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A Final Shot at Federal Felon Dispossession: Bruen, Heller's Haven, and Non-Violent Felons

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NOTE

A Final Shot at Federal Felon Dispossession: *Bruen*, *Heller*'s Haven, and Non-Violent Felons

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

Keaton Campbell[*]

I. INTRODUCTION

Felons are not allowed to possess firearms—*yet*. *New York State Rifle and Pistol Association v. Bruen* is the Supreme Court's most recent elaboration on the Second Amendment, and the Court enunciated a new constitutional test for firearms regulations.[1] The Supreme Court disclaimed the means-end balancing approach developed by courts in the wake of *D.C. v. Heller* and replaced it with a test focusing only on the plain text of the Second Amendment and the Nation's historical tradition of firearms regulation.[2] 18 U.S.C. § 922(g)(1), the federal felon dispossession statute, fared well under means-end balancing in the decade after *Heller*.[3] Although the statute is facing a new onslaught of challenges post-*Bruen*, § 922(g)(1) remains unscathed. Since *Bruen*, not a single challenge to § 922(g)(1) has succeeded—including as-applied challenges brought by non-violent felons. This Comment contends that a faithful application of *Bruen* should not necessarily yield this result, and that the historical record supporting § 922(g)(1)'s constitutionality as applied to non-violent felons is not as straightforward as its winning record suggests. Particularly, this Comment argues that courts must *at least* conduct a historical inquiry, as mandated by *Bruen*, when facing challenges to §

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

[2] District of Columbia v. Heller, 554 U.S. 570 (2008).

[3] 18 U.S.C. § 922(g)(1) (2022).

922(g)(1), and courts cannot cut their analysis short by relying solely on dicta from *Heller*.

Part II of this Comment provides a brief description of § 922(g)(1) and the role that it plays in the United States. Part III summarizes the facts and holding of *Bruen*. Part IV explains the legal background leading up to *Bruen*, beginning with *Heller*. This Part also discusses pre-*Bruen* challenges to § 922(g)(1) and the reasoning courts used to dismiss these challenges, particularly as-applied challenges brought by non-violent felons. Part IV concludes by providing the historical record that was used in *Bruen.* Part V details *Bruen*'s holding, illustrates the manner in which the *Bruen* test is conducted, and explains how *Bruen* treats historical analogues. Finally, Part VI discusses post-*Bruen* challenges to § 922(g)(1) and concludes by explaining the reasoning of the courts that have faced and rejected as-applied challenges to § 922(g)(1), along with the weaknesses in the courts' arguments.

II. 18 U.S.C. § 922(g)(1)

In 1938, Congress passed the Federal Firearms Act ("FFA").[4] The FFA prohibited the transfer of firearms to those convicted of a "crime of violence."[5] The statute defined "crime of violence" as "murder, manslaughter, rape, mayhem, kidnapping, burglary, and housebreaking," and certain forms of aggravated assault—"assault with intent to kill, commit rape, or rob; assault with a dangerous weapon; or assault with intent to commit any offence punishable by imprisonment for more than one year."[6] In 1961, Congress amended the FFA to bar not only violent offenders, but any person convicted of a crime punishable by more than one year in prison from receiving any firearm in interstate commerce.[7] In 1968, Congress extended this prohibition to include any firearm that has ever traveled in interstate commerce.[8] 18 U.S.C. § 922(g)(1) is the modern statute, which provides "[i]t 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 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."[9]

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[4] Federal Firearms Act, ch. 850, § 1(6), 52 Stat. 1250, 1250 (1938).

[5] *Id.*

[6] *Id.*

[7] An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

[8] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 925, 82 Stat. 197, 233–34

[9] 18 U.S.C. 922(g)(1) (2022).

In 2021, over 7,400 offenders were convicted under § 922(g)(1), and convictions under § 922(g)(1) constituted 13% of all federal convictions.[10] In some federal districts, felon-in-possession convictions constituted over 40% of all convictions within the district.[11] The average sentence for all felons in possession of a firearm was sixty months.[12] This relatively high number of convictions can be partially attributed to the ease which the government can convict a defendant under § 922(g)(1).[13] In order to convict a defendant under this statute, the government must simply establish four elements: (1) that the defendant has a qualifying prior felony conviction; (2) that he knew of his felony status; (3) that he knowingly possessed a firearm at some point; and (4) that the firearm was in or affecting commerce.[14] Nearly twenty million Americans have a prior felony conviction;[15] consequently, nearly twenty million Americans are prohibited, under threat of substantial criminal penalties, from possessing any kind of firearm for any reason.[16]

III. FACTS AND HOLDING

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, plaintiffs Brandon Koch and Robert Nash each applied for an unrestricted license to carry a handgun in public.[17] Both men were denied applications by the New York State Police, the department responsible for enforcing New York's firearm licensing laws.[18] Koch and Nash endeavored to obtain unrestricted public carry licenses for the purpose of "general self-defense."[19] The licensing officer, however, determined that neither Koch

[10] UNITED STATES SENTENCING COMMISSION, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY21.pdf [https://perma.cc/L7GY-6WZK].

[11] *Id.*

[12] *Id.*

[13] Zach Sherwood, *Time to Reload: The Harms of the Federal Felon-in-Possession Ban in A Post-Heller World*, 70 DUKE L.J. 1429, 1452–53 (2021).

[14] *See, e.g.*, United States v. Parsons, 946 F.3d 1011, 1014 (8th Cir. 2020); United States v. Smith, 939 F.3d 612, 614 (4th Cir. 2019).

[15] *America's Invisible Felon Population: A Blindspot In US National Statistics*, *Hearing on the Economic Impacts of the 2020 Census and Business Uses of Federal Data before the Joint Economic Committee*, 117th Cong. (statement of Nicholas Eberstadt, Henry Wendt Chair in Political Economy, American Enterprise Institute).

[16] Sherwood, *supra* note 13, at 3.

[17] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2117 (2022).

[18] *Id.* at 2125.

[19] *Id.*

nor Nash made the required "proper cause" showing under New York law that was necessary to obtain an unrestricted license.[20]

The Supreme Court granted certiorari to determine whether New York's denial of petitioners' license applications violated the Constitution, and the Court held that New York's proper-cause standard was unconstitutional under the Fourteenth Amendment.[21] Additionally, the Court held "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[22] The government cannot justify its regulation by suggesting that it "promotes an important interest." [23] "Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearms regulation."[24] Only after the government makes this showing can a court conclude that the individual's conduct falls outside of the Second Amendment's "unqualified command."[25] Thus, the Court pivoted from its traditional "means-end" balancing test and articulated a "text and history" test for analyzing constitutional challenges arising under the Second Amendment.

IV. LEGAL BACKGROUND

This section consists of three parts. Part A briefly covers *Heller*, the *Bruen* predecessor, and the standard of review for challenged firearms regulations that lower courts developed in its wake. Part B discusses the way lower courts treated 18 U.S.C. § 922(g)(1); the federal felon-in-possession statute post-*Heller*. Part C walks through the history of public carry in the United States as described by the majority in *Bruen* and provides the critical context necessary for understanding the Court's historical analysis in *Bruen*.

A. Heller and the Lower Courts

Heller was described by the Supreme Court as its "first in-depth examination of the Second Amendment."[26] The Court explained that *Heller* could not "clarify the entire field," and would not leave the right to bear arms in a state of "utter certainty."[27] This assessment proved to be

[20] *Id.*
[21] *Id.*
[22] *Id.* at 2126.
[23] *Id.*
[24] *Id.*
[25] *Id.* (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961).
[26] District of Columbia v. Heller, 554 U.S. 595, 635 (2008).
[27] *Id.*

true, and the U.S. Courts of Appeals scrambled to settle on a standard to assess the constitutionality of firearms regulations post-*Heller*.[28]

1. Heller and McDonald

In *Heller*, the Court held that the Second Amendment conferred an individual right to keep and bear arms.[29] In *McDonald*, a case decided two years later, the Court held that this individual right to keep and bear arms is fully applicable to the states by virtue of the Fourteenth Amendment.[30] In both cases, the regulations at issue banned the possession of handguns in the home, and in both cases, the Court recognized that the right to keep and bear arms in the home for the purpose of self-defense is a right at the core of the Second Amendment.[31] However, the Court in *Heller* stated that the right to possess a firearm is not unlimited, and this sentiment was reaffirmed in *McDonald.*[32] This recognition was accompanied by the following list of regulations that the Court identified as "presumptively lawful": "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms."[33]

The Court stated that this list merely provided examples of presumptively lawful regulations, but it was not exhaustive.[34] Additional regulations on firearms may be constitutional, particularly outside of the home, but *Heller* did not enunciate a clear standard under which to evaluate such regulations.[35] *Heller*'s limited guidance came in the form of explicitly dismissing two potential standards: interest-balancing and rational basis scrutiny. The Court expressly rejected Justice Breyer's proposed "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[36] Additionally, the Court acknowledged that the regulation at issue in *Heller* would survive rational-basis scrutiny, but it

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[28] Stephen Kiehl, *In Search of A Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1141 (2011).

[29] *Heller*, 554 U.S. at 595.

[30] McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

[31] *Heller*, 554 U.S. at 628–29; *McDonald*, 561 U.S. at 750, 767.

[32] *Heller*, 554 U.S. at 626 (explaining that the Second Amendment allows for regulation of the manner of and purpose for carrying a firearm, as well as regulation of the types of arms that may be carried); *McDonald*, 561 U.S. at 786.

[33] *Heller*, 554 U.S. at 626–27, 626 n.26; *McDonald*, 561 U.S. at 786.

[34] *Heller*, 554 U.S. at 626 n.26.

[35] *Id.* at 634 (acknowledging Justice Breyer's accusation that the majority declined "to establish a level of scrutiny for Second Amendment restrictions").

[36] *Id.*

stated that rational-basis scrutiny cannot be used to evaluate the extent to which a legislature may regulate a specific, enumerated right.[37]

Heller undertook an extensive historical inquiry to conclude that the Second Amendment protects an individual's right to keep and bear arms, particularly for self-defense. The Court reviewed post-ratification commentary, pre-Civil War case law, post-Civil War legislation, and post-Civil War commentators to determine the original meaning and intent of the Second Amendment.[38] Standing alone, this historical inquiry and focus on original meaning suggests that the only question courts should have considered in determining the constitutionality of firearms regulations post-*Heller* was whether the regulation "infringes an individual's right to possess and carry firearms in common civilian use."[39] The Court in *Heller* stated that when faced with future challenges to firearms regulations deemed presumptively lawful, it would "expound upon the historical justifications for the exceptions." This reasoning implied that historical justifications were how constitutional challenges to firearms regulations should have been assessed.[40] However, commentators suggested that *Heller*'s dicta on permissible regulations, its focus on the core interest of lawful armed defense, and its comparison between the burden imposed by the contested regulation and the burden imposed by framing-era regulations proposed that *Heller* meant to allow for some form of means-end scrutiny.[41] *Heller*'s condemnation of "judge-empowering interest-balancing inquir[ies]" was received with confusion by the lower courts, and some commentators concluded that interest balancing was inevitable in Second Amendment jurisprudence.[42] Regardless, if the Court in *Heller* and *McDonald* intended to communicate that the individual right to possess a firearm was absolute and not subject to any form of means-end scrutiny, the lower courts did not receive the message.[43]

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[37] *Id.* at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

[38] *Id.* at 605–19.

[39] Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1197 (2015).

[40] *Heller*, 554 U.S. at 635.

[41] Rosenthal, *supra* note 39, at 1229.

[42] *Id.* at 1203–04.

[43] *Id.* ("It is remarkable that an opinion that focused so consciously on the original meaning of the Second Amendment's operative clause, and which abjured any form of interest balancing, has resulted in litigation that pays so little attention to the original meaning of the operative clause, and which seems to utilize interest balancing with abandon.").

2. The Search for a Standard

In the wake of *Heller*, lower courts struggled to settle on a single standard of review when analyzing the constitutionality of firearm regulations.[44] However, all courts ultimately concluded that the Second Amendment right to possess a firearm was subject to some form of means-end scrutiny.[45] In the early years after *Heller*, lower courts utilized intermediate scrutiny,[46] strict scrutiny,[47] a reasonableness standard,[48] an undue burden standard,[49] and a hybrid of strict and intermediate scrutiny.[50] Courts also expressed a hesitancy to extend gun rights beyond the right to possession within the home for the purpose of self-defense explicitly granted by *Heller*.[51]

The Third Circuit developed a two-step test in *Marzzarella* that was ultimately adopted by almost every circuit court.[52] The first prong of the

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[44] Kiehl, *supra* note 28, at 1141.

[45] *See id.* at 1141–42. There were a few District Courts that initially rejected any form of means-end scrutiny. *See* Peruta v. Cnty. of San Diego, 742 F.3d 1144, 1176 (9th Cir. 2014) (characterizing the embrace of means-end scrutiny in post-*Heller* jurisprudence as "near-identical to the freestanding 'interest-balancing inquiry' that Justice Breyer proposed—and that the majority explicitly rejected—in *Heller*").

[46] *See* Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC'Y 4 (Oct. 2010), https://www.acslaw.org/wp-content/uploads/2018/04/Mehr_and_Winkler_Standardless_Second_Amendment.pdf [https://perma.cc/B523-ZYRT] (citing United States v. Schultz, No. 1:08-CR-75-TS, 2009 WL 35225, at *5 (N.D. Ind. Jan. 5, 2009); United States v. Radencich, No. 3:08-CR-00048(01)RM, 2009 WL 127648, at *4–5 (N.D. Ind. Jan. 20, 2009); United States v. Tooley, 717 F. Supp. 2d 580, 592–93 (S.D. W. Va. 2010)).

[47] *See id.* at 3 (citing United States v. Booker, 570 F. Supp. 2d 161 (D. Me. 2008); United States v. Montalvo, No. 08-CR004S, 2009 WL 667229, at *3 (W.D.N.Y. Mar. 12, 2009)).

[48] *See id.* at 7 (citing Students for Concealed Carry on Campus, LLC v. Regents of the Univ. of Colo., 280 P.3d 18, 29 (Colo. App. 2010) ("the reasonable exercise test . . . not the rational basis test, is the appropriate test"); State v. Whitaker, 689 S.E.2d 395, 404–05 (N.C. Ct. App. 2009) (law "is a reasonable regulation which is fairly related to the preservation of public peace and safety") (internal quotations omitted); Wilson v. State, 207 P.3d 565 (Alaska Ct. App. 2009)).

[49] *See id.* at 6 (citing United States v. Hendrix, N No. 09-cr-56-bbc, 2010 WL 1372663 (W.D. Wis. 2010); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1454–55 (2009); Lacy v. State, 903 N.E.2d 486 (Ind. Ct. App. 2009)).

[50] Kiehl, *supra* note 28, at 1142–43.

[51] *Id.* at 1143.

[52] David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017); United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010); *e.g.,* NYSRPA, Inc. v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010); NRA v. BATFE, 700 F.3d 185, 194 (5th Cir. 2012); United States v. Greeno, 679 F.3d

test was "whether the challenged law impose[d] a burden on conduct falling within the scope of the Second Amendment's guarantee."[53] If the burdened conduct was not within the scope of the Second Amendment, the inquiry was complete.[54] If the conduct was within the scope, the court would move to the second step and "evaluate the law under some form of means-end scrutiny."[55]

However, after adopting the two-step test, the circuit courts which adopted the test further disagreed on which form of means-end scrutiny should be applied in the second step.[56] The most common view amongst the circuits was that a court should determine which level of scrutiny to use based on whether the regulated conduct was a core Second Amendment right and how severely the regulation burdened that right.[57] Generally, courts applied strict scrutiny to firearm regulations that burdened a core Second Amendment right, and courts applied intermediate scrutiny to regulations that did not burden a core right.[58] Taking what they believed to be *Heller*'s lead, the circuit courts decided that the "core" of the Second Amendment was the right to use a firearm in the home for self-defense.[59]

3. *Heller*'s "Presumptively Lawful" List

Another question that lower courts wrestled with post-*Heller* was how to treat challenged firearms regulations that *Heller* characterized as "long standing" and "presumptively lawful."[60] Courts primarily addressed this question in the large number of challenges to the federal felon-in-possession statute brought after the *Heller* decision.[61] Initially, courts

510, 518 (6th Cir. 2012); Ezell v. City of Chicago, 651 F.3d 684, 701–03 (7th Cir. 2011); United States v. Chovan, 735 F.3d 1127, 1136–37 (9th Cir. 2013); United States v. Reese, 627 F.3d 792, 800–01 (10th Cir. 2010); GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011).

[53] *Marzzarella*, 614 F.3d at 89.

[54] *Id.*

[55] *Id.*

[56] Kopel & Greenlee, *supra* note 52, at 275–76.

[57] *Id.* at 276 (quoting *Heller II*, 670 F.3d at 1257 (D.C. Cir. 2011)); *see also* United States v. Reese, 627 F.3d 792, 801 (10th Cir. 2010) ("The Second Amendment can trigger more than one particular standard of scrutiny, depending, at least in part, upon the type of law challenged and the type of [Second Amendment restriction] at issue.") (internal quotations omitted); Ezell v. City of Chicago, 651 F.3d 684, 708 (7th Cir. 2011).

[58] *See* Kopel & Greenlee, *supra* note 52, at 277–78.

[59] *Id.*

[60] Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 729 (2012).

[61] *Id.*

easily dismissed these claims by simply citing to *Heller*'s list of presumptively lawful regulations.[62] The list provided a safe haven from challenges for the firearms regulations included within. This began to change after Judge Timothy M. Tymkovich of the Tenth Circuit pushed back on the notion that *Heller*'s dictum should have been unquestioningly adopted as law.[63] Judge Tymkovich wondered if, "at least with regard to felon dispossession, whether the *Heller* dictum ha[d] swallowed the rule," because felon dispossession statutes could not withstand the historical review undertaken in *Heller.*[64] Although Judge Tymkovich ultimately concluded that the dictum bound lower courts, his misgivings led lower courts to give the matter much more attention.[65] Still, every federal court of appeals that faced a challenge to the felon-in-possession statute relied on the "presumptively lawful" language in holding that the felon-in-possession statute does not violate the Second Amendment on its face.[66]

Judge Easterbrook's opinion in *United States v. Skoien* proposed a new way to interpret *Heller*'s presumptively lawful list.[67] Judge Easterbrook agreed with Judge Tymkovich that felon dispossession laws were neither "longstanding" nor traditional.[68] This fact led Judge Easterbrook to conclude, not that the "presumptively lawful" list was invalid under *Heller*'s own rule, but that *Heller*'s rule did not require that

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[62] *See, e.g.*, United States v. Brye, 318 F. App'x 878, 880 (11th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009); United States v. Frazier, 314 F. App'x 801, 807 (6th Cir. 2008); United States v. Brunson, 292 F. App'x 259, 261 (4th Cir. 2008); United States v. Irish, 285 F. App'x 326, 327 (8th Cir. 2008); United States v. Gilbert, 286 F. App'x 383, 386 (9th Cir. 2008).

[63] United States v. McCane, 573 F.3d 1037, 1047–48 (10th Cir. 2009) (Tymkovich, J., concurring).

[64] *Id.* at 1049.

[65] Rostron, *supra* note 60, at 730 (citing United States v. Barton, 633 F.3d 168, 171–73 (3d Cir. 2011); United States v. Rozier, 598 F.3d 768, 771 n.6 (4th Cir. 2010), *cert. denied*, 130 S. Ct. 3399 (2010); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 294 (2010); United States v. Khami, 362 F. App'x 501, 508 (6th Cir. 2010), *cert. denied*, 130 S. Ct. 3345 (2010); People v. Davis, 947 N.E.2d 813, 817 (Ill. App. Ct. 2011), *appeal denied*, 955 N.E.2d 474 (Ill. 2011)).

[66] Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019) (citing United States v. Davis, 406 F. App'x 52, 53–54 (7th Cir. 2010); United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013) (per curiam); United States v. Moore, 666 F.3d 313, 318–19 (4th Cir. 2012); United States v. Barton, 633 F.3d 168, 172 (3d Cir. 2011); Schrader v. Holder, 704 F.3d 980, 989–91 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 989 (2013); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011); *Khami*, 362 F. App'x at 508; United States v. Battle, 347 F. App'x 478, 480 (11th Cir. 2009) (per curiam); *McCane*, 573 F.3d at 1047; United States v. Smith, 329 F. App'x 109, 110–11 (9th Cir. 2009); *Anderson*, 559 F.3d at 352).

[67] Rostron, *supra* note 60, at 745.

[68] United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) ("The first federal statute disqualifying felons from possessing firearms was not enacted until 1938.").

firearm restrictions mirror "limits that were on the books in 1791."[69] Other courts concluded that *Heller*'s presumptively lawful list was central to *Heller*'s holding and, therefore, not dicta.[70] Regardless of the approach taken by lower courts in interpreting *Heller*'s "presumptively lawful" list, courts continued to uniformly uphold restrictions contained within the list.[71]

B. Post-Heller Challenges to 18 U.S.C. § 922(g)(1)

18 U.S.C. § 922(g)(1), the federal felon-in-possession statute, prohibits "any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to transport or possess any firearm or ammunition.[72] As stated above, this statute withstood the numerous constitutional challenges brought against it post-*Heller*.[73] The vast majority of lower courts relied, at least partially, on the inclusion of felon-in-possession laws in *Heller*'s list of presumptively lawful regulations.[74] Other courts concluded that felons fall outside of the Second Amendment's protection entirely, defining *Heller*'s core right as the right of "law-abiding, responsible citizen[s] to possess and carry a weapon for self-defense."[75] Many courts held that felon-in-possession laws easily withstood means-end scrutiny.[76]

Post-*Heller*, a split arose amongst circuit courts concerning whether a defendant could ever succeed on an as-applied challenge to 18 U.S.C. § 922(g)(1).[77] Five circuits foreclosed the possibility of as-applied challenges entirely, regardless of whether the felon was violent or non-violent, and "regardless of their individual circumstances and the nature of their offenses."[78] Six other circuits left open the possibility of successful as-applied challenges.[79] Only the Third Circuit expressly held the federal felon-in-possession ban unconstitutional as applied to a

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[69] *Id.* at 641.

[70] *Rozier*, 598 F.3d at 771 n.6 ("[T]o the extent that this portion of Heller limits the Court's opinion to possession of firearms by law-abiding and qualified individuals, it is not dicta."); *Vongxay*, 594 F.3d at 1115.

[71] Kiehl, *supra* note 28, at 1142.

[72] 18 U.S.C § 922(g)(1) (2022).

[73] Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019).

[74] Sherwood, *supra* note 13, at 1440 (citing United States v. Khami, 362 F. App'x 501, 507–08 (6th Cir. 2010)).

[75] *Id.* (citing United States v. Vongxay, 594 F.3d 1111 (9th Cir. 2010)).

[76] *Id.* at 1440–41 (citing Schrader v. Holder, 704 F.3d 980 (D.C. Cir. 2013)).

[77] Alexander C. Barrett, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 183 (2013).

[78] *Kanter*, 919 F.3d at 442.

[79] *Id.* at 442–43.

particular defendant.[80] In *Binderup v. Attorney General U.S.*, the Third Circuit reasoned that § 922(g)(1) was unconstitutional as applied to two defendants, because the defendants made "a factual showing that [they fell] outside of the historically barred class."[81] The court in *Binderup* concluded that the historical justification for stripping felons of their Second Amendment rights was the felons' lack of virtue.[82] Violent felons were certainly considered "unvirtuous citizens," but the court concluded that the historically barred class included non-violent felons as well.[83] Only those who demonstrated that they had not committed a "serious criminal offense, violent or nonviolent[,]" could succeed on an as-applied challenge.[84]

Several commentators also suggested that § 922(g)(1), a broadly sweeping statute with an uncertain historical basis that targeted a fundamental right, may not be constitutional as applied to all felons post-*Heller.*[85] Particularly, commentators questioned whether there really was a "longstanding" tradition of disarming non-violent felons.[86] A notable proponent of this position was Justice Amy Coney Barrett, who made this argument as a former Seventh Circuit judge in her 2019 dissent in *Kanter v. Barr*.[87] The court in *Kanter* faced an as-applied challenge to § 922(g)(1).[88] After analyzing the historical evidence, then-Judge Barrett concluded that the evidence did not "support the proposition that felons lose their Second Amendment rights solely because of their status as felons."[89] *Kanter* is notable because Justice Barrett's dissent in *Kanter* may prove particularly instructive post-*Bruen.*

V. INSTANT DECISION

In *Bruen*, the majority began by detailing the two-part test that had been widely adopted by the U.S. Courts of Appeals.[90] The majority refused to adopt this two-step approach because, despite its popularity and

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[80] Binderup v. Att'y Gen., 836 F.3d 336, 353 (3d Cir. 2016).

[81] Holloway v. Att'y Gen., 948 F.3d 164 (3d Cir. 2020) (explaining *Binderup*'s holding)

[82] *Binderup*, 836 F.3d at 349.

[83] *Id.* at 348.

[84] *Id.*

[85] *See, e.g.*, Barrett, *supra* note 77, at 199; Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113 (2013); Sherwood, *supra* note 13, at 1433–34.

[86] C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 698–99 (2009).

[87] Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019).

[88] *Id.* at 438.

[89] *Id.* at 454 (Barrett, J., dissenting).

[90] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2117–18 (2022).

seemingly simplistic nature, it is "one step too many."[91] While the first step is consistent with *Heller*, the majority determined that *Heller* does not support applying any kind of means-end scrutiny in the Second Amendment context.[92] The majority walked through the Court's analysis in *Heller*, explaining that the Court "began with a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language."[93] The majority stated that *Heller*'s textual analysis was followed by an assessment of "whether [the Court's] initial conclusion was 'confirmed by the historical background of the Second Amendment.'"[94] Finally, the Court in *Heller* "canvassed the historical record[.]"[95] The *Bruen* majority emphasized that the analysis undertaken in *Heller* centered on constitutional text and history, did not utilize any kind of means-end scrutiny, and outright rejected "judge-empowering interest-balancing inquir[ies]."[96] The majority then concluded its textual analysis by enunciating the standard for applying the Second Amendment:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[97]

Next, the Court explained the method for conducting the historical analysis, acknowledging that the endeavor can be difficult and requires judges "[to make] nuanced judgements about which evidence to consult and how to interpret it."[98] The majority provided that a challenged firearms regulation would be held unconstitutional when: (1) it "addresses a general societal problem that has persisted since the 18th century," but there are no distinctly similar historical regulations addressing that problem;[99] (2) it addresses a societal problem that has persisted since the 18th century, and "earlier generations addressed the societal problem, but

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[91] *Id.* at 2125–27.

[92] *Id.* at 2118.

[93] *Id.* at 2127.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 2129.

[97] *Id.* at 2129–30.

[98] *Id.* at 2130 (quoting McDonald v. City of Chicago, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring)).

[99] *Id.* at 2131.

did so though materially different means;"[100] or (3) it addresses a societal problem that has persisted since the 18th century, and earlier generations attempted to enact analogous regulations, but those regulations were rejected on constitutional grounds.[101]

The majority explained that the primary way a challenged regulation can be viewed as consistent with the Nation's historical tradition of firearm regulation is by showing that there is an analogous historical regulation.[102] According to the majority, a historical regulation is "analogous" when it is relevantly similar,[103] and a historical regulation is "relevantly similar" if it burdens a citizen's right to armed self-defense for the same reasons and in the same way as the challenged regulation.[104]

After detailing its "text and history" framework, the Court then applied its novel standard to New York's proper-cause requirement, beginning with a textual analysis.[105] The majority quickly concluded that it was undisputed that Koch and Nash—two law-abiding, adult citizens—are among the people that the Second Amendment was designed to protect.[106] It also concluded that handguns are weapons used commonly for self-defense; thus, they are covered by the Second Amendment.[107] The majority then considered whether the conduct prohibited by the statute—public carry of a handgun for self-defense—is covered by the plain language of the Second Amendment.[108] The Court concluded that the Second Amendment covers this conduct, as there is no textual distinction drawn between home and public carry.[109] Additionally, the word "bear" implies public carry, according to the Court.[110]

Because the conduct was covered by the plain text of the Second Amendment, the majority determined that the respondents had the burden "to show that New York's proper-cause requirement [was] consistent with this Nation's historical tradition of firearm regulation."[111] To meet this burden, the Court noted that respondents provided historical sources from five eras: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4)

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[100] *Id.*
[101] *Id.*
[102] *Id.* at 2132.
[103] *Id.*
[104] *Id.* at 2132–33.
[105] *Id.* at 2134.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 2135.

Reconstruction; and (5) the late-19th and early-20th centuries."[112] The majority emphasized that all history is not created equal when interpreting the Constitution.[113] According to the Court, historical analogues from the time that the people adopted the Second Amendment are significantly more persuasive than analogues that long predate adoption or did not come into existence until long after adoption.[114] The majority also noted that the states did not adopt the Bill of Rights until the Fourteenth Amendment was ratified in 1868, rather than when the Bill of Rights was ratified in 1791.[115] Despite acknowledging that there was an ongoing debate as to which time period courts should primarily rely on when engaging in historical analysis,[116] the majority elected not to choose a side in the debate, since the understanding of the Second Amendment right to public carry was the same in both 1868 and 1791.[117]

Consequently, the Court addressed each historical era in turn. The Court first addressed the English sources provided by the respondents by acknowledging that the Second Amendment "codified a right inherited from our English ancestors."[118] However, the Court emphasized that British common law is only relevant to constitutional interpretation insofar as it was actually adopted by the Framers.[119] According to the Court, English law from the time that the Constitution was framed and adopted is relevant; but law from the Middle Ages is not.[120] In its analysis, the Court considered the age of the laws, whether or not they actually contemplated handguns, and how the laws were enforced by the time of the founding.[121] The Court determined that the history provided by respondents was "ambiguous at best" and there was "little reason to think that the Framers would have thought it applicable in the New World."[122]

Next, the Court considered the history of the Colonies and early Republic. The Court first noted that, even if the three statutes were analogous to New York's public carry restriction, three restrictions would not be sufficient to show a tradition of public-carry regulation.[123] Nevertheless, the Court determined that these statutes were not

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[112] *Id.* at 2135–36.

[113] *Id.* at 2136.

[114] *Id.* at 2136–37.

[115] *Id.* at 2137.

[116] *Id.* at 2138.

[117] *Id.*

[118] *Id.* at 2139 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 2139–40.

[122] *Id.* at 2119.

[123] *Id.* at 2142–43.

analogous.[124] The Massachusetts and New Hampshire statutes codified the common-law offense of bearing arms to terrify the people, which, according to the Court, is not the same as prohibiting the carrying of firearms generally.[125] The Court also determined that the third restriction provided by the respondents was not analogous, because it restricted only concealed carry, and the restrictions only applied to unusual or unlawful weapons.[126]

The Court then assessed the respondents' evidence from the 18th and 19th centuries, which included common law prohibitions and a Tennessee statute.[127] Again, the Court dismissed the common law prohibitions provided because these prohibitions only banned the carrying of firearms "to the terror of the people." [128] The Court dismissed several statutes from this era because they merely prohibited concealed carry and not public carry generally.[129] The Court acknowledged that the Tennessee law respondents provided was uniquely severe on its face; however, the Court noted that the Tennessee Supreme Court read the statute to allow for the public carry of larger, military-style pistols.[130] The Court concluded that state-court decisions demonstrate that states were not free to altogether prohibit the public carry of firearms.[131] The Court also addressed the surety statutes provided by respondents from this era. The Court distinguished these laws from New York's licensing regime because the New York regime presumed that "individuals have no public carry right without a showing of heightened need," while the surety statutes "presumed that individuals had a right to public carry."[132] Additionally, the Court determined that the burden of the surety statutes was not as significant as the burden caused by New York's law, and the surety statutes were rarely enforced.[133]

The Court also determined that respondents' evidence from the Reconstruction-era was insufficient, placing much emphasis on the Freedmen's Bureau Act and its reaffirmation of the right to keep and bear arms.[134] Again, the Court dismissed many state regulations on the basis that they were mere parallels of prohibitions of public carry "to the terror

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[124] *Id.*
[125] *Id.* at 2142–43.
[126] *Id.* at 2134.
[127] *Id.* at 2144.
[128] *Id.* at 2145.
[129] *Id.*
[130] *Id.* at 2147.
[131] *Id.* at 2146.
[132] *Id.* at 2148.
[133] *Id.* at 2148–49.
[134] *Id.* at 2150–51.

of the people."[135] The Court also dismissed the Texas statute and cases as outliers and stated that they "will not give disproportionate weight to a single statute and a pair of state-court decisions."[136]

Finally, the Court addressed the Territorial restrictions on public carry. Territorial restrictions were the laws of the Western Territories before their admission to the Union as a state.[137] The Court identified several reasons why these restrictions failed to justify New York's proper-cause requirement: (1) the "transitional and temporary nature of the American territorial system" allowed for legal improvisations; (2) the relatively miniscule populations of the Territories; (3) the lack of judicial scrutiny faced by territorial restrictions; and (4) the short-lived nature of the regulations.[138]

In a footnote, the Court stated that it would not address any of the 20th-century historical evidence provided by respondents because it contradicted earlier evidence and did not "provide insight into the meaning of the Second Amendment . . . ." [139]

After conducting a review of each historical era proffered by the respondents, the Court concluded that the respondents did not meet their burden to "identify an American tradition justifying [New York's] proper-cause requirement."[140] The Court thus concluded that New York's proper-cause requirement violated the Fourteenth Amendment and was unconstitutional.[141]

A. Justice Kavanaugh's Concurrence

Justice Kavanaugh joined the Court's opinion in its entirety but wrote separately to underscore two points.[142] First, Justice Kavanaugh emphasized that this decision does not prohibit states from instituting licensing regimes.[143] The majority's opinion, according to Justice Kavanaugh, should be read to prohibit only the "unusual discretionary licensing regimes, known as 'may-issue' regimes."[144] Second, Justice Kavanaugh restated a point made by Justice Scalia in *Heller*: the Second Amendment allows for a wide variety of firearms restrictions, including

[135] *Id.* at 2152 (quoting 1870 S.C. Act. P. 403, no. 288, § 4).
[136] *Id.* at 2153.
[137] *Id.* at 2154.
[138] *Id.* at 2153–55.
[139] *Id.* at 2154 n.28.
[140] *Id.* at 2156.
[141] *Id.*
[142] *Id.* at 2156 (Kavanaugh, J., concurring).
[143] *Id.*
[144] *Id.*

the possession of firearms by felons.[145] Justice Kavanaugh's concurrence suggested that the restrictions considered "presumptively lawful" under *Heller* remain "presumptively lawful" under *Bruen* as well.[146]

B. Dissent

The dissent, which included Justices Breyer, Sotomayor, and Kagan, observed that New York's public-carry statute had been in existence for well over 100 years, having been enacted in 1911.[147] The dissent noted that this law was older than "at least three of the four types of firearms regulations that *Heller* identified as 'presumptively lawful,'" including felon-in-possession laws.[148] Disagreeing with Justice Kavanaugh, the dissent stated that it found *Heller's* treatment of laws prohibiting possession of firearms by felons "hard to square" with the majority's treatment of New York's licensing regime.[149]

V. POST-*BRUEN* CHALLENGES TO 18 U.S.C. § 922(g)(1)

The Second Amendment challenges to 18 U.S.C. 922(g)(1) since *Bruen* have been relentless. Defense attorneys around the country recognized *Bruen* as an opportunity to secure freedom for their clients charged under § 922(g).[150] However, the prohibition on felons' possession of firearms has been widely upheld in the federal district courts. Over 100 district court cases have addressed the constitutionality of § 922(g)(1) under *Bruen*, and no court has concluded that the statute is unconstitutional under *Bruen*'s new test.[151] These challenges include both facial and as-applied challenges.[152]

The Department of Justice keeps a list of the challenges to federal firearms statutes under *Bruen*.[153] Section 922(g)(1) challenges are both

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[145] *Id.* at 2162 (citing District of Columbia v. Heller, 554 U.S. 570, 636 (2008)).

[146] *Id.* (quoting *Heller*, 554 U.S. at 627 n.26).

[147] *Id.* at 2169 (Breyer, J., dissenting).

[148] *Id.* at 2189 (quoting *Heller*, 554 U.S. at 627 n.26).

[149] *Id.*

[150] Zachary L. Newland & Catherine Turner, *What's Brewin' With* Bruen*: A New Landscape for Defense of Gun Crimes*, 47 CHAMPION 46, 48 (2023).

[151] As applied: *see, e.g.*, United States v. Coombes, 629 F. Supp. 3d 1149 (N.D. Okla. 2022); United States v. Baker, 2:20-CR-00301-DBB, 2022 WL 16855423 (D. Utah Nov. 10, 2022); United States v. Robinson, 4:22-CR-00070-BP, 2022 WL 18356667 (Mo. Ct. App. Dec. 1, 2022). Facial: *see, e.g.*, United States v. Rice, 3:22-CR-36 JD, 2023 WL 2560836 (N.D. Ind. Mar. 17, 2023); United States v. Grinage, SA-21-CR-00399-JKP, 2022 WL 17420390 (W.D. Tex. Dec. 5, 2022).

[152] *See supra* note 151 and accompanying cases.

[153] Michael A. Foster, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, CONG. RSCH. SERV. (Mar. 25, 2019),

the most abundant, and the most rejected.[154] Rejection of these challenges has become so commonplace that when federal prosecutors are faced with a challenge to the felon in possession statute, they use a string citation provided by the DOJ in their response.[155] When included as a footnote, this string citation takes up two full pages.

The sheer number of courts that have rejected the challenge to § 922(g)(1) suggests that the challenges under *Bruen*, including as-applied challenges, are meritless. The two-page-long footnote included in the responses of federal prosecutors has been especially compelling to courts.[156] This Part addresses the various arguments put forth by the many courts that have heard and rejected as-applied challenges to 18 U.S.C. § 922(g)(1), with a particular focus on as-applied challenges brought by non-violent felons.

A. Stare Decisis and Refusing to Address a Challenge

Before moving to the substantive arguments in favor of the constitutionality of 18 U.S.C § 922(g)(1), one of the most common legal arguments upholding § 922(g)(1) must be addressed. Some district courts follow circuit court precedent unless it is overruled under the doctrine of *stare decisis*.[157] District courts in the First, Second, Fifth, Eighth, Ninth, and Tenth Circuits have declined to hold that § 922(g)(1) is unconstitutional because *Bruen* did not alter binding circuit precedent.[158]

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https://crsreports.congress.gov/product/pdf/R/R45629 [https://perma.cc/T37H-AJYY].

[154] *Id.*

[155] The citation begins: "[o]ne court of appeals decision has considered and rejected a post-*Bruen* challenge to the constitutionality of Section 922(g)(1), although that disposition is presently under review by the en banc court. *See* Range v. Att'y Gen., 53 F.4th 262 (3d Cir. 2022), *reh'g en banc granted, opinion vacated*, 56 F.4th 96 (3d Cir. 2023). Over 100 district-court decisions have done the same." The citation continues by listing every case where the challenge to Section 922(g)(1) has been heard and rejected. United States v. Manns, No. 5:22-CR-00066, 2023 WL 3559737, at *3 (S.D. W. Va. Apr. 27, 2023).

[156] United States v. Carpenter, 1:21-CR-00086-DBB, 2022 WL 16855533, at *4 (D. Utah Nov. 10, 2022); United States v. Carrero, 635 F. Supp. 3d 1210, 1214 n.2 (D. Utah 2022); United States v. Teerlink, 2:22-CR-0024-TS, 2022 WL 17093425, at *1 (D. Utah Nov. 21, 2022); United States v. Robinson, 4:22-CR-00070-BP, 2022 WL 18356667, at *2 (Mo. Ct. App. Dec. 1, 2022).

[157] *See, e.g.*, United States v. Hill, 629 F. Supp. 3d 1027, 1030 (S.D. Cal. 2022) (quoting Miller v. Gammie, 335 F.3d 889, 890, 893 (9th Cir. 2003) (en banc)) ("This Court is bound by this Ninth Circuit precedent unless that precedent is 'effectively overruled,' which occurs when 'the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.'").

[158] *Carrero*, 635 F. Supp. 3d at 1214–15; United States v. Coombes, 629 F. Supp. 3d 1149, 1156 (N.D. Okla. 2022); United States v. Butts, 637 F. Supp. 3d 1134, 1138

Pre-*Bruen*, the U.S. Courts of Appeals upheld § 922(g)(1) as constitutional.[159] Because *Bruen* did not specifically address the constitutionality of § 922(g)(1),[160] nor did *Bruen* overrule *Heller*, some district courts conclude they have no authority to depart from their circuit's precedent upholding § 922(g)(1).[161] After these courts determined that *Bruen* did not overrule their circuit's precedent, they concluded that they are bound by this precedent and need not engage in further analysis.[162]

District courts taking this position are certainly correct in several of these conclusions. *Bruen* did not overrule *Heller*.[163] The majority stated that its decision was "in keeping with *Heller*[.]"[164] *Bruen* also did not specifically address the constitutionality of § 922(g)(1).[165] Additionally, these lower courts may be correct in their conclusion that, based on directives from their respective circuit courts, *Bruen*'s holding does not allow the district courts to hold contrary to circuit court precedent.[166] Regardless of the correctness of the district courts' interpretations of their respective *stare decisis* mandates, this conclusion does not bear on the constitutionality of 18 U.S.C. § 922(g)(1).

B. Substantive Arguments for Upholding 18 U.S.C. § 922(g)(1)

The Third Circuit is the only United States Court of Appeals that has addressed a Second Amendment challenge to § 922(g)(1) since *Bruen*.[167] In *Range v. Attorney General of the United States*, the Third Circuit upheld

(D. Mont. 2022); United States v. Trinidad, No. 21-398, 2022 WL 10067519, at *2 (D.P.R. Oct. 17, 2022); United States v. King, 634 F. Supp. 3d 76, 83 (S.D.N.Y. 2022); United States v. Siddoway, No. 1:21-CR-00205-BLW, 2022 WL 4482739, at *1 (D. Idaho Sept. 27, 2022); *Hill*, 629 F. Supp. 3d at 1030; United States v. Cockerham, No. 5:21-CR-6-DCB-FKB, 2022 WL 4229314, at *1 (S.D. Miss. Sept. 13, 2022); United States v. Good, 21-00180-01-CR-W-HFS, 2022 WL 18107183, at *3 (Mo. Ct. App. Nov. 18, 2022).

[159] *See supra* Section IV.B.

[160] *Good*, 2022 WL 18107183, at *5.

[161] *See Trinidad*, 2022 WL 10067519, at *3 ("Because *Bruen* has not affected *Torres-Rosario*—let alone unmistakably cast it into disrepute—we are bound by it. We need go no further.").

[162] *Siddoway*, 2022 WL 4482739, *2 ("Although Mr. Siddoway would like the Court to scrutinize the history of felon-in-possession statutes, such examination is unnecessary at this time. The Court is bound by *Vongxay* and the motion must be denied.").

[163] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2118 (2022).

[164] *Id.* at 2126.

[165] *Id.*

[166] This Comment will not address whether the district courts are correct in this conclusion.

[167] Range v. Att'y Gen., 53 F.4th 262 (3d Cir. 2022), *reh'g en banc granted, opinion vacated sub nom.* 56 F.4th 992 (3d Cir. 2023).

§ 922(g)(1) as constitutional.[168] This decision has since been vacated for rehearing en banc.[169] While the vacated opinion holds no legal power, it provides the reasoning of a panel that a circuit court found compelling in deciding to uphold § 922(g)(1) post-*Bruen*. The Third Circuit concluded that "the people" to which the Second Amendment refers as those who are constitutionally entitled to bear arms are the "'law-abiding, responsible citizens' of the polity."[170] All felons, violent or non-violent, have "demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses." This status, according to the Third Circuit panel, exudes them from their right to possess a firearm.[171]

In *Range*, the appellant previously pled guilty to the felony-equivalent charge of welfare fraud.[172] Range had made false statement about his income in a welfare application, and he received $2,458 in assistance as a result. This conviction was not a felony; rather, it was a "misdemeanor punishable by up to five years imprisonment."[173] Range never served any time for his welfare fraud conviction.[174] Range sought a declaratory judgment that § 922(g)(1) was unconstitutional as applied to him because of the non-violent nature of his conviction. The Third Circuit concluded that his welfare fraud conviction was sufficient to take Range fully outside of the text of the Second Amendment and cause him to lose his constitutional right to possess a firearm forever.[175] For good measure, the Third Circuit additionally concluded that § 922(g)(1), as applied to non-violent felons, is consistent with historical tradition, meaning it withstands *Bruen*'s historical analogue test.[176]

1. Felons are Outside of the Second Amendment's Text

The first argument accepted by courts in support of the constitutionality of § 922(g)(1) is that felons are not within the text of the Second Amendment. This argument finds support in the first part of *Bruen*'s test, which directs courts to determine whether the conduct is covered by the "plain text" of the Second Amendment.[177] If felons are not within the "plain text" of the Second Amendment, then the Second

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[168] *Range*, 53 F.4th at 285.

[169] *Range*, 56 F.4th at 106.

[170] *Range*, 53 F.4th at 266 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

[171] *Id.*

[172] *Id.*; 62 PA. CONS. STAT. § 481(a).

[173] *Range*, 53 F.4th at 266.

[174] *Id.*

[175] *Id.* at 285.

[176] *Id.*

[177] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2117 (2022).

Amendment does not presumptively protect the conduct prohibited by § 922(g)(1), and no historical inquiry is necessary.[178] The Third Circuit cited the language of *Bruen* in concluding that felons—and those with felony-equivalent convictions—are outside the scope of "the people" whom the Second Amendment protects.[179] In its analysis, the Third Circuit first pointed out that the *Bruen* "majority characterized the holders of Second Amendment rights as 'law-abiding' citizens no fewer than fourteen times."[180] Second, the *Bruen* majority stated that its decision allowed for "'shall-issue' licensing regimes, which often require applicants to undergo a criminal background check."[181] Finally, the Third Circuit cited *Heller*'s list of presumptively lawful regulations.[182] The Court relied on the *Bruen* majority's statement that the right to bear arms is "subject to certain reasonable, well-defined restrictions,"[183] along with Justice Kavanaugh's concurrence.[184] Considered together, this evidence persuaded the Third Circuit, not that felons can be constitutionally dispossessed of their rights under the Second Amendment, but that felons do not possess Second Amendment rights *at all* because these rights are not within the text of the Second Amendment.[185]

This argument has been accepted by some district courts and rejected by others. In *United States v. Coombs*, the Northern District of Oklahoma cited *Heller* to support its conclusion that the defendant, who was a felon, was within the text of the Second Amendment.[186] *Coombs* emphasized *Heller*'s position that courts must begin their Second Amendment analysis with "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[187] Other courts that reject this argument cite *Bruen*'s instruction to "look at 'the Second Amendment's plain text' to determine whether the Constitution presumptively protects that conduct."[188] The plain text of the Second Amendment does not include an express qualification excluding felons.[189] The district courts

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[178] *Id.* at 2129–30.

[179] *Range*, 53 F.4th at 271.

[180] *Id.* (citing *Bruen*, 142 S. Ct. at 2122, 2125, 2131, 2133–34, 2135 n.8, 2138 n.9, 2150, 2156; *accord* District of Columbia v. Heller, 554 U.S. 570, 625, 635 (2008)).

[181] *Id.* (citing *Bruen*, 142 S. Ct. at 2138 n.9).

[182] *Id.* (citing *Heller*, 554 U.S. at 626–27, 627 n.26)

[183] *Id.* (quoting *Bruen*, 142 S. Ct. at 2156; citing *Heller*, 554 U.S. at 581).

[184] *Id.* (quoting *Heller*, 554 U.S. at 626–27 & 627 n.26).

[185] *Id.* at 284.

[186] United States v. Coombes, 629 F. Supp. 3d 1149, 1155 (N.D. Okla. 2022); *Heller*, 554 U.S. at 580–81.

[187] *Heller*, 554 U.S. at 580–81.

[188] United States v. Price, 635 F. Supp. 3d 455, 464 (S.D. W. Va. 2022).

[189] *Id.* (quoting United States v. Jackson, 622 F. Supp. 3d 1063, 1067 (W.D. Okla. 2022)).

that hold that felons fall outside the scope of the Second Amendment rely on the same pieces of evidence cited in the vacated *Range* opinion and refer repeatedly to *Bruen*'s references to "law abiding citizens."[190]

i. Presumptively Lawful List Places Felons Outside of Text

The Third Circuit's reference to *Heller*'s list of presumptively lawful firearms regulations as an argument for why felons are not within the text of the Second Amendment is odd. *Heller*'s safe haven has done a lot of heavy lifting in district court decisions upholding 922(g)(1).[191] It is usually cited by district courts as a way to avoid conducting the full *Bruen* analysis, because the courts determine that *Heller* deemed § 922(g)(1) lawful.[192] In *Heller*, the dicta in question says that the decision "should [not] be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons. . . ."[193] The inclusion of the word "longstanding" implies the *Heller* Court assumed that these prohibitions were constitutional because they existed at the time that the Second and Fourteenth Amendments were ratified.[194] This argument in favor of the lawfulness of § 922(g)(1) fits squarely in the *Bruen* historical analogue test.[195] The "textual analysis" in *Heller* and *Bruen* purported to focus on the "'normal' and 'ordinary' meaning of the Second Amendment's language."[196] However, the plain language of the Second Amendment refers to "the people."[197] Nothing about the "normal and ordinary" meaning of this phrase suggests that felons are categorically excluded. Additionally, as noted by district courts, the phrase "the people" is used multiple times throughout the Constitution, including in the Fourth Amendment.[198] *Heller* concluded that "the people" has a consistent

[190] United States v. Young, 639 F. Supp. 3d 515, 524 (W.D. Pa. 2022); United States v. Ingram, 623 F. Supp. 3d 660, 664 (D.S.C. 2022).

[191] *See supra* section IV.

[192] "In fact, a majority of the Justices indicated *Bruen* does not invalidate *Heller's* statements regarding the lawfulness of statutes prohibiting felons from possessing firearms." United States v. Robinson, 22-00070-01-CR-W-BP, 2023 WL 214163, at *1 (Mo. Ct. App. Jan. 17, 2023) (citing N.Y. Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring)).

[193] District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

[194] *Id.* at 580.

[195] *See Bruen*, 142 S. Ct. at 2127.

[196] *Id.* (quoting *Heller*, 554 U.S. at 611).

[197] U.S. CONST. amend. II.

[198] *See, e.g.*, United States v. Charles, 633 F. Supp. 3d 874, 880 (W.D. Tex. 2022); "The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added).

meaning throughout the Constitution.[199] It would certainly be wrong to say that felons are categorically excluded from the text of the Fourth Amendment, though. Even if *Heller*'s list of presumptively lawful firearms regulations deems § 922(g)(1) constitutional, this conclusion cannot be founded on the basis that felons are outside the scope of the Second Amendment.

ii. "Law Abiding Citizens" Places Felons Outside of Text

The Third Circuit and other district court's focus on *Bruen*'s reference to "law-abiding citizens" in determining that felons are not within the text of the Second Amendment is also misguided. First, the petitioners in *Bruen* were both law-abiding.[200] It is clear that the *Bruen* majority viewed this fact as one that bolstered the petitioners' argument that the New York licensing regime was unconstitutional.[201] The Court took the "law-abiding" language directly from *Heller*, where it concluded that the Second Amendment "'surely elevate[d] above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense."[202] The right to possess firearms for "self-defense" is mentioned twice as often in *Bruen* as the fact that the petitioners were "law-abiding."[203] However, the *Heller* Court clearly did not hold that the possession of a firearm for a non-self-defense purpose was outside of the text of the Second Amendment.[204] Rather, *Heller* stated that the possession of a firearm for self-defense is the *central* basis for the right to possess a firearm.[205] Possession of a rifle for hunting, while not *central* to the Second Amendment, is still "one basis for the right to keep and bear arms."[206]

By analogy, *Bruen*'s repeated mention of the "law-abiding" status of petitioners should be taken as a reference to what *Heller* considered to be the "core protection" of the Second Amendment.[207] While *Bruen* clearly considered the "law-abiding" status of the petitioners to place them within the *core* of the Second Amendment's protections, it does not logically follow that a non-law-abiding citizen is taken entirely outside of the text

[199] *Heller*, 554 U.S. at 580.

[200] *Bruen*, 142 S. Ct. at 2117.

[201] *Id.* at 2138.

[202] *Id.* at 2118 (quoting *Heller*, 554 U.S. at 635).

[203] *Id.* at 2117.

[204] *Heller*, 554 U.S. at 635.

[205] *Id.* at 628.

[206] Heller v. District of Columbia, 670 F.3d 1244, 1259 n.* (D.C. Cir. 2011) (citing *Heller*, 554 U.S. at 599).

[207] *Heller*, 554 U.S. at 634.

of the Second Amendment without any need to conduct a historical inquiry.[208]

iii. Shall-Issue Regimes Place Felons Outside of the Text

Additionally, *Bruen*'s statement that "shall-issue" regimes requiring criminal background checks are not necessarily unconstitutional does not suggest that felons are not within the text of the Second Amendment. In fact, this determination fits much better within the historical inquiry prescribed by *Bruen*. Based on the *Bruen* Court's focus on the plain language of the Second Amendment when conducting the textual analysis, it is more likely that the Court's statement assumes that "shall-issue" regimes are justified because of historical analogues. It is not likely that the Court meant that conduct prohibited in "shall-issue" licensing regimes is outside of the plain text of the Second Amendment.[209]

iv. Are Felons Outside of the Text?

Prior to *Bruen*, the Third Circuit concluded that § 922(g)(1) was constitutional under *Heller* because felons are not within the text of the Second Amendment.[210] Justice Barrett addressed this approach in *Kanter*, while she sat as a judge on the Seventh Circuit.[211] Justice Barrett's arguments still hold weight under *Bruen*, as *Bruen* merely elaborated on *Heller*'s holding.[212] Justice Barrett contended that the notion that felons are outside of the scope of the Second Amendment is "at odds with *Heller*"

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[208] Instead, *Bruen* refers to the "law-abiding" status of the person and their possession of firearms for the purpose of "individual self-defense" as factors to consider when conducting the historical inquiry. *Bruen*, 142 S. Ct. at 2156. This runs in opposition to the notion of the 3rd Circuit and other district courts that the inquiry ends at the textual stage when the person is non-law-abiding. *Id.* at 2132–33 ("While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense. As we stated in *Heller* and repeated in *McDonald*, "individual self-defense is 'the central component' of the Second Amendment right."); *see* United States v. Price, 635 F. Supp. 3d 455, 464 (S.D. W. Va. 2022) ("While the Government argues that based on the Court's repeated reference to 'law-abiding citizens' in *Bruen*, 'the Second Amendment does not extend to possession of firearms by convicted felons,' I find that proposition relevant to the second prong of Second Amendment analysis.").

[209] *See Bruen*, 142 S. Ct. at 2123.

[210] Binderup v. Att'y Gen., 836 F.3d 336, 357 (3d Cir. 2016) (Hardiman, T., concurring).

[211] Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated by Bruen*, 142 S. Ct. 2111 (2022).

[212] *Bruen*, 142 S. Ct. at 2161.

because the Court "interpreted the word 'people' to refer to 'all Americans.'"[213] Additionally, Justice Barrett stated that this is not the ordinary way that rights are lost.[214] The actions and status of Americans can cause them to become *eligible* to lose a right, subject to state action.[215] Justice Barrett identified the correct question as being "whether the government has the power to disable the exercise of a right that [felons] otherwise possess, rather than whether they possess the right at all."[216] The question Justice Barrett posed in *Kanter* allowed her to move to the next inquiry: the historical scope of the Second Amendment and/or whether means-end scrutiny allowed Congress to balance away a felon's Second Amendment rights under the test developed post-*Heller*.[217] However, *Bruen* removed means-end scrutiny from the test.[218] Thus, post-*Bruen*, concluding that felons are within the text of the Second Amendment allows courts to move to the second inquiry: whether the "firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[219]

C. The Presumptively Lawful List

Another argument wielded in support of the constitutionality of § 922(g)(1) is the inclusion of felon dispossession laws in *Heller*'s list of presumptively lawful firearms regulations.[220] *Heller*'s list of presumptively lawful firearms regulations remains highly persuasive to courts post-*Bruen*. The language has been cited in nearly every post-*Bruen* challenge to § 922(g)(1), although courts use the list in different ways. Some courts engage in the historical analysis prescribed by *Bruen* and include the list as an additional reason why § 922(g)(1) is constitutional.[221] Many courts rely entirely on *Heller*'s dicta, citing it as justification for avoiding the *Bruen* historical analysis altogether.[222]

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[213] *Kanter*, 919 F.3d at 453 (Barrett, J., dissenting).

[214] *Id.* at 452.

[215] *Id.* at 453.

[216] *Id.*

[217] *Id.*; N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2127 (2022); *see also supra* Section IV.A.2.

[218] *Bruen*, 142 S. Ct. at 2128.

[219] *Id.*

[220] District of Columbia v. Heller, 554 U.S. 570 (2008).

[221] United States v. Coombes, 629 F. Supp. 3d 1149, 1160 (N.D. Okla. 2022) (citing the presumptively lawful list after engaging in a thorough historical analysis, and suggesting that "[m]oreover, the Supreme Court's dicta in *Heller* and *McDonald* arguably bind this district court.").

[222] United States v. Price, 635 F. Supp. 3d 455, 466 (S.D.W. Va. 2022) ("I do not find it necessary to engage in the historical analysis test articulated in *Bruen* as to 18 U.S.C. § 922(g)(1). Rather, I am convinced that the Supreme Court left generally

Unusually, *Range* cited the presumptively lawful list as evidence that felons fall outside of "the people" protected by the Second Amendment.[223] Many lower courts reason that because *Bruen* did not overrule *Heller*, *Heller* remains good law.[224] Courts frequently cite Justice Kavanaugh's concurrence that restates *Heller*'s presumptively lawful list of firearms.[225] Even though the *Bruen* majority did not reaffirm *Heller*'s dicta, one court stated that it was "hesitant to read too much into the Court's silence," because the Supreme Court had not abrogated its statements in *Heller* and *McDonald.*[226] In response to the argument that the language should be disregarded on the basis that it is dicta, courts have stated that they are essentially bound by Supreme Court dicta.[227]

Additionally, some courts cite Justice Thomas's repeated use of the phrase "law-abiding citizens" to affirm the majority's express reaffirmation of *Heller*'s statement that prohibitions on felons' possession of firearms was presumptively lawful.[228] Other courts see the phrase "law-

undisturbed the regulatory framework that keeps firearms out of the hands of dangerous felons through its decision in *Bruen* by reaffirming and adhering to its reasoning in *Heller* and *McDonald*."); United States v. Minter, 635 F. Supp. 3d 352, 358 (M.D. Pa. 2022) (concluding that no historical analysis is necessary "where the Supreme Court in *Bruen* has already signaled the answer to this question."); *see also* United States v. King, 634 F. Supp. 3d 76, 83 (S.D.N.Y. 2022); United States v. Charles, 633 F. Supp. 3d 874, 886 (W.D. Tex. 2022); United States v. Siddoway, No. 1:21-CR-00205-BLW, 2022 WL 4482739, at *2 (D. Idaho Sept. 27, 2022); United States v. Collette, 630 F. Supp. 3d 841, 845 (W.D. Tex. 2022); *Coombes*, 629 F. Supp. 3d at 1160; United States v. Hill, 629 F.Supp.3d 1027 (S.D. Cal. 2022); United States v. Cockerham, No. 5:21-CR-6-DCB-FKB, 2022 WL 4229314, at *1 (S.D. Miss. Sept. 13, 2022); United States v. Burrell, No. 21-20395, 2022 WL 4096865, at *2 (E.D. Mich. Sept. 7, 2022); United States v. Ingram, 623 F. Supp. 3d 660, 664 (D.S.C. 2022).

[223] Range v. Att'y Gen., 53 F.4th 262 (3d Cir. 2022), *reh'g en banc granted, opinion vacated sub nom*. 56 F.4th 992 (3d Cir. 2023).

[224] United States v. Robinson, 4:22-CR-00070-BP, 2022 WL 18356667, at *2 (Mo. Ct. App. Dec. 1, 2022) ("*Bruen* did not overrule the pertinent portions of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which addressed prohibitions on the possession of firearms by felons.").

[225] *See, e.g.*, *Price*, 635 F. Supp. at 459.

[226] *Coombes*, 629 F. Supp. 3d at 1161.

[227] United States v. Carpenter, 1:21-CR-00086-DBB, 2022 WL 16855533, at *2–3 (D. Utah Nov. 10, 2022); *Price*, 635 F. Supp. 3d at 465 ("Nevertheless, the Fourth Circuit has repeatedly instructed that '[w]e routinely afford substantial, if not controlling deference to dicta from the Supreme Court,' 'particularly when the supposed dicta is recent and not enfeebled by later statements.'").

[228] *Price*, 635 F. Supp. 3d at 465 ("Justice Thomas opens *Bruen* by expressly reaffirming the holdings of the Supreme Court's recent Second Amendment cases, which defined the right to bear arms as belonging to 'law-abiding, responsible citizens.'").

abiding" as evidence that *Bruen* at least did not intend to depart from *Heller* and *McDonald* or deliberately cast doubt on such prohibitions.[229]

1. Survival of the Presumptively Lawful List

Heller's list of presumptively lawful firearms regulations has not lost any power in the district courts since *Bruen*.[230] The list has continued to provide a haven for § 922(g)(1) and shield § 922(g)(1) from review. Two questions emerge from this fact: (1) what legal weight did this list have prior to *Bruen*, and (2) what legal weight does this list have now? *Bruen* did not purport to overrule *Heller*.[231] Instead, the Court identified the case as an elaboration on *Heller*'s holding.[232] Thus, if *Heller*'s haven was the law, then it remains the law; however, *Heller*'s haven is plainly dicta.[233] The courts that have cited the list have acknowledged as much,[234] and the fact that lower courts treat Supreme Court dicta with deference does not cement its status as the law.[235] One thing that *Bruen* demonstrated is that Judge Easterbrook's theory of how to square *Heller*'s list of presumptively lawful regulations with its holding is not correct.[236] *Bruen* made clear that firearms restrictions must resemble restrictions that were "on the books in 1791."[237]

The *Bruen* majority did not include *Heller*'s "safe haven" in its opinion.[238] This language originated in *Heller*, was restated in *McDonald,* and has been cited by hundreds of lower courts. Its absence is notable. District courts point to language in *Bruen* that they believe reaffirms *Heller*'s list, including Justice Thomas's statement that "the right to keep and bear arms in public has traditionally been subject to well-defined restrictions[.]"[239] However, this statement and others alike prove nothing other than the Court's belief that the rights conferred by the Second Amendment are not unlimited.[240] According to *Bruen*, the limits of the

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[229] United States v. King, 634 F. Supp. 3d 76, 83 (S.D.N.Y. 2022).

[230] *See Price*, 635 F. Supp. 3d at 460.

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

[232] *Id.*

[233] *See supra S*ection IV.A.3.

[234] *See supra* Section IV.A.3.

[235] *See supra* Section IV.A.3.

[236] *See supra* Section IV.A.3 ("This fact led Judge Easterbrook to conclude, not that the 'presumptively lawful' list was invalid under Heller's own rule, but that Heller's rule did not require that firearms restrictions mirror 'limits that were on the books in 1791.'").

[237] *Bruen*, 142 S. Ct. at 2139.

[238] *See id.*

[239] United States v. Minter, 635 F. Supp. 3d 352, 359 (M.D. Pa. 2022) (citing *Bruen*, 142 S. Ct. at 2138)).

[240] *Bruen*, 142 S. Ct. at 2128.

Second Amendment are determined through a text and history analysis.[241] For the lower courts to avoid conducting this analysis, they must show that *Bruen* exempted § 922(g)(1) from the text and history analysis altogether.

The two strongest arguments for this case are Justice Thomas's frequent use of the phrase "law-abiding" and his statement that *Bruen* is "in keeping" with *Heller*.[242] As discussed above, the phrase "law-abiding" does not *necessarily* convey that non-law-abiding citizens are categorically excluded from the protections of the Second Amendment.[243] It *is* possible that "law-abiding" suggests an assumption by the majority that laws prohibiting non-law-abiding citizens from possessing firearms would survive the *Bruen* historical analysis if the analysis was conducted.[244] The test set forth in *Bruen* is simple: a court must look to the plain text of the Second Amendment[245] and then look at history.[246] The Supreme Court in *Bruen* stated that "only then," after the regulation is shown to be "consistent with the Nation's historical tradition of firearm regulation . . . may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'"[247] *Bruen* does not provide a carveout for those regulations that the *Heller* Court deemed to be "presumptively lawful."[248] Therefore, the phrase "law-abiding" used in the context of describing the characteristics of the petitioners in *Bruen* does not exempt § 922(g)(1) from the *Bruen* historical analysis.

The second strongest argument for *Heller*'s haven is Justice Thomas's statement that *Bruen* is "in keeping" with *Heller*.[249] If the presumptively lawful list was the law before *Bruen,* it remains the law. As discussed above, lower courts post-*Heller* treated the list as conclusively deeming the included regulations to be lawful.[250] This practice, while accepted by most lower courts, was questioned post-*Heller*.[251] In his concurrence in *Binderup*, Judge Hardiman discussed what the presumptively lawful list means for felon dispossession, stating he doubted "the Supreme Court couched its first definitive characterization

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[241] *Id.* at 2129.

[242] *Id.* at 2125–26.

[243] *See supra* Section V.B.1.ii.

[244] *See supra* Section V.B.1.ii.

[245] For a discussion of why felons are within the text of the Second Amendment, *see* Section V.B.1.

[246] *Bruen*, 142 S. Ct. 2117–18.

[247] *Id.* at 2130 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50, 50 n.10 (1961).

[248] *See id.*

[249] *Id.* at 2126.

[250] *See supra* Section IV.A.3.

[251] Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 250 (2020); Kahn, *supra* note 85, at 126; *see supra* Section IV.A.3.

of the nature of the Second Amendment right so as to completely immunize this statute from any constitutional challenge whatsoever. Put simply, we take the Supreme Court at its word that felon dispossession is 'presumptively lawful.'"[252] *Heller* itself contains language suggesting that its identified presumptively lawful regulations are not immune from constitutional attack.[253] Later in the opinion, while responding to the criticisms of the dissenting Justices regarding the presumptively lawful list of regulatory measures, Justice Scalia promised that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."[254] This language from *Heller* does not support exempting § 922(g)(1) from *Bruen*'s historical analysis. In fact, it supports the opposite. As the *Heller* Court's use of the word "presumptively" suggests,[255] the majority *presumed* that the listed regulations, including felon dispossession, were historically justified. The *Heller* Court was prepared to provide those historical justifications "if and when" the cases came before the Court[256] Justice Scalia did not appear to believe that a citation to *Heller*'s presumptively lawful list of regulations would be sufficient to defeat a constitutional challenge.[257]

Yet, single citations by district courts routinely defeat § 922(g)(1) challenges post-*Heller*.[258] Since *Bruen* was decided, the question is whether *Bruen* supports the argument that *Heller*'s list is binding law that exempts § 922(g)(1) from *Bruen*'s historical inquiry, or whether *Bruen* supports the argument that the regulations in *Heller*'s list are merely *presumptively* lawful but still subject to constitutional scrutiny. *Bruen* did not provide any explicit exemptions to its test.[259] *Bruen* did not restate the list of presumptively lawful regulations.[260] Justice Kavanaugh restated the list in his concurrence, but Justice Thomas declined to include it in his majority opinion.[261] In short, *Bruen* cast even more doubt on the already questionable list of presumptively lawful regulations. It is understandable why district courts use the presumptively lawful list to avoid conducting an extensive historical inquiry given that the list does not require complex or lengthy legal analysis. Regardless, exempting § 922(g)(1) from *Bruen*'s historical analysis is not the correct approach. Post-*Bruen*, 18 U.S.C. §

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[252] *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 626–27 n.26 (2008)).
[253] Rostron, *supra* note 60, at 715.
[254] *Id.* (quoting *Heller*, 554 U.S. at 635).
[255] *Heller*, 554 U.S. at 627 n.26.
[256] *Id.* at 635.
[257] Rostron, *supra* note 60, at 715.
[258] United States v. Price, 635 F. Supp. 3d 455, 458 (S.D. W. Va. 2002).
[259] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).
[260] *Id.*
[261] *Id.* at 2162 (Kavanaugh, J., concurring).

922(g)(1) cannot be upheld with a single citation to *Heller*. Courts must conduct the *Bruen* historical inquiry.

D. Persuasive Historical Analogues

The final argument provided by lower courts in support of the constitutionality of § 922(g)(1) is that there are historical analogues proving § 922(g)(1) to be "consistent with this Nation's historical tradition of firearms regulation."[262] This Part will identify the historical analogues that district courts find most persuasive. *Range* provides most of the analogues because *Range* conducted the most extensive historical inquiry of any court to hear a challenge to § 922(g)(1) post-*Bruen*.[263] This Part will also consider the historical analogues in light of *Bruen*'s treatment of the historical sources presented in support of New York's licensing regime.

1. Historical Analogues Provided by *Range* and Other District Courts

Lower courts have provided several historical regulations they consider to be analogous to § 922(g)(1). This Part identifies the most commonly cited analogues and categorizes them in the same manner as the lower courts.

a. England's Restoration and Glorious Revolution

Range first addressed the late 17th century period in its reasoning.[264] The opinion cites the Stuart monarchs' disarmament of non-Anglican Protestants as a persuasive historical analogue.[265] The court claims that these "nonconformists" were disarmed because their religious status was viewed as a proxy for disobedience and disrespect for the law.[266] Even after Protestants' right to bear arms was restored under the English Bill of Rights,[267] Parliament maintained power and discretion over who was

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[262] *Id.*

[263] Range v. Att'y Gen., 53 F.4th 262, 269–71 (3d Cir. 2022).

[264] *Id.* at 274.

[265] *Id.* (citing JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 45 (1994)).

[266] *Id.* at 275 (citing Christopher Haigh, *'Theological Wars': 'Socinians' v. 'Antinomians' in Restoration England*, 67 J. ECCLESIASTICAL HIST. 325, 326, 334 (2016)).

[267] *Id.* at 274 (quoting 1 W. & M., Sess. 2, ch. 2, § 7 (Eng. 1689)) ("Parliament enacted the English Bill of Rights, which declared: "Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law . . . .").

allowed to possess arms.[268] The court rejected the argument that non-Anglican Protestants were disarmed because they were considered to be dangerous, because "the notion that every disarmed nonconformist was dangerous defies common sense."[269]

The second analogue cited in *Range* was the categorical disarmament of Catholics who refused to denounce their faith, enacted by Parliament in 1689.[270] The court again rejected the argument that this prohibition was based on a belief that Catholics were dangerous.[271] Instead, the court in *Range* argued that Catholics were disarmed for their perceived disrespect for and disobedience to English law.[272] The court concluded that these two laws demonstrate a historical tradition of disarming those who demonstrated, "not a proclivity for violence, but rather a disregard for the legally binding decrees of the sovereign."[273]

In *United States v. Barber*, the Eastern District of Texas cited several of the same sources as the court in *Range*.[274] *Barber* is distinct from *Range*, though, because the court in *Barber* reviewed historical analogues to determine whether disarmament of *violent* felons, rather than non-violent felons, is consistent with this Nation's history and tradition of firearms regulation.[275] The court in *Barber* came to the opposite conclusion of the *Range* court regarding whether concern for violence and dangerousness was the reason for the disarmament of Catholics and Protestants in 17th Century England.[276] The court in *Barber* noted that "disaffection and dangerousness were often associated with religious differences in this period,"[277] and concluded that disarmament of religious groups was premised on the fear that these groups would "revolt or otherwise engage in violence."[278]

b. Colonial America

From the Colonial period, the court in *Range* cited acts from Maryland, Virginia, and Pennsylvania disarming Catholics during the

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[268] *Id.* at 275 (citing Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 CHI.-KENT L. REV. 27, 47–48 (2000)).

[269] *Id.* at 274.

[270] *Id.* at 275 (citing "An Act for the Better Securing the Government by Disarming Papists and Reputed Papists", 1 W. & M., Sess. 1, ch. 15 (1688)).

[271] *Id.*

[272] *Id.*

[273] *Id.* at 276.

[274] United States v. Barber, 4:20-CR-384-SDJ, 2023 WL 1073667 (E.D. Tex. Jan. 27, 2023).

[275] *Id.* at *11.

[276] *Id.* at *9.

[277] *Id.*

[278] *Id.* (citing MALCOM, *supra* note 265, at 115).

Seven Years War.[279] The court claimed that Catholics were disarmed because Protestants viewed them as "defying sovereign authority and communal values."[280] In *Barber*, the district court also reviewed these acts and concluded that Catholics were disarmed because the colonists "were particularly fearful of the disloyal, who were potentially violent and dangerous."[281] These colonies disarmed Catholics to prevent upheaval and rebellion.[282] In *Coombes*, the Northern District of Oklahoma discussed how some American Colonies initially adopted the concept of attainder, which could result in forfeiture of property and loss of civil rights for "[t]ories and those not associated with either side."[283] The district court determined that attainder was sufficient as a historical analogue because it reflected regulations designed to protect the virtuous citizenry through the disarmament of the less virtuous.[284] In *Young*, the Western District of Pennsylvania cited a statute from colonial Massachusetts that required "named individuals who expressed 'opinion & revelations,' that 'seduced & led into dangerous errors many of the people' of New England to turn in all 'guns, pistol, swords, powder, shot & match.'"[285] According to the court, this practice continued "until and through the debates surrounding the passage of the Second Amendment . . . ."[286]

c. Revolutionary War

The court in *Range* also cited state statutes from the period surrounding the Revolutionary War that required individuals to make an oath of loyalty to the revolutionary regime as a condition of keeping their firearms.[287] In 1775, Connecticut passed a statute "prohibiting anyone who defamed resolutions of the Continental Congress from keeping arms,

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[279] Range v. Att'y Gen., 53 F.4th 262, 277 (3d Cir. 2022) (citing Greenlee, *supra* note 251, at 263).

[280] *Id.*

[281] Barber, 2023 WL 1073667, at *9 (quoting Folajtar v. Att'y Gen., 980 F.3d 879, 914 (3d Cir. 2020) (Bibas, J., dissenting)).

[282] *Id.* (citing Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 157 (2007)).

[283] United States v. Coombes, 629 F. Supp. 3d 1149, 1157 (N.D. Okla. 2022).

[284] *Id.* at 1158.

[285] United States v. Young, 639 F. Supp. 3d 515, 524 (W.D. Pa. 2022) (citing Eric M. Ruben and Darrell A. H. Miller, *Gun Law History in the United States and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 72 (2017) (quoting 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 211–12 (Nathanial B. Shurtleff ed., 1853)).

[286] *Id*. at 525 (citing United States v. Bena, 664 F.3d 1180 (8th Cir. 2011)).

[287] Range v. Att'y Gen., 53 F.4th 262, 278 (3d Cir. 2022) (citing G.A. Gilbert, *The Connecticut Loyalists*, 4 AM. HIST. REV. 273, 280 (1899)).

voting, or serving as a civil official . . . ."[288] In 1777, Pennsylvania enacted a statute requiring all White male inhabitants above the age of eighteen to swear to "be faithful and bear true allegiance to the commonwealth of Pennsylvania as a free and independent state," and subsequently disarming those who refused to take the oath.[289] The court suggested this statute was particularly instructive for two reasons: (1) Pennsylvania's Constitution protected the right to bear arms, and (2) the Pennsylvania statute disarmed people regardless of their propensity for violence.[290] Similarly, a Virginia statute from 1777 disarmed "all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service" who refused to swear their "allegiance and fidelity" to the state.[291]

The *Barber* court also discussed these state statutes that mandated the swearing of loyalty to the state as a condition of possessing firearms.[292] *Barber* concluded that loyalists were disarmed so they could not "join with the open and avowed enemies of America" to inflict "ruin and destruction ... against these Colonies."[293] Disarmament of those who refused to swear allegiance to the state was for the purpose of eliminating the possibility that they would violently protest the state.[294]

d. Ratification Debates

The court in *Range* additionally cited "The Dissent of the Minority," an essay published by Anti-Federalists during the ratification debates.[295] "The Dissent of the Minority" proposed the following amendment: "[T]he people have a right to bear arms for the defence of themselves and their own State or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals."[296] *Range* concluded this proposal makes clear that some of the members of

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[288] *Id.*

[289] *Id.* (citing 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1652–1801 110, 111 (William Stanley Ray ed., 1903)).

[290] *Id.* at 278–79.

[291] *Id.* at 279 (quoting 9 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 281, 281 (William W. Hening ed., 1821)).

[292] United States v. Barber, 4:20-CR-384-SDJ, 2023 WL 1073667, at *9 (E.D. Tex. Jan. 27, 2023).

[293] *Id.* (quoting 2 AMERICAN ARCHIVES 793 (Peter Force ed., 4th Ser., 1839)).

[294] *Id.*

[295] *Id.* at 279–80.

[296] *Id.* at 280.

the founding generation viewed criminality as an independent ground for exclusion from the Second Amendment.[297]

The court in *Barber* cited two additional amendment proposals from the ratification debates.[298] The first proposal was from New Hampshire, and it was the only citied proposal approved by the majority.[299] The amendment proposal provided: "Congress shall never disarm any Citizen, unless such as are or have been in actual Rebellion."[300] At the Massachusetts convention, Samuel Adams proposed another amendment proposal to the Constitution guaranteeing that "the said Constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms."[301] The court in *Barber* stated that "peaceable" was understood at the time to mean "non-violent."[302] *Barber* concluded that the three proposals, taken together, demonstrate a common concern for "threatened violence and risk of public injury."[303] However, the court in *Coombes* reviewed the same three proposals and concluded that they indicated that the Founders did not consider *any* felon to be within the Second Amendment's protection.[304]

e. Other Non-Violent Offenses

Finally, the court in *Range* found that punishments for non-violent offenses between the 17th and 19th centuries provided additional support for a historical tradition of disarming non-violent felons.[305] The court noted that offenses like larceny, repeated forgery, and false pretenses were punishable by death and forfeiture of the perpetrator's entire estate.[306] The court concluded these "draconian punishments" for non-violent offenses

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[297] *Id.*

[298] United States v. Barber, 4:20-CR-384-SDJ, 2023 WL 1073667, at *9 (E.D. Tex. Jan. 27, 2023).

[299] *Id.*

[300] *Id.* (quoting 1 JOHNATHON ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed.1891)).

[301] *Id.* at *10 (quoting 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675, 681 (1971)).

[302] *Id.* at *10 n.6 (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773)) ("Samuel Johnson's dictionary defined 'peaceable' as '1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent.'").

[303] *Id.* at *10 (quoting Kanter v. Barr, 919 F.3d 437, 456 (7th Cir. 2019) (Barrett, J., dissenting)).

[304] United States v. Coombes, 629 F. Supp. 3d 1149, 1159 (N.D. Okla. 2022) (quoting Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1984)).

[305] Range v. Att'y Gen., 53 F.4th 262 280 (3d Cir. 2022) *rev'd and remanded en banc*, 69 F.4th 96 (3d Cir. 2023).

[306] *Id.* (citing Folajtar v. Att'y Gen., 980 F.3d 897 904–05 (3d Cir. 2020)).

demonstrate that the relatively lenient consequence of disarmament is permissible.[307] *Coombes* cited similar laws, noting that felons in the New York province could not own property or chattels at all.[308] The *Range* court also cited several examples of statutes disarming perpetrators of non-violent, misdemeanor hunting offenses.[309]

2. *Bruen*'s Treatment of Hisotry and 922(g)(1)

Because *Bruen* rejected every historical regulation provided by Respondents, *Bruen* cannot provide an example of a historical regulation that is sufficiently analogous to satisfy its test. These rejected analogies will guide this assessment of the historical sources accepted by courts that have faced challenges to and upheld 18 U.S.C. § 922(g)(1). Particularly, this Part will address historical analogues provided to justify § 922(g)(1)'s application to non-violent felons. Founding-era regulations existed which disarmed at least those who were dangerous or posed a threat of violence.[310] The primary question is whether those regulations also targeted non-dangerous, non-violent individuals.

Bruen purported to provide "straightforward" ways to determine whether a regulation is consistent with the Nation's history of firearms regulations.[311] *Bruen* stated that the inquiry is straightforward: "When a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical

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[307] *Id.* at 281.

[308] *Coombes*, 629 F. Supp. 3d at 1158.

[309] *Range*, 53 F.4th at 262 (quoting 1652 N.Y. Laws 138) ("In 1652, New Netherlands passed an ordinance that forbid 'firing within the jurisdiction of this city [of New Amsterdam] or about the Fort, with any guns at Partridges or other Game that may by chance fly within the city, on pain of forfeiting the Gun . . . .'"); *Id.* (quoting Act of Apr. 20, ch. III (1745), 23 ACTS OF THE NORTH CAROLINA GENERAL ASSEMBLY 218, 219 (1805)) ("A 1745 North Carolina law prohibited nonresidents from hunting deer in 'the King's Wast' and stated that any violator 'shall forfeit his gun' to the authorities."); *Id.* (quoting 1771 N.J. LAWS 19–20) ("New Jersey enacted a statute 'for the preservation of deer, and other game' in 1771 that punished non-residents caught trespassing with a firearm by seizing the individuals' guns."); *Id.* (citing AN ACT FOR THE PROTECTION AND SECURITY OF THE SHEEP AND OTHER STOCK ON TARPAULIN COVE ISLAND, OTHERWISE CALLED NAUSHON ISLAND, AND ON NENNEMESSETT ISLAND, AND SEVERAL SMALL ISLANDS CONTIGUOUS, SITUATED IN THE COUNTY OF DUKES COUNTY § 2 (1790)); *Id.* (quoting 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 258, 259 (Manning & Loring ed., 1805)) ("To protect the sheep of Naushon Island, Massachusetts passed a statute requiring armed trespassers on the island to forfeit their guns); *Id.* (quoting 12 DEL. LAWS 365 (1863)) ("And Delaware law required non-residents who hunted wild geese on the state's waterways to forfeit their guns, even though the statute specified that this hunting offense was a misdemeanor.").

[310] *See* Greenlee, *supra* note 251, at 285.

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

regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[312] Additionally, if earlier generations faced the same issues addressed by the modern regulation, but addressed the issues in a materially different way, it would be evidence of unconstitutionality.[313]

18 U.S.C § 922(g)(1) addresses the societal problem of felons possessing firearms.[314] The government's interest in passing § 922(g)(1) was to prevent "gun violence by keeping firearms away from persons, such as those convicted of serious crimes, who might be expected to misuse them."[315] Gun violence is a societal problem that has undoubtedly persisted since the 18th century;[316] however, regulations preventing all felons, violent or non-violent, from possessing firearms did not emerge until the 1960s.[317] Courts addressing the constitutionality of § 922(g)(1) do not dispute this.[318] Rather, they provide three different kinds of laws as potential analogies: (1) regulations that permitted certain disfavored groups of people to be disarmed; (2) punishments aimed at felons that are more severe than disarmament;[319] and (3) regulations disarming certain types of criminals. Notably, none of these categories of laws are perfectly on point.

Regulations that prevented disfavored groups of people from possessing firearms are dissimilar from § 922(g)(1) because the disenfranchised groups were not necessarily felons as defined by § 922(g)(1).[320] The more severe punishments are equally dissimilar because the punishments were not firearm dispossession, and the crimes that were punished were not necessarily the crimes that are covered by § 922(g)(1). Finally, regulations that disarm those who committed *certain types* of crimes are not necessarily analogous for § 922(g)(1), which disarms those who commit *nearly any* crime.[321] *Bruen* notes that the historical regulation need not be a "historical twin."[322] The government must only identify a "well-established and representative historical analogue."[323] Even though

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[312] *Id.* at 2131.

[313] *Id.*

[314] Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019), *abrogated by Bruen*, 142 S. Ct. 2111.

[315] *Id.* at 448.

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

[317] *See supra* Section II.

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

[319] Range v. Att'y Gen., 53 F.4th 262, 266 (3d Cir. 2022) *rev'd en banc*, 69 F.4th 96 (3d Cir. 2023); United States v. Barber, 4:20-CR-384-SDJ, 2023 WL 1073667, at *11 (E.D. Tex. Jan. 27, 2023).

[320] *See Range*, 53 F.4th at 278–81.

[321] 18 U.S.C. § 922(g)(1) (2022).

[322] *Bruen*, 142 S. Ct. at 2133.

[323] *Id.*

the regulations accepted by courts are not perfectly on-point, they may be sufficiently analogous under *Bruen.* Consequently, the relevant metrics for determining whether a historical regulation is analogous are *how* and *why* the regulation burdens a citizen's Second Amendment rights.[324]

a. Regulations Disarming Disfavored Groups

Regulations that disarmed disfavored groups of people, including Protestants, Catholics, and loyalists may be analogous to § 922(g)(1) in *how* they burdened the Second Amendment rights of individuals. Section 922(g)(1) and historical regulations burden Second Amendment rights through total disarmament. However, the historical regulations disarming disfavored groups of people may not be analogous to § 922(g)(1) in *why* they disarmed individuals. Courts disagree as to whether these historical regulations disarmed groups because they were perceived to be dangerous, or because they were perceived to disrespect the law.[325] This distinction is fundamental to the inquiry.

Assuming that dangerous felons can be disarmed under the Second Amendment, one of the following must be true for § 922(g)(1) to be constitutional as applied to all non-dangerous felons: (1) the Second Amendment permits the disarmament of anyone who disobeys the law regardless of dangerousness, or (2) all felons covered by § 922(g)(1) are dangerous. When addressing an as-applied challenge to § 922(g)(1), courts argue either that the defendant in the case *is* dangerous,[326] or that felons can be disarmed regardless of dangerousness.[327] No court has argued that all felons under § 922(g)(1) are per se dangerous. Courts that address as-applied challenges made by concededly non-violent felons must show that there is a historical tradition of disarming non-violent, non-dangerous felons.[328] Thus, to uphold § 922(g)(1) as applied to a non-violent felon, courts must find that the alleged historical analogues were not targeted at only violent or dangerous individuals.[329] The court must find that disobedience of the law is enough to justify disarmament under the Second Amendment.

Courts and scholars alike disagree as to the intended purpose of these regulations.[330] Specifically, the purpose of the regulations disarming

[324] *Id.*

[325] *Range*, 53 F.4th at 266.

[326] *Id.*

[327] *Id.*

[328] *Id.*

[329] *Id.* at 271–72.

[330] Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339 (2009).

Catholics and Protestants in 17th century England is disputed.[331] Some courts suggest that Catholics and Protestants were disarmed in 17th century England because of their "perceived disrespect for and disobedience to English law."[332] Other courts contend that Catholics and Protestants were disarmed because dangerousness was associated with religious differences at the time.[333] Both arguments are supported by the interpretations of scholars.[334] Whether these regulations are sufficiently analogous under *Bruen* will depend on the court's interpretation of the history, and which scholarship they find most compelling. Justice Barrett, in her *Kanter* dissent, adopted the perspective that Parliament disarmed Catholics because they posed a threat of violence—not simply because they disrespected the law.[335] Justice Barrett quoted a scholar that concluded "the stated principle supporting the disability was cause to fear that a person, although technically an English subject, was because of his beliefs effectively a resident enemy alien liable to violence against the king."[336]

Courts and scholars also disagree on the purpose of disarming Catholics during the Colonial Period.[337] It should be noted that courts point to three colonies that enacted such regulations.[338] The Court in *Bruen* stated that it "doubt[s] that [just] three colonial regulations could suffice to show a tradition of . . . regulation."[339] Still, the Court in *Bruen* went on to address the merits of the allegedly analogous regulations.[340] Justice Barrett's dissent in *Kanter* contends with the disarmament of Catholics and discusses its merits as an analogue for disarming non-violent felons.[341] Justice Barrett determined that colonial regulations disarming Catholics were created to avoid "social upheavals" and "rebellion."[342] Justice Barrett found that these regulations did not provide support for disarming all non-violent felons under § 922(g)(1).[343]

Finally, courts disagree on the purposes of Revolutionary War regulations that disarmed those who refused to swear an oath of allegiance

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[331] *See supra* Section V.D.1.a.

[332] *Range*, 53 F.4th at 275.

[333] United States v. Barber, 4:20-CR-384-SDJ, 2023 WL 1073667, at *9 (E.D. Tex. Jan. 27, 2023).

[334] Schwoerer, *supra* note 268, at 47; Marshall, *supra* note 86, at 722–23.

[335] Kanter v. Barr, 919 F.3d 437, 456–57 (7th Cir. 2019).

[336] *Id.* (quoting Marshall, *supra* note 86, at 712).

[337] *Range*, 53 F.4th at 277; *Barber*, 2023 WL 1073667, at *9.

[338] *Range*, 53 F.4th at 275–76 (discussing regulations by colonial Virginia, Maryland, and Pennsylvania).

[339] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2142 (2022).

[340] *Id.*

[341] *Kanter*, 919 F.3d at 452–53 (Barrett, J., dissenting).

[342] *Id.*

[343] *Id.* at 466.

to the colonies.[344] In *Kanter,* Justice Barrett concluded that "confiscation of guns from those who refused to swear an oath was meant to 'deal with the potential threat coming from armed citizens who remained loyal to' another sovereign."[345] Additionally, these regulations are distinct from § 922(g)(1) in an important way: those disarmed under the Revolutionary War regulations could regain their right to possess a firearm by swearing an oath; those disarmed under § 922(g)(1) cannot take any individual action to regain their Second Amendment rights once they become a felon under the statute.[346] This alone may be enough to cause the Revolutionary War regulations to be insufficiently analogous to § 922(g)(1) under *Bruen,* because they differ in how significantly they burden Second Amendment rights.[347]

b. Severe Punishments for Felons

The historical practices of subjecting felons to the death penalty, forfeiture, or attainder may not be analogous to § 922(g)(1) in how or why they burdened Second Amendment rights. At common law, one forfeited all personal property upon conviction for any "of the higher kinds of offense."[348] However, forfeiture did not prevent a convict from obtaining personal property later—which included obtaining firearms.[349] Only a judgement of death, causing one to be "attained," prevented certain criminals at common law from obtaining new property.[350] While the common law practice of stripping felons of their property and other rights may provide "every reason to believe that the Founding Fathers would have deemed persons convicted of any of the *common law felonies*" to be excluded from the right to bear arms, not every felony under § 922(g)(1) was a felony at common law.[351] "At early common law, the term 'felony'

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[344] Range v. Att'y Gen., 53 F.4th 262, 279 (3d Cir. 2022); United States v. Barber, 4:20-CR-384-SDJ, 2023 WL 1073667, at *11 (E.D. Tex. Jan. 27, 2023).

[345] *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting) (quoting Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 506 (2004)).

[346] 18 U.S.C. § 921(a)(20) (2022) (defining which crimes fall under 922(g)(1), and identifying the only action that can be taken to remove qualifying crimes from the purview of the statute as those which have been pardoned).

[347] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2149 (2022) (stating that a regulation with a relatively insignificant burden will not "shed light" on the constitutionality of a regulation with a significant burden on Second Amendment rights).

[348] Marshall, *supra* note 86, at 714.

[349] *Id.* at 715–16.

[350] *Id.* at 715.

[351] Kates & Cramer, *supra* note 330, at 1360 (emphasis added).

applied only to a few offenses such as murder, rape, arson, and robbery."[352] To conclude that capital punishment and forfeiture signal the Founders' approval of disarming all non-violent offenders, a court would have to at least find that similar felonies were punished by death and forfeiture. Courts have found that certain non-violent crimes including larceny, repeated forgery, and false pretenses were punished by death and forfeiture at the time of the founding.[353] Still, modern law criminalizes "vast categories of non-dangerous activities" that were not criminalized at the time of the founding.[354] Early American practices cannot illuminate how modern felons, whose conduct was not criminalized at the time of the founding, would have fared historically.[355]

Other scholars suggest that the common law doctrines of forfeiture and attainder did not carry over to the United States in their strict English form, so these practices "do not bear on the ability of a convict, if alive and released, to possess a firearm."[356] In her dissent in *Kanter*, Justice Barrett emphasized that at the time of the founding, the connection between felonies and capital punishment had "started to fray."[357] In the colonies, capital punishment was used sparingly, and property crimes including variations on theft, burglary, and robbery were typically not capital offenses.[358] At the time of the founding, forfeiture and attainder were not at all common.[359] Justice Barrett concluded that "the argument that the severity of punishment at the founding implicitly sanctions the blanket stripping of rights from all felons, including those serving a term of years, is misguided."[360]

Regardless, it is not clear that these common law practices are analogous regulations under *Bruen* because the death penalty, forfeiture, and attainder are not analogous to § 922(g)(1) in *why* they deprive non-violent felons of Second Amendment rights. While common law punishments targeted felons, both violent or non-violent, the punishments did not specifically target firearms. Disarmament of certain felons was incidental to attainder or death. It seems unlikely that the reason for these practices was to prevent a felon from possessing a firearm. Additionally, *how* these practices deprived felons of their right to possess firearms is not

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[352] *Id.* at 1362.

[353] Range v. Att'y Gen., 53 F.4th 262, 266 (3d Cir. 2022) *rev'd and remanded en banc*, 68 F.4th 96 (3d Cir. 2023).

[354] Barrett, *supra* note 77, at 195.

[355] *Id.*

[356] Marshall, *supra* note 86, at 716.

[357] Kanter v. Barr, 919 F.3d 437, 459 (7th Cir. 2019) (Barrett, J., dissenting).

[358] *Id.* (quoting LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 42 (1993)).

[359] *Id.* (quoting *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1797 (2012)).

[360] *Id.* at 461.

analogous to § 922(g)(1). Section 922(g)(1) disarms felons who serve a term of years but otherwise have their individual rights restored.[361] The common law punishments disarmed felons by killing them or depriving them of all property. Justice Barrett noted in *Kanter* that even if felons were punished severely at the time of the founding, it should not necessarily inform our view of the Second Amendment's scope.[362]

c. Regulations Disenfranchising Certain Types of Criminals

The court in *Range* cited several colonial regulations that punished non-violent hunting violations with disarmament.[363] These colonial regulations could possibly serve as analogies in an as-applied challenge by a felon who violated a hunting law; however, it is less likely that these regulations would be sufficient analogies for the many other kinds of non-violent felonies covered by § 922(g)(1). The *Range* court claimed that because colonial hunting laws disarmed certain non-violent offenders, these laws support the notion that the government is constitutionally able to disarm *all* non-violent offenders.[364] Whether this conclusion is valid under *Bruen* depends on how broadly a court should apply a historical analogue. While *Bruen* makes clear that a "historical twin" is not necessary, *Bruen* also refuses to apply analogies "too broadly."[365] For example, the Court in *Bruen* declined to assume that a statute prohibiting the carry of certain types of firearms meant that the government could constitutionally prohibit the carry of *all* types of firearms.[366] Additionally, for this to be a persuasive historical analogue under *Bruen*, it must be shown that these laws were actually enforced.[367]

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[361] *Id.* (noting that while felons do not have certain civic rights restored, like the right to vote or sit on a jury, the right to possess a firearm is distinct because it is an individual right, rather than a civic right).

[362] *Id.* at 461–62 ("[F]or example, we wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding."); *Id.* ("The obvious point that the dead enjoy no rights does not tell us what the founding-era generation would have understood about the rights of felons who lived, discharged their sentences, and returned to society.").

[363] Range v. Att'y Gen., 53 F.4th 262, 281 (3d Cir. 2022), *rev'd and remanded en banc*, 68 F.4th 96 (3d Cir. 2023).

[364] *Id.* at 270.

[365] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133, 2134 (2022).

[366] *Id.* at 2144 ("although the 'planter' restriction may have prohibited the public carry of pistols, it did not prohibit planters from carrying long guns for self-defense—including the popular musket and carbine.").

[367] *Id.* at 2149 (finding that an analogue was not persuasive when little evidence was provided that the law was ever enforced).

d. Ratification Debates

Courts also provide configurations of the Second Amendment proposed during the ratification debates. *Bruen* does not address any evidence from the ratification debates, including proposed versions of the Second Amendment.[368] *Bruen* focused the entirety of its discussion on analogous historical statutes that the legislature enacted and enforced.[369] It is unlikely that rejected Second Amendment proposals would carry much weight under *Bruen*. However, *Bruen*'s inquiry is concerned with determining the scope of the Second Amendment at the time of the Founding.[370] Thus, these proposals may be relevant insofar as they illuminate the historical understanding of the Second Amendment.[371]

Justice Barrett provided her interpretation of the Second Amendment proposals in her dissent in *Kanter*.[372] The New Hampshire proposal would have only disarmed those citizens who "are or have been in actual rebellion."[373] Justice Barrett explained that this disarmament would have targeted a narrow group, because rebellion was a very specific crime.[374] Therefore, the New Hampshire proposal is not analogous to § 922(g)(1), because it does not speak to "disarming those who have committed other crimes, much less non-violent ones."[375] The Massachusetts proposal, Justice Barrett explained, would have limited the right to "peaceable citizens."[376] She concluded that "peaceable citizen" referred to those who did not present a "threat of violence."[377] According to Justice Barrett, not every crime is violent, and non-peaceable was not a synonym for felon.[378] Lastly, Justice Barrett discussed the Pennsylvania proposal, which would have guaranteed a right to arms "unless for crimes committed, or real danger of public injury from individuals."[379] While this is the broadest proposal, Justice Barrett determined that the proposal should not be read to support the disarmament of all felons, but only those that created a real danger of public injury.[380] Justice Barrett suggested that "no one even today reads this provision to support the disarmament of literally all

[368] *See generally id.*

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

[373] *Id.* at 454.

[374] *Id.* at 455 (citing *Rebellion*, 2 NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (4th ed. 1756)).

[375] *Id.*

[376] *Id.*

[377] *Id.* at 456.

[378] *Id.*

[379] *Id.*

[380] *Id.*

criminals, even nonviolent misdemeanants."[381] Justice Barrett concluded that, taken together, these proposals demonstrate concern "not about felons in particular or even criminals in general; it is about threatened violence and the risk of public injury."[382] Thus, under this interpretation, the Second Amendment proposals would not support the constitutionality of § 922(g)(1)'s disarmament of all non-violent felons.

3. Sufficient Historical Analogue Under *Bruen*?

The historical record is not straightforward when it comes to the disarmament of non-violent felons. There are interpretations of every proposed historical analogue that may allow a court to uphold § 922(g)(1) as applied to non-violent felons. However, there are also valid interpretations of these analogues, many adopted by Justice Barrett in her *Kanter* dissent, that do not support the constitutionality of § 922(g)(1) as applied to non-violent felons.[383] The uniformity with which the courts have upheld § 922(g)(1) may cause some to believe that there is no debate as to the presence of sufficiently analogous historical analogues for § 922(g)(1). However, this is not an accurate contention. A court applying a narrower version of the *Bruen* historical analysis could conclude, in good faith, that § 922(g)(1) is not consistent with the Nation's tradition of firearms regulation.

VI. CONCLUSION

The number of courts that have upheld 18 U.S.C. § 922(g)(1) as applied to non-violent felons does not conclusively prove that § 922(g)(1) is consistent with the Nation's tradition of firearms regulation. Section 922(g)(1) was roundly upheld by courts post-*Heller* using means-end balancing and *Heller*'s presumptively lawful list, but the law has been clarified under *Bruen*, and the analysis of courts has changed. Although courts have abstained from using a forbidden means-end balancing test to uphold § 922(g)(1) post-*Bruen*, they have continued to rely heavily on *Heller*'s presumptively lawful list. This practice is unjustifiable post-*Bruen*. *Bruen* clearly enunciated the test for determining the constitutionality of firearms regulations. A citation to *Heller*'s presumptively lawful list is not sufficient to satisfy *Bruen*'s test. Courts must provide sufficient historical analogues to defeat as-applied challenges to 18 U.S.C § 922(g)(1). While the historical record is not entirely clear, history leaves room for successful as-applied challenges to § 922(g)(1). The only question is whether any court is willing to be the

[381] *Id.*
[382] *Id.*
[383] *Id.*

first to hold that § 922(g)(1) is unconstitutional as applied to non-violent felons.