle to rely on the national background check system when deciding whom to charge under § 922(g)(1), as that system would not reveal which felons are or are not like Range.[281] Judge Krause argued that her method of granting relief would avoid both issues.[282] Felons would know that, absent a judicial declaration, § 922(g)(1)'s disarmament can be constitutionally applied to them, thus eliminating any "void-for-vagueness" concerns.[283] Similarly, because felons who successfully obtain prospective declaratory relief could submit that declaration to the Federal Bureau of Investigation to incorporate into the background check system, law enforcement could still rely on the national background check system to determine who is barred from possessing firearms.[284]

274. *See id.* at 136.
275. *See id.*
276. *See id.*
277. *See id.* at 136–37.
278. *See id.* at 137.
279. *See id.* at 129.
280. *See id.*
281. *See id.*
282. *See id.*
283. *See id.*
284. *See id.*

B. The Eighth, Tenth, and Eleventh Circuits Application of Bruen *to 18 U.S.C. § 922(g)(1)*

Unlike the Third Circuit, the Eighth, Tenth, and Eleventh Circuits upheld § 922(g)(1) against Second Amendment challenges.[285] Despite reaching the same result, the courts differed significantly in their analyses.[286]

1. The Eighth Circuit's Approach in *Jackson*

In *United States v. Jackson*,[287] Jackson challenged § 922(g)(1) as applied to him, arguing that "his drug offenses were 'non-violent' and [did] not show that he is more dangerous than the typical law-abiding citizen."[288] The Eighth Circuit rejected the challenge, relying primarily on three sources: (1) the "law-abiding citizens" language from *Bruen* and *Heller*, (2) some of the analysis from the panel decision in *Range I*,[289] and (3) its own historical analysis.[290]

The Eighth Circuit first cited *Heller*, specifically highlighting the Court's language that nothing in that opinion "should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons."[291] The Eighth Circuit further noted that the language in various *Bruen* concurrences emphasized that the felon-in-possession ban remained valid.[292] Thus, the Eighth Circuit "conclude[d] that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)."[293]

Next, the Eighth Circuit noted that sufficient historical analogues existed, such that § 922(g)(1) was constitutional under *Bruen*'s second step.[294] The court detailed several historical examples of disarmament to support that conclusion. First, in seventeenth century England, the British government prohibited firearm possession for "non-Anglican Protestants who refused to participate in the Church of England" and later for Catholics who would not denounce Catholicism.[295] Next, the court noted, in seventeenth century America, many state governments disarmed Native Americans, and at least three states disarmed religious minorities like Catholics.[296] Last, the court acknowledged that around the time of the Revolutionary War, at least six

285. *See* United States v. Jackson, 69 F.4th 495, 502 (8th Cir. 2023); Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023); United States v. Dubois, No. 22-10829, 2024 WL 927030, at *1 (11th Cir. Mar. 5, 2024).

286. *Compare infra* Part II.C.1, *with infra* Part II.C.2.

287. 69 F.4th 495 (8th Cir. 2023).

288. *See id.* at 502.

289. *See supra* Part II.A.1.

290. *Jackson*, 69 F.4th at 502–07.

291. *Id.* at 501 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)); *see supra* Part I.A.

292. *Jackson*, 69 F.4th at 501–02.

293. *Id.* at 501–02.

294. *Id.*

295. *Id.*

296. *Id.*

states, as well as the Continental Congress, disarmed those who refused to declare an oath of loyalty.[297]

Drawing on these various historical examples of disarmament, the court concluded that "legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms."[298] The court noted that it was unclear whether such restrictions should be characterized as "restrictions on persons who deviated from legal norms or persons who presented an unacceptable risk of dangerousness"—the former would not hinge on a person's potential dangerousness for disarmament, whereas the latter might.[299] However, the court noted that even in the latter conception, the historical evidence suggests that there "is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons."[300] The court drew that conclusion because "[n]ot all persons disarmed under historical precedents—not all Protestants or Catholics in England, not all Native Americans, not all Catholics in Maryland, not all early Americans who declined to swear an oath of loyalty—were violent or dangerous persons."[301] Rather, the Eighth Circuit reasoned, the legislature could conclude that if armed, certain categories "as a whole," present a risk of danger.[302]

2. The Tenth and Eleventh Circuit's Approach in *Vincent* and *Dubois*

In *Vincent v. Garland*,[303] the Tenth Circuit upheld § 922(g)(1) as applied to a nonviolent felon's Second Amendment challenge.[304] However, the court's analysis differed from that of the other circuits. First, the Tenth Circuit addressed whether the Supreme Court's decision in *Bruen* abrogated the Tenth Circuit's 2009 case, *United States v. McCane*.[305] The Tenth Circuit noted that in *McCane* it had found § 922(g)(1) constitutional based on language from *Heller*.[306] Specifically, the Tenth Circuit noted *McCane*'s reliance on *Heller*'s language that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[307]

Next, the Tenth Circuit considered whether *Bruen* conflicted with or invalidated the court's analysis in *McCane*.[308] The court noted that in *Bruen*, the Supreme Court "expressly abrogated" a means-end test used in some

297. *Id.* at 503.
298. *Id.* at 505.
299. *Id.*
300. *Id.* at 504.
301. *Id.*
302. *Id.*
303. 80 F.4th 1197 (10th Cir. 2023).
304. *See id.* at 1199.
305. 573 F.3d 1037 (10th Cir. 2009).
306. *Vincent*, 80 F.4th at 1197.
307. District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see supra* Part I.A.
308. *Vincent*, 80 F.4th at 1198.

circuits, but it explained that, because *McCane* had not used that means-end test and instead solely relied on language from *Heller*, *Bruen* did not similarly abrogate *McCane*.[309]

In fact, the Tenth Circuit found support for its precedent in several aspects of *Bruen*. In addition to *Bruen*'s reliance on *Heller*, the Tenth Circuit found it relevant that "six of the nine Justices pointed out that *Bruen* was not casting any doubt on [the law-abiding] language in *Heller*."[310] The Tenth Circuit also noted that, in *Bruen*, the Court's approval of shall-issue licensing regimes may have implicitly approved of § 922(g)(1), as such licensing regimes typically involve criminal background checks.[311]

In sum, the Tenth Circuit found that its precedent upholding the constitutionality of § 922(g)(1) remained intact.[312] The court also held that, under its precedent, it would not "draw constitutional distinctions based on the type of felony involved."[313] Thus, the Tenth Circuit arrived at a result consistent with the Eighth Circuit in *Jackson*.[314] Similarly, the Eleventh Circuit in *United States v. Dubois* relied on its own precedent from before *Bruen* in rejecting a Second Amendment challenge to § 922(g)(1).[315] In adhering to circuit precedent, the Eleventh Circuit thus also upheld § 922(g)(1) without applying *Bruen*'s test.[316]

C. The Seventh Circuit's Remand for Historical Analysis in Atkinson v. Garland

In addition to the above courts, the U.S. Court of Appeals for the Seventh Circuit appears poised to weigh in on the constitutionality of § 922(g)(1) in due time. In *Atkinson v. Garland*,[317] the Seventh Circuit remanded a Second Amendment challenge to § 922(g)(1) to the district court because neither parties' briefing adequately "grapple[d] with [the requirements of] *Bruen*."[318] In doing so, the Seventh Circuit acknowledged that the Government relied on the "presumptively lawful" language of *Heller* and *McDonald*,[319] but it deemed that language dicta and stated that "[n]othing allows us to sidestep *Bruen* in the way the government invites."[320] Thus, the Seventh Circuit is likely to eventually engage in a comprehensive historical analysis, just as the Third Circuit did in *Range II*.[321]

309. *Id.* at 1200 n.3.
310. *Id.* at 1201.
311. *Id.*
312. *Id.*
313. *Id.* at 1202.
314. *See supra* Part II.B.1.
315. United States v. Dubois, No. 22-10829, 2024 WL 927030, at *1 (11th Cir. Mar. 5, 2024).
316. *Id.*
317. 70 F.4th 1018 (7th Cir. 2023).
318. *Id.* at 1022.
319. *See supra* Part I.A.
320. *Atkinson*, 70 F.4th at 1022.
321. *See supra* Part I.A.2.

In its decision to remand, the Seventh Circuit recommended a series of questions for both parties to consider when briefing for the issue in the district court: (1) Does § 922(g)(1) deal with a long-lasting societal issue and, if so, what did past generations do to deal with this issue?; (2) Do relevant historical sources demonstrate the authority to disarm felons?; (3) Are there historical examples of laws disarming dangerous groups other than felons?; (4) Are there any historical laws analogous to § 922(g)(1) that were enforced widely or scrutinized closely?; and (5) What method of determination should be used if history showed support for "Atkinson's call for individualized assessments or for a distinction between violent and non-violent felonies"?[322]

In a spirited dissent, Judge Dianne Wood framed the issue concisely:

> The question before us in this case could not be more important: may individual rights under the Second Amendment be curtailed or denied only on the basis of a granular, case-by-case analysis, or does Congress have the power to enact categorical restrictions? And if some categorical limits are possible and others are not, what sorting principle may or must we use to separate the permissible from the impermissible?[323]

Judge Wood argued that the court could have resolved the issue itself and that § 922(g)(1)'s categorical prohibition is constitutional.[324] In examining the historical basis for § 922(g)(1), Judge Wood concluded that governments of the founding era always had the power to disarm certain categories of people based on that category's potential dangerousness.[325] Acknowledging that not all of the historical laws displaying this power would survive equal protection challenges today,[326] she found sufficient authority in laws disarming those who refused to take loyalty oaths, laws that disarmed those guilty of treason, and laws disarming Native Americans and other groups.[327] Judge Wood concluded by arguing that the choice of whether to regulate guns through categorical restrictions or through laws that work on individualized determinations is a purely legislative one.[328]

III. RESOLVING THE CIRCUIT SPLIT ON § 922(G)(1)

This Note argues that the Supreme Court should uphold the constitutionality of § 922(g)(1) under *Bruen*, as history and tradition demonstrate a legislature's power to disarm those deemed dangerous as well as those who are not law-abiding.[329] Further, if the Court declines to take a categorical approach to Second Amendment challenges to § 922(g)(1), it should adopt Judge Krause's proposed narrow approach.[330] Specifically, the Court should limit any relief granted in as-applied challenges to § 922(g)(1)

322. *Atkinson*, 70 F.4th at 1024.
323. *Id.* at 1025 (Wood, J., dissenting).
324. *Id.*
325. *Id.* at 1034.
326. *See supra* Part II.A.2.
327. *Atkinson*, 70 F.4th at 1034 (Wood, J., dissenting).
328. *Id.* at 1038.
329. *See infra* Part III.A.
330. *See infra* Part III.B.

to prospective declaratory relief and decline to declare past § 922(g)(1) disarmament unconstitutional.[331] This would permit felons seeking restoration of their Second Amendment rights to bring as-applied challenges to their disarmament in civil suits but prohibit felons from using the Second Amendment as a defense to indictments or convictions under § 922(g)(1).[332]

The novelty of *Bruen*'s test and scholarship invites two important caveats to this part's analysis. First, in arguing that § 922(g)(1) passes *Bruen*'s two-step inquiry, this part does *not* argue that felons, as non-law-abiding individuals, have no Second Amendment right at all. Rather, this part argues that history and tradition support the power of the Government to restrict the Second Amendment right of felons.[333] Though that distinction may appear unimportant, *Bruen*'s two-part test designates the question of whom the Second Amendment protects as analytically distinct from the question of what history and tradition permit the government to legislate with respect to firearms law.[334] Thus, this Note argues that the Court should uphold § 922(g)(1) under step two of *Bruen*, as that law's constitutionality is affirmed by a plethora of analogous historical laws and regulations from the founding era. Second, rather than conducting another round of exhaustive historical research, this part applies *Bruen*'s test to § 922(g)(1) based on the various founding-era historical examples discussed by the four federal appellate courts that have heard this issue. In doing so, this part prioritizes the task of extracting workable principles from the generally accepted historical evidence[335] and, in particular, from what is likely the most relevant historical evidence.[336]

A. 18 U.S.C. § 922(g)(1) Is Firmly Based in History and Tradition

The restrictions that § 922(g)(1) places on convicted felons' ability to possess firearms are firmly rooted in history and tradition and should be upheld as constitutional under the second step of *Bruen*. The Third Circuit in *Range II* misapplied *Bruen* when evaluating § 922(g)(1), and, as such, the Supreme Court should adopt the reasoning of the Eighth Circuit in *Jackson*[337] and that of Judge Wood in *Atkinson*[338] to find that history and tradition support § 922(g)(1)'s validity. Although the Tenth and Eleventh Circuits'

331. *See id.*
332. *See id.*
333. *See infra* Part III.A.
334. *See supra* Part I.B.3.
335. *See* William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4618350 [https://perma.cc/BM7H-RLQ6] (arguing for a nuanced middle ground between overly rigid historical analogizing and overly broad abstraction of historical principles).
336. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2136 (2022) (explaining that "not all history is created equal," and that the Second Amendment's scope derives from what people thought it to be in 1791).
337. *See supra* Part II.B.1.
338. *See supra* Part II.C.

decisions in *Vincent* and *Dubois* support this result, this part does not rely on those cases, as reliance on circuit precedent rather than *Bruen*'s test is likely less persuasive to the Court.[339] As the Third and Eighth Circuits considered and addressed the same historical examples from the founding era, the circuits' primary disagreement is about the application of *Bruen*'s test.[340] Whereas the Third Circuit dismissed the proffered founding-era examples of disarmament as far too broad and insufficiently analogous to § 922(g)(1), the Eighth Circuit better engaged with the careful analogical reasoning required by *Bruen*.

In doing so, the Eighth Circuit extracted several fundamental and interrelated conclusions from the Government's historical analogues—all of which support the validity of § 922(g)(1). First, legislatures historically enacted categorical prohibitions on firearm possession by certain groups.[341] Second, that power to enact categorical prohibitions is rooted in historical evidence that legislatures used such categorical bans either to disarm those who were not law abiding or those groups deemed to pose an unreasonable risk of dangerousness.[342] Third, the Eighth Circuit found that even if a determination of dangerousness, as opposed to one's non-law-abiding status, was the basis for disarmament, history and tradition did not require individualized assessments of one's dangerousness.[343] Rather, legislatures exercised discretion in determining which groups posed an unreasonable risk of dangerousness.[344] Though uncertain as to which interpretation was better, the Eighth Circuit decided that either the power to disarm the non-law-abiding or the power to disarm those identified as posing an unreasonable risk of dangerousness appropriately supported disarming felons.[345] As a result, the Eighth Circuit found that Congress's categorical ban in § 922(g)(1) fell squarely within these permissible uses.[346]

The above analysis illustrates that the Eighth Circuit more faithfully applied *Bruen*'s test than the Third Circuit. In presenting the *Bruen* test, the

339. *See supra* Part II.B.2. As documented in Part II.B.2, the Tenth and Eleventh Circuits also upheld § 922(g)(1) under *Bruen*, based primarily on language in *Heller*, *see supra* Part I.A, but without engaging in a comprehensive historical analysis. Although this decision lends some support for § 922(g)(1), it is, on its own, unlikely to persuade the Court. *See Range II*, 69 F.4th 96, 98 (3d Cir. 2023); *id.* at 120 (Krause, J., dissenting); Atkinson v. Garland, 70 F.4th 1018, 1022–23 (7th Cir. 2023); *cf.* Transcript of Oral Argument, *supra* note 107, at 5–13 (documenting the Justice's questions in *Rahimi* about who the Second Amendment protects despite the "law-abiding" language in *Heller*). Thus, Part III focuses primarily on the divide between the Third and Eighth Circuits, which both engaged in a comprehensive historical analysis.

340. *Compare supra* Part II.A.2, *with supra* Part II.B.1.

341. *See supra* note 298 and accompanying text.

342. *See supra* note 301 and accompanying text.

343. *See id.*

344. *See id. But see* Jamie G. McWilliam, *Refining the Dangerousness Standard in Felon Disarmament*, 108 MINN. L. REV. HEADNOTES (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4652331 [https://perma.cc/BZN2-Q5Z4] (conceding that legislatures had this broad power but making the normative argument that it is unworkably broad and the only permissible reason to deem a person dangerous is their past violence).

345. *See* United States v. Jackson, 69 F.4th 495, 501 (8th Cir. 2023).

346. *See id.*; *see also supra* Part II.B.1.

Supreme Court warned that it requires "only that the government identify a well-established and representative historical *analogue*, not a historical *twin*."[347] Yet the Third Circuit in *Range II* demanded a historical twin.[348] *Range II* used just one paragraph to address and dismiss the historical examples of disarmament in the founding era. Indeed, the Third Circuit even acknowledged as established fact that "[f]ounding-era governments disarm[ed] groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks."[349] Yet the court provided few reasons for finding that cluster of historical examples insufficient. It first noted, as an aside, that all of those historical laws would now be unconstitutional under the First and Fourteenth Amendments.[350] Of course, that argument has little to do with § 922(g)(1), which pertains to only felons and implicates none of the historical laws' equal protection issues.[351] Second, the Third Circuit noted that the Government had not adequately analogized those groups to Range and declared that any such analogy would nonetheless be "too broad."[352]

The majority in *Range II* acknowledged, but did not apply, one of *Bruen*'s key metrics in analogizing between a modern firearm law and historical ones: *why* the regulation burdens a law-abiding citizen's right to armed self-defense.[353] In passing over this important aspect of the analogical reasoning required by *Bruen*, the *Range II* majority evaded the glaring similarities between Range and the groups disarmed in the Government's historical examples.[354] Namely, both those groups and Range were among those whom legislatures had decided to disarm, whether because these individuals could not be trusted to follow the law based on past conduct or because they were deemed to pose an unreasonable risk of dangerousness if armed.[355]

When one considers the historical justifications for disarmament, § 922(g)(1) constitutes a comparably well-tailored mode of disarmament under either the non-law-abiding rationale or the determined to pose a risk of dangerousness rationale.[356] For these examples of disarmament, the very fact of a historical group's non-law-abiding status often arose only from their refusal to take an oath, due to their religious beliefs.[357] Section 922(g)(1)'s disarmament, on the other hand, applies only to those with felony or felony-equivalent convictions, and thus it only applies to those who have

347. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022); *see also supra* Part I.A.

348. *See supra* Part II.A.2; *see also* United States v. Brown, No. 22–CR–704, 2023 WL 7323335, at *3 n.3 (N.D. Ohio Nov. 7, 2023) (opining that *Range II* was "wrongly decided").

349. *Range II*, 69 F.4th 96, 105 (3d Cir. 2023).

350. *Id.* at 104.

351. *See id.* at 129 (Krause, J., dissenting).

352. *Id.* at 105 (majority opinion).

353. *See* Bernabei, *supra* note 113, at 110; *supra* Part I.A.

354. *Range II*, 69 F.4th at 104–05 (declaring that *any* analogy will be unlike "Range and his individual circumstances").

355. *See supra* Part II.B.1.

356. *See supra* Part II.B.1.

357. *Range II*, 69 F.4th at 119, 135 (Krause, J., dissenting).

failed to actually follow the law.[358] And the high mens rea requirements for § 922(g)(1) ensure as much, as any § 922(g)(1) conviction requires that a defendant, in addition to knowing that they possessed a firearm, know that they had been previously convicted of a crime punishable by at least one year in prison.[359] Indeed, as Justice Alito noted in 2019, § 922(g) "does more to combat gun violence than any other federal law," and that mens rea standard alone poses potentially severe burdens for § 922(g) prosecutions.[360] Thus, if § 922(g)(1)'s validity in history and tradition depends on it reaching only those not trusted to follow the law, that requirement is satisfied—likely in a more appropriate manner than the government's historical examples in *Range II* and *Jackson*.

If, on the other hand, § 922(g)(1)'s validity comes from a legislature's power to disarm those perceived to be dangerous, § 922(g)(1) again is likely more precise than its historical analogues. First and foremost, as evidenced by the founding-era laws that categorically disarmed certain groups, the lack of individualized assessments of dangerousness indicates that legislatures received deference in making such determinations.[361] That deference is inherent in any of the founding era's categorical disarmament laws, which surely swept up many nonviolent citizens.[362]

Moreover, even absent the broad deference traditionally given to legislatures, § 922(g)(1) is entirely sufficient as a legislative determination of which groups pose an unreasonable risk of danger. One recent 2022 study by the U.S. Sentencing Commission analyzed recidivism rates among federal offenders and found that among a cohort released in 2010, over 63 percent of violent offenders were rearrested sometime within the next eight years.[363] And of the cohort of nonviolent offenders released in 2010, 38 percent were rearrested within the next eight years.[364] And within both cohorts, the most common reason for rearrest was assault.[365] Of course, this data does not lessen the important and underrecognized issues with the current era of mass incarceration.[366] Nor does it lessen the many issues that arise from an entirely carceral response to gun violence.[367] But the data above supports the intuition underlying § 922(g)(1)'s broad sweep: an individual's past criminal conduct, even if not violent, correlates with an increased likelihood of more criminal conduct in the future and, specifically, criminal conduct that

358. *See* 18 U.S.C. § 922(g)(1).
359. *See* Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019).
360. *See id.* at 2201 (Alito, J., dissenting).
361. *See* United States v. Jackson, 69 F.4th 495, 504 (8th Cir. 2023).
362. *See supra* note 300 and accompanying text.
363. U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS RELEASED IN 2010, at 5 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf [https://perma.cc/K2F4-JPQH].
364. *See id.* at 12.
365. *See id.* at 5.
366. *See generally* Peter Wagner & Daniel Kopf, *The Racial Geography of Mass Incarceration*, PRISON POL'Y INST. (July 2015), https://www.prisonpolicy.org/racialgeography/report.html [https://perma.cc/J5CW-BP9P].
367. *See generally* Charles & Garret, *supra* note 143.

is violent.[368] In this more scrutinizing empirical frame, § 922(g)(1) is still a sensible determination that a specific group—felons—poses at least a heightened risk of danger and thus can be disarmed. Again, this suggests that § 922(g)(1) passes muster under the absolute least charitable interpretation of its historical basis: the legislatures' ability to disarm groups that, as proven empirically, pose an unreasonable risk of dangerousness if armed. Of course, historically, legislatures in the founding era did not disarm only those who had committed violent crimes and thus proved themselves dangerous; instead, founding-era disarmament laws swept up plenty of nonviolent citizens,[369] occasionally applied even to whole groups whom state governors acknowledged had been peaceful,[370] and even disarmed groups like the Quakers who were "committed pacifists."[371]

Lastly, *Range II*'s primary point against the founding-era disarmament laws was that any such analogy between those historically disarmed groups and Range would be "far too broad."[372] That is incorrect. *Bruen* does not require a "historical twin."[373] It merely commands courts to consider "whether the two *regulations* are relevantly similar."[374] To do so, a court must consider also "how . . . [each] regulation[] burden[s] a law-abiding citizen's right to armed self-defense."[375] In both the case of the founding-era disarmament laws and § 922(g)(1), the "how" is the same: by prohibiting specified groups from firearm possession. Almost certainly, § 922(g)(1) also extends to many nonviolent citizens. The number of American citizens with felony convictions today is almost twenty million.[376] And of course not all felons are dangerous to those around them. However, as Judge Wood's dissent in *Atkinson* notes, criticizing § 922(g)(1) as a poor proxy—perhaps an overinclusive one—for disarming the dangerous is an equal protection argument, not an argument about the scope of the Second Amendment.[377]

The historical examples do not portend to require anything more exacting than that determination. In fact, in choosing to categorically disarm by the crude metrics of race or religion,[378] the founding-era governments' laws confirm just how little a check there was on how it determined which groups to disarm. In disarming African Americans, Catholics, Native Americans, and Quakers without any further mechanism to verify an individual's

368. *See supra* note 363.
369. *See supra* note 301.
370. *Range II*, 69 F.4th 96, 124 (3d Cir. 2023) (Krause, J., dissenting).
371. *Id.*
372. *Id.* at 105.
373. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022); *see also* Part I.A; Bernabei, *supra* note 113, at 111; Charles, *supra* note 26, at 90.
374. *Bruen*, 142 S. Ct. at 2132 (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993) (emphasis added)).
375. *Id.* at 29.
376. *See* Ariana Freeman & Jan Crawford, *Facing a Stigma, Many Ex-convicts in the U.S. Struggle to Find Work*, CBS NEWS (Jan. 31, 2023, 8:13 PM), https://www.cbsnews.com/news/ex-convicts-u-s-struggle-to-find-employment/ [https://perma.cc/9XSU-XZK4].
377. Atkinson v. Garland, 70 F.4th 1018, 1035–36 (7th Cir. 2023) (Wood, J., dissenting).
378. *See supra* Part II.A.

propensity for violence before this disarmament, the historical disarmament laws unabashedly swept up vast swaths of nonviolent people.[379] Thankfully, disarmament based on race or religion is no longer permissible.[380] But the truth remains: that the discriminatory founding-era disarmament laws extended to many nonviolent citizens supports the broad sweep of § 922(g)(1).

B. Providing Prospective Relief for Responsible, Law-Abiding Citizens

Even though the Second Amendment allows Congress to disarm felons, the Court might decline to close off all potential relief in Second Amendment challenges to § 922(g)(1). If that is the case, the Court should leave open only narrow, prospective relief from § 922(g)(1). As discussed, § 922(g)(1) fits within the historical tradition in which legislatures had the power to categorically disarm certain groups based either on a determination of that group's risk of danger or based on that group's non-law-abiding status.[381] However, § 922(g)(1)'s prohibition on firearm possession by those with felonies and felony-equivalent crimes likely extends to around twenty million citizens.[382] Given the provision's reach, the Court should adopt the narrow approach described in Judge Krause's dissent in *Range II*.[383] Accordingly, felons faced with a § 922(g)(1) charge should not be able to use a Second Amendment challenge to dismiss an indictment; instead, any relief from the provision should be limited to prospective declaratory relief in civil proceedings.[384] Thus, this model could provide relief for certain felons who have abided by § 922(g)(1)'s disarmament but would provide no relief for those who have violated § 922(g)(1). Further, this type of limited relief aligns with the historical bases for § 922(g)(1).[385] At least one scholar has suggested that § 922(g) might be on more stable constitutional ground if some potential form of relief, such as § 925(c), was functional rather than ineffectual due to a lack of funding.[386] Although § 925(c) seems likely to remain unfunded, this approach would provide a structurally similar form of potential relief and thus might similarly bolster § 922(g)'s presumption of validity. Below, this part details why Second Amendment relief from § 922(g)(1) should not be used for criminal indictments, why this narrow

379. *See generally* Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 FORDHAM URB. L.J. 25 (2023).

380. *See* U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1.

381. *See supra* Part III.A.

382. *See* Freeman & Crawford, *supra* note 376.

383. *See supra* Part II.A.3.

384. *See Range II*, 69 F.4th 96, 135–38 (3d Cir. 2023) (Krause, J, dissenting).

385. *See id.* at 136 (explaining how conditioning such prospective relief on a felon initiating a civil action would mirror the historical situations in which a disarmed citizen seeking rearmament had to come forward to take an oath or swear allegiance).

386. *See* Baude & Leider, *supra* note 335 (suggesting that if functional, § 925(c) "could do a great deal to render the various federal firearms provisions consistent with a hypothetical general-law dangerousness principle").

form of prospective relief is justified, and how this ruling would more faithfully adhere to the Court's precedent than *Range II* does.

Closing off Second Amendment relief for those who have violated § 922(g)(1) fits with the historical bases for disarming felons. Section 922(g)(1)'s validity arises from the historical power of legislatures to disarm those perceived as dangerous and those who are not law-abiding.[387] Perhaps, then, history supports rearming certain individuals who can prove that they are law-abiding and responsible.[388] However, any felon shown to have violated § 922(g)(1) has, almost by default, proven that they are not law-abiding and responsible. Thus, the historical tradition supporting § 922(g)(1) logically leaves no space for Second Amendment challenges in such prosecutions.[389]

Conversely, the Court might be justified in allowing for relief in civil proceedings and permitting lower courts to grant prospective declaratory relief in successful Second Amendment challenges to § 922(g)(1).[390] In this context, a person with a prior felony conviction who brings a civil suit to challenge their disarmament under § 922(g)(1) and obtain prospective relief arguably displays an observance of, rather than disregard for, the law. That difference alone, of course, would not justify a court in declaring § 922(g)(1)'s disarmament unconstitutional going forward as applied to the party. However, if a felon can meet the burden of proving their present law-abiding and responsible status, then prospective declaratory relief might be warranted.[391] Put simply, if the Court leaves open any relief for Second Amendment challenges to § 922(g)(1), it should be limited to situations when a citizen preemptively challenges, and has not yet violated, their disarmament under § 922(g)(1).

Following this approach, the narrower issue on which the Third Circuit in *Range II* should have ruled was whether, after thirty years of lawful, good behavior following a nonviolent crime, the government could still constitutionally prohibit Range from possessing firearms going forward.[392] Crucially, this means that courts may not, as the Third Circuit did in *Range II*, deem a felon's past disarmament under § 922(g)(1) unconstitutional.[393] That holding wrongly implies that Congress lacks the power to disarm the non-law-abiding or those whom it perceives as dangerous.[394] Further, that holding wrongly suggests that perhaps Congress may only disarm those whose crimes show a propensity for violence. But that is not true, as Congress may disarm those who have demonstrated a failure to abide by the law as well as those groups deemed to be dangerous.[395]

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387. *See supra* Part III.A.
388. *See Range II*, 69 F.4th 96, 137 (3d Cir. 2023) (Krause, J., dissenting).
389. *See supra* Part I.C.1.
390. *See supra* Part II.A.3.
391. *See Range II*, 69 F.4th at 137 (Krause, J., dissenting).
392. *See supra* Part II.A.3.
393. *See supra* Part II.A.
394. *See supra* Part III.A.
395. *See supra* Part III.A.

Rather than declare Range's past disarmament unconstitutional, the Third Circuit could merely have deemed any further disarmament of Range unconstitutional.[396] Handling challenges to § 922(g)(1) in this way has several benefits. First, it would counter the objections of those who argue that § 922(g)(1) is unconstitutional because the result for every single felon is permanent and lifetime disarmament.[397] By permitting this sort of civil, preemptive challenge, the Court would enable lower courts to provide relief in particularly striking cases, thus easing concerns that § 922(g)(1) means permanent, lifetime disarmament for every felon, regardless of individual circumstances.[398] Second, the Court might find that § 922(g)(1)'s disarmament must include some equivalent of the loyalty oath by which historically disarmed groups could, sometimes, regain their right to bear arms.[399] If so, permitting these civil challenges for declaratory relief would satisfy that requirement.

How exactly these civil proceedings would function is not entirely clear, but Judge Krause's dissent provides helpful direction.[400] In these civil proceedings, the felon would be the party to initiate the suit and challenge their disarmament under § 922(g)(1). The felon would have the burden of rebutting § 922(g)(1)'s ban by showing that they are "presently a 'law-abiding, responsible' citizen."[401] Normally, *Bruen* dictates that the government bears the burden of proof in Second Amendment challenges.[402] Here, however the government would have already met the burden by proving that the party challenging the law is a felon and thus presumptively falls within § 922(g)(1)'s historically valid prohibition of firearm possession by felons.[403] Although questions remain as to how a felon would meet this burden, this model is consistent with historical practice, in which disarmed citizens could sometimes be rearmed by an oath of loyalty or allegiance.[404] As noted in Judge Krause's dissent, this structuring of Second Amendment challenges might embody the language in *Heller* and *McDonald* deeming felon-possession bans "presumptively lawful."[405] In each civil proceeding

396. *See supra* Part II.A.3.

397. *See Range II*, 69 F.4th at 137 (Krause, J, dissenting). It is true that § 922(g)(1) does not apply to those felons who have obtained an expungement, pardon, or had their civil rights restored. 18 U.S.C. § 921(a)(20). However, at least for federal felonies, presidential pardon might be the only one of those options that is consistently functional. *See generally* Beecham v. United States, 511 U.S. 368 (1994). Accordingly, for felons disarmed due to federal law convictions, § 921(a)(20)'s exceptions to § 922(g)(1) may be almost meaningless.

398. *See supra* Part II.A.3. Indeed, Bryan Range might be one such case; however, this approach, unlike the majority's, might rearm Range on the basis that after many years of lawful behavior following a nonviolent crime, Range is once again law-abiding and responsible.

399. *See supra* note 297 and accompanying text.

400. *See Range II*, 69 F.4th at 136–37 (Krause, J., dissenting).

401. *See id.* at 137 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022)).

402. *See supra* Part I.C.

403. *See Range II*, 69 F.4th at 137 (Krause, J., dissenting).

404. *See id.* at 136–37.

405. *See id.* at 135–38.

of this kind, because the felon-in-possession ban is "presumptively lawful,"[406] the felon challenging that ban would have to rebut that presumption by proving their law-abiding and responsible status, such that they may no longer lawfully be disarmed.

CONCLUSION

The Supreme Court should hold that § 922(g)(1) is rooted in history and tradition, and it should clarify that Congress's power to disarm the non-law-abiding extends to those with prior felony convictions. Upholding § 922(g)(1) not only follows the spirit of *Heller* and *McDonald*, but it also fits squarely within the Court's Second Amendment jurisprudence in *Bruen*. *Bruen* positioned history and tradition as the lodestar for determining the constitutionality of firearms laws. Accordingly, this Note illustrates how § 922(g)(1)'s constitutionality is affirmed by founding-era history, wherein legislatures repeatedly disarmed whole groups based on no more than a determination that such a group posed an unreasonable risk of danger if armed. Although the Court could allow for relief in the form of prospective civil declaratory relief, it need not under *Bruen*. And if the Court does entertain prospective petitions for relief from § 922(g)(1), under *Bruen*, disarmed individuals must bear the burden of rebutting the validity of § 922(g)(1) going forward.

406. *See supra* Part I.A.