Comments:

Going Off Half-Cocked: Opposing As-Applied Challenges to the "Felon-in-Possession" Prohibition of 18 U.S.C. § 922(g)(1)

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ABSTRACT

The scope of government restrictions on the sale, possession, and use of firearms is currently one of the most hotly contested political issues facing the United States. Opponents of gun control legislation argue that stringent government restrictions on firearms violate the Second Amendment's guarantee that "the right of the people to keep and bear Arms, shall not be infringed." In contrast, proponents of gun control legislation argue that vigorous restrictions on firearms are essential to maintain public safety and curtail gun violence.

Despite being at the forefront of political debate, the Supreme Court speaks infrequently on the scope of the Second Amendment, having only published three Second Amendment opinions. Because of the Court's silence on the scope of the Second Amendment, the circuit courts of appeals have struggled with Second Amendment issues.

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One such Second Amendment issue that has confounded the circuit courts of appeals is the validity of as-applied challenges to 18 U.S.C. § 922(g)(1), the federal law that makes it unlawful for persons convicted of a felony to possess, purchase, or sell a firearm. Every circuit court has upheld 18 U.S.C. § 922(g)(1) on its face. A circuit split, however, continues to persist on the issue of whether a convicted felon can challenge the law as unconstitutional when applied to the individual's specific circumstances.

This circuit split has led to inconsistent application of § 922(g)(1). Because the circuit split surrounding § 922(g)(1) leads to inconsistent application of the felon-in-possession prohibition, as-applied challenges should not be entertained. Not only is this consistent with the Supreme Court's Second Amendment jurisprudence, but as-applied challenges should also always fail the two-step analytical framework used by most circuits. Furthermore, by not entertaining as-applied challenges, 18 U.S.C. § 922(g)(1) will be applied consistently and fairly across the United States.

Table of Contents

I. INTRODUCTION

Friday, December 14, 2012, was a day that shocked the United States to its core.[1] In the morning hours of what seemed to be the conclusion to an ordinary work week, Adam Lanza entered the doors of Sandy Hook Elementary School and opened fire on young schoolchildren, teachers, and other school staff members.[2] In a matter of ten blood-chilling minutes, Lanza shot and killed 20 first graders and six members of the school's staff before taking his own life.[3] Lanza entered the school armed with a semiautomatic rifle and two handguns.[4]

On Sunday, October 1, 2017, a gunman opened fire from the window of his suite at the Mandalay Bay Hotel in Las Vegas, Nevada, into a crowd of more than 22,000 people attending a nearby country music concert.[5] After ten to 15 minutes of continuous gunfire, Stephen Paddock murdered 58 people and injured more than 500 others.[6] The rampage resulted in the deadliest mass shooting in modern American history.[7] Paddock, a 64-year-old man from Nevada, was the single perpetrator of the incident.[8] Like Lanza, Paddock took his own life as the police stormed his hotel room.[9] Upon entering the hotel room, the police found 23 firearms, a camera used to monitor the hallway, and thousands of rounds of ammunition.[10]

The horrific events that occurred at Sandy Hook Elementary School and in Las Vegas are just two instances of mass shootings that the United States endured over the past few decades.[11] Given the frequency with which mass shootings have occurred as of late, firearm regulation and the ensuing Second Amendment implications[12] have unsurprisingly become

1. *See* Steve Vogel et al., *Sandy Hook Elementary School Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 14, 2012), https://wapo.st/39c5Hpx.

2. *See id.*

3. *See id.*

4. *See id.*

5. *See How the Las Vegas Strip Shooting Unfolded*, WASH. POST (Oct. 11, 2017, 8:52 AM), https://wapo.st/2MguRu0.

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See, e.g.*, Carolina A. Miranda, *Recent Mass Shootings in the U.S.: A Timeline*, L.A. TIMES (Sept. 1, 2019, 9:11 AM), https://lat.ms/39kHCwJ (defining a mass shooting as an incident where a gunman kills four or more people and describing every mass shooting that occurred in the United States from 2015–2019).

12. *See* U.S. CONST. amend. II. ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

some of the recent electoral cycles' most hotly contested political issues.[13] Despite being a contentious issue, the Supreme Court has said little about the Second Amendment's meaning and proper interpretation, leaving the lower courts to grapple with the constitutionality of firearm restrictions.[14] One such firearm regulatory scheme that has created tension amongst the circuit courts of appeals is the prohibition of firearm possession by convicted felons in 18 U.S.C. § 922(g)(1).[15]

18 U.S.C. § 922(g)(1) makes it unlawful for persons convicted of a crime punishable by an imprisonment term exceeding one year to possess, purchase, or own firearms.[16] The prohibition has few exceptions.[17] Additionally, individuals convicted of a state law misdemeanor that includes a potential incarceration period greater than two years cannot possess, purchase, or own a firearm under 18 U.S.C. § 922(g)(1).[18] Given the breadth of 18 U.S.C. § 922(g)(1)'s scope, the law has been challenged as unconstitutional numerous times.[19] Every circuit that has considered a challenge has upheld 18 U.S.C. § 922(g)(1) as constitutional under the Second Amendment on its face.[20] There is a circuit split percolating, however, as to whether a convicted felon can challenge 18 U.S.C. § 922(g)(1) as unconstitutional under the Second Amendment as applied to their individual circumstances and predicate convictions.[21]

This Comment will evaluate the current circuit split pertaining to as-applied challenges of 18 U.S.C. § 922(g)(1) and will take the position that these challenges should be prohibited.[22] Part II of this Comment examines the Supreme Court's Second Amendment jurisprudence, the history of federal firearms legislation, 18 U.S.C. § 922(g)(1) itself, and the circuit split percolating in the circuit courts of appeals.[23] Part III of this Comment takes the position that as-applied challenges to 18 U.S.C. § 922(g)(1) should be prohibited and presents a justification to support that approach.[24]

13. *See* Joseph P. Williams, *Where the 2020 Candidates Stand on Gun Control and Gun Rights*, U.S. NEWS & WORLD REP. (Sept. 12, 2019), https://bit.ly/3a0TeUz.

14. *See infra* Section II.A.

15. *See* 18 U.S.C. § 922(g)(1).

16. *See id.*

17. *See* 18 U.S.C. § 921(20).

18. *See id.*

19. *See infra* Section II.C.

20. *See* United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013); United States v. Moore, 666 F.3d 313, 318 (4th Cir. 2012); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011); United States v. Rozier, 598 F.3d 768, 770–71 (11th Cir. 2010); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010); United States v. McCrane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009).

21. *See infra* Section II.C.

22. *See infra* Part III.

23. *See infra* Part II.

24. *See infra* Part III.

Finally, this Comment recommends that Congress resolve the issue of as-applied challenges to 18 U.S.C. § 922(g)(1) rather than the courts.[25]

II. BACKGROUND

To fully understand as-applied challenges to the felon-in-possession ban,[26] understanding the Second Amendment, 18 U.S.C. § 922(g)(1), and the evolving circuit split over these challenges is necessary.[27] By providing an overview of the United States Supreme Court's Second Amendment jurisprudence,[28] a brief history of federal firearms legislation,[29] an examination of 18 U.S.C. § 922(g)(1),[30] and a breakdown of how the circuit courts of appeals have ruled on as-applied challenges to 18 U.S.C. § 922(g)(1),[31] it will become clear that as-applied challenges to the felon-in-possession ban are unnecessary.[32]

A. The Supreme Court's Second Amendment Jurisprudence

Despite gun control being one of the most vehemently contested political issues in the United States today,[33] the United States Supreme Court avoids discussing the Second Amendment.[34] In fact, the Court has only issued three opinions dealing with a Second Amendment issue,[35] and until 2021, the Court had declined to hear a Second Amendment case despite having ample opportunity to do so.[36]

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25. *See infra* Section III.D.

26. *See* 18 U.S.C. § 922(g)(1) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess 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.").

27. *See infra* Part II.

28. *See infra* Section II.A.

29. *See infra* Section II.B.

30. *See infra* Section II.B.2.

31. *See infra* Section II.C.

32. *See infra* Part III.

33. *See* Burke E. Strunsky, *The Gun Control Controversy*, HUFFPOST (Jan. 12, 2013), https://bit.ly/3p3WqWj.

34. *See* Jamie Ehrlich, *Supreme Court Again Declines to Take Up Second Amendment Cases*, CNN POL. (June 15, 2020, 11:45 AM), https://cnn.it/3mE2BPR; *see also* Joyce Lee Malcolm, *Defying the Supreme Court: Federal Courts and the Nullification of the Second Amendment*, 13 CHARLESTON L. REV. 295, 295–97 (2018) (explaining the Supreme Court's refusal to grant certiorari on Second Amendment issues and Justice Gorsuch and Thomas's dissatisfaction with doing so).

35. *See* United States v. Miller, 307 U.S. 174 (1939); District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

36. *See* Ehrlich, *supra* note 34; Ariane de Vogue & Devan Cole, *Supreme Court Agrees to Take Up Major Second Amendment Case*, CNN POL. (Apr. 26, 2021, 11:21 AM), https://cnn.it/3D89ctU.

1. Humble Beginnings: *United States v. Miller*

A discussion of the Supreme Court's Second Amendment jurisprudence begins with *United States v. Miller*.[37] In *Miller*, the federal government charged the defendants under the National Firearms Act[38] ("NFA") for traveling in interstate commerce with "a double barrel 12-gauge . . . shotgun having a barrel less than 18 inches in length" that the defendants had not registered.[39] On appeal, the defendants challenged the validity of the NFA under the theory that the Act was unconstitutional under the Second Amendment.[40] The Court concluded that no evidence existed to support the defendant's argument that the shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia[.]"[41] In so holding, the Court focused exclusively on the first clause in the Second Amendment that relates to service in a well-regulated militia.[42] The Court stated that because the shotgun in question was not a weapon that was historically used in connection with militia service, the Second Amendment did not protect the shotgun's possession.[43] The Court later distinguished *Miller* in *District of Columbia v. Heller*.[44]

2. Progress: *District of Columbia v. Heller*

In *Heller*, the Supreme Court undertook its first significant examination of the Second Amendment's meaning.[45] The plaintiff, a Washington D.C. special police officer,[46] applied to register a handgun that he had previously purchased for the purpose of keeping it at his home

37. *Miller*, 307 U.S. at 174.

38. *See* National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872).

39. *Miller*, 307 U.S. at 175.

40. *See id.* at 176.

41. *Id.* at 178.

42. *See id.* at 178–83.

43. *See id.* at 178 ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

44. *See* District of Columbia v. Heller, 554 U.S. 570, 622 (2008) (reasoning that the holding in *Miller* is limited only to the types of weapons that can be protected under the Second Amendment).

45. *See id.* at 635 ("[T]his case represents this Court's first in-depth examination of the Second Amendment . . . .").

46. Special police officers have the same powers of arrest as regular police officers, so long as the arrest occurs within the special police officer's jurisdiction. *See How to Get a Special Police Officer (SPO) Certification in Washington DC*, SEC. OFFICER NETWORK (June 20, 2017), https://bit.ly/3p6B7Dv. Unlike a regular police officer, a special police officer is employed by a private security agency, rather than the government. *See id.*

for self-defense.[47] The District of Columbia denied Heller's application.[48] At the time, the District of Columbia had an array of firearm restrictions that made it illegal to: (1) carry an unregistered firearm;[49] (2) register a handgun;[50] and (3) carry a handgun without a license, unless the chief of police issued a license for a period of one year.[51] In addition, the District of Columbia required residents to store lawfully owned firearms "'unloaded and dissembled or bound by a trigger lock or similar device' unless they are located in a place of business or are being used for lawful recreational activities."[52] Heller challenged the District of Columbia's handgun ownership and registration laws as unconstitutional under the Second Amendment,[53] pushing the Court to address the issue of whether the Second Amendment conferred an individual right to keep and bear arms.[54]

In a 5-4 decision, the majority held that the Second Amendment conferred an "individual right to keep and bear arms,"[55] which was not limited to service in a militia.[56] In so holding, the majority regarded "'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'" as the core of the Second Amendment.[57]

While the *Heller* decision seemed to give unbridled protections to firearm owners, the Court stated that a person's Second Amendment

47. *See Heller*, 554 U.S. at 575–76.

48. *See id.* at 575.

49. *See* D.C. CODE ANN. § 7-2502.01(a) (West 2001) ("Except as otherwise provided in this unit, . . . no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm."), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008).

50. *See* D.C. CODE ANN. § 7-2501.02(a)(4) (West 2001) ("A registration certificate shall not be issued for a . . . [p]istol not validly registered to the current registrant in the District prior to September 24, 1976 . . . ."), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008).

51. *See* D.C. CODE ANN. §§ 22-4504(a), 22-4506 (West 2001), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008).

52. D.C. CODE ANN. § 7-2507.02 (West 2001), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008); *Heller*, 554 U.S. at 574.

53. *See Heller*, 554 U.S. at 575–76.

54. *See id.* at 577. If the Second Amendment merely granted a collective right for individuals to keep arms in relation to service in a militia, as the petitioners argued, the Amendment would essentially provide no individual protections for firearm ownership. *See id.*

55. *Id.* at 595.

56. *See id.* at 635 ("In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

57. Schrader v. Holder, 704 F.3d 980, 988 (D.C. Cir. 2013) (quoting *Heller*, 554 U.S. at 635).

rights, like most rights,[58] are "not unlimited."[59] Specifically, the Court stated:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[60]

Beyond *Heller*'s holding pertaining to firearm possession in the home for the purpose of self-defense, the opinion lacked a full examination of the scope of the Second Amendment.[61] The Court did, however, specifically opine that the Second Amendment does not permit an individual to carry a firearm for any purpose.[62] Thus, the Court left open the possibility for federal legislators to lawfully impose restrictions on firearm ownership.[63]

After *Heller*, questions remained as to how the holding applied to the states and how the Court would view future attempts by legislators to control firearm possession in light of the Second Amendment.[64] In 2010, the Court provided a little more clarity on its interpretation of the Second Amendment when it decided *McDonald v. City of Chicago*.[65]

3. Incorporation: *McDonald v. City of Chicago*

Because the laws at issue in *Heller* pertained to the District of Columbia, the question before the Court in *McDonald* was whether the Second Amendment applied to the states via the Fourteenth Amendment.[66]

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58. Justice Scalia specifically noted that like the Second Amendment, First Amendment rights are not unlimited. *See Heller*, 554 U.S. at 595 (citing United States v. Williams, 553 U.S. 285, 299 (2008) (holding that the First Amendment does not cover an offer to exchange child pornography)). For more information regarding Justice Scalia, *see infra* notes 235–38 and accompanying text.

59. *See Heller*, 554 U.S. at 626.

60. *Id.* at 626–27.

61. *See id.* at 626.

62. *Id.* at 595 ("Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.").

63. *See id.* at 626.

64. *See* Kari Lorentson, *18 U.S.C. § 922(g)(1) Under Attack: The Case for As-Applied Challenges to the Felon-In-Possession Ban*, 93 NOTRE DAME L. REV. 1723, 1729 (2018) ("Because *Heller* addressed a Second Amendment challenge in the context of District of Columbia's statutory code, the question remaining after *Heller* was how its holding affected the states.").

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

66. *See id.* at 749–50; *see also* U.S. CONST. amend. XIV § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .").

In *McDonald*, Chicago residents challenged the city's handgun ownership laws.[67] In 2010, Chicago's handgun laws effectively prohibited handgun possession in a manner similar to the District of Columbia's gun ownership laws, which the Court in *Heller* held unconstitutional.[68] In *McDonald*, the Court held that the Second Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment.[69] The Court reasoned that the individual right to self-defense, which was found in *Heller* to be the "central component"[70] of the right to keep and bear arms, is a basic right deeply rooted in history and tradition.[71] Additionally, the Court reaffirmed the position stated in *Heller* that the Court's decision does not cast any doubt on the constitutionality of longstanding firearms regulations.[72]

Since *McDonald*, the Supreme Court has not ruled on a single Second Amendment issue.[73] Because neither *Heller* nor *McDonald* addressed the full scope of the Second Amendment,[74] the Supreme Court has left the lower courts to grapple with many significant firearm-related issues without sufficient controlling precedent.[75] The Supreme Court's inability

67. *See McDonald*, 561 U.S. at 750; *see also* CHI, ILL., MUN. CODE §§ 8–20–040(a), 8–20–050(c) (2009) (prohibiting a person from possessing any firearm unless that person has a valid registration certificate, which effectively prohibits handgun possession for almost all private citizens), *invalidated by* McDonald v. City of Chicago, 561 U.S. 742 (2010); OAK PARK, ILL., VILL. CODE §§ 27-1-1, 27-2-1 (2009) (prohibiting possession of any firearm unless the firearm is not a pistol, revolver, gun, or other small arm commonly known as a handgun), *invalidated by* McDonald v. City of Chicago, 561 U.S. 742 (2010).

68. *See McDonald*, 561 U.S. at 750. *Compare* CHI. ILL. MUN. CODE §§ 8-20–040(a), 8–20–050(c) (2009) (prohibiting a person from possessing any firearm unless that person has a valid registration certificate, which effectively prohibits handgun possession for almost all private citizens), *invalidated by* McDonald v. City of Chicago, 561 U.S. 742 (2010) *and* OAK PARK, ILL., VILL. CODE §§ 27-1-1, 27-2-1 (2009) (prohibiting possession of any firearm unless the firearm is not a pistol, revolver, gun, or other small arm that is commonly known as a handgun), *invalidated by* McDonald v. City of Chicago, 561 U.S. 742 (2010), *with* D.C. CODE ANN. § 7-2502.01(a) (West 2001) ("Except as otherwise provided in this unit, . . . no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm."), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008).

69. *See McDonald*, 561 U.S. at 791.

70. *Id.* at 767 (citing *Heller*, 554 U.S. at 599).

71. *See id.* at 767–68 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)); Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (reasoning that in considering whether the Second Amendment right to keep and bear arms should be applicable to the states under the Due Process Clause of the Fourteenth Amendment, the Court will incorporate a right should it be determined to be fundamental to the scheme of ordered liberty, or it is deeply rooted in the country's history and tradition).

72. *See McDonald*, 561 U.S. at 786 (citing *Heller*, 554 U.S. at 626–27).

73. *See* Ehrlich, *supra* note 34. *But see* de Vogue & Cole, *supr*a note 36.

74. *Heller*, 554 U.S. at 626 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment . . . .").

75. *See* Carly Lagrotteria, *Heller's Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 FORDHAM L. REV. 1963, 1966 (2018) (discussing *Heller*'s limitations); *see also, e.g.*, Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.,

to provide sufficient guidance on the scope of the Second Amendment created the circuit split pertaining to the validity of as-applied challenges to 18 U.S.C. § 922(g)(1).[76]

B. Federal Firearms Legislation.

Before turning to an examination of the circuit split surrounding the validity of as-applied challenges to 18 U.S.C. § 922(g)(1),[77] discussing the history of federal firearms legislation is imperative to understanding how prohibitions on firearm possession by felons arose and how the law stands in present day.[78]

1. A Brief History of Federal Gun Control

Gun control,[79] a relatively recent legislative innovation, did not become commonplace until the twentieth century.[80] In the 1930s, Congress enacted the first significant round of federal firearms legislation in response to an increase in gang violence that arose during prohibition.[81] Congress's efforts culminated in the passage of the National Firearms Act of 1934[82] and the Federal Firearms Act of 1938.[83]

The National Firearms Act ("NFA") of 1934 imposed a $200 tax on the manufacture or sale of sawed-off shotguns and machine guns, and the Act required all sales of such weapons to be recorded in a national registry.[84] Four years later, Congress passed the Federal Firearms Act ("FFA") of 1938.[85] The FFA expanded on its predecessor by "[requiring]

910 F.3d 106, 110 (3d Cir. 2018) (holding that New Jersey state legislation limiting firearm magazine capacity to ten rounds did not run afoul of the Second Amendment); Silvester v. Harris, 843 F.3d 816, 818 (9th Cir. 2016) (holding that a mandatory ten-day waiting period on all firearm purchases was constitutional under the Second Amendment).

76. *See* Lagrotteria, *supra* note 75, at 1966.

77. *See* 18 U.S.C. § 922(g)(1).

78. *See infra* Section II.B.1.

79. *See* Jon Schuppe, *What is Gun Control? Everything You Need to* Know, NBC NEWS (June 5, 2018, 10:24 AM), https://nbcnews.to/3c9ukF8. Gun control is the debate over what kinds of guns should be available for sale to the public, where they can be carried, who can legally shoot one, and whether increased restrictions on firearm use and possession are an effective means to combat violent crime. *See id.*

80. *See History of Gun-Control Legislation*, WASH. POST (Dec. 22, 2012), https://wapo.st/35LuEXr.

81. *See id.*

82. National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801–5872).

83. Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938) (repealed 1968).

84. *See* § 3(a), 48 Stat. at 1237 ("There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for.").

85. *See* 52 Stat. at 1250.

gun manufacturers, importers, and dealers to obtain a federal firearms license."[86] Additionally, the FFA became the first statute to bar felons who committed "crimes of violence" from possessing firearms.[87]

The NFA of 1934 and the FFA of 1938 stood at the forefront of federal firearms legislation until the assassinations of Dr. Martin Luther King Jr.,[88] President John F. Kennedy,[89] and Robert Kennedy[90] brought issues of gun control back into the national spotlight.[91] Soon after, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968[92] and the Gun Control Act of 1968.[93] The Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968 together prohibited "drug users and the mentally ill from buying guns; [raised] the

86. Sarah Gray, *Here's a Timeline of the Major Gun Control Laws in America*, TIME (April 30, 2019, 11:13 AM), https://bit.ly/30RcMHv; *see also* § 2(a), 52 Stat. at 1250 ("It shall be unlawful for any manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this Act, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce.").

87. *See* § 2(f), 52 Stat. at 1251 ("It shall be unlawful for any person who has been convicted of a crime of violence . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such a person in violation of this Act."); § 1(6), 52 Stat. at 1250 ("The term 'crime of violence' means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year."); *see also History of Gun-Control Legislation*, *supra* note 80.

88. Dr. Martin Luther King Jr. was a civil rights activist and Christian minister. *See Dr. King Jr.*, THE KING CTR., https://bit.ly/3oL4JZq (last visited Oct. 9, 2021). He was the most visible leader of the civil rights movement from 1955 to 1968 and is widely regarded as one of the greatest nonviolent leaders in the history of the world. *See id.* On April 4th, 1968, the 39-year-old Dr. King was assassinated at the Lorraine Motel in Memphis, Tennessee. *See id.*

89. John F. Kennedy was the 35th President of the United States. *See About the White House, Presidents, John F. Kennedy*, THE WHITE HOUSE, https://bit.ly/2IdQHfV (last visited Nov. 6, 2020). He served in office from 1961–1963, before being assassinated in Dallas, Texas. *See id.* At 46 years of age, he was the youngest President to die in office. *See id.*

90. Robert F. Kennedy, President John F. Kennedy's brother, served as Attorney General of the United States during his brother's Presidency. *See About JFK, The Kennedy Family, Robert F. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://bit.ly/2U5F1hy (last visited Nov. 6, 2020). In 1964, he ran successfully for the United States Senate in New York. *See id.* On June 5, 1968, while campaigning in the primary for the Democratic presidential nomination, he was fatally shot and killed. *See id.* He died at 42 years old. *See id.*

91. *See History of Gun-Control Legislation*, *supra* note 80 ("Spurred by the assassinations of President John F. Kennedy, Robert Kennedy and the Rev. Martin Luther King Jr., President Lyndon B. Johnson renews the fight for gun control.").

92. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

93. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968); *History of Gun-Control Legislation*, *supra* note 80.

age to purchase handguns from a federally licensed dealer to 21; and [expanded] the licensing requirements to more gun dealers and [required] more detailed record-keeping."[94] Additionally, the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968 prohibited convicted felons from purchasing firearms from federally licensed dealers.[95] According to Congress, the prohibition on felons and the mentally ill from purchasing firearms occurred because of "the ease with which any person can acquire firearms other than a rifle or shotgun."[96] The federal prohibition on felons possessing firearms still stands today.[97]

2. The Felon-in-Possession Prohibition Currently

The federal prohibition on felons possessing firearms is presently codified at 18 U.S.C. § 922(g)(1),[98] which states "[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 . . . possess in or affecting commerce, any firearm or ammunition."[99] 18 U.S.C. § 922(g)(1) also prohibits these persons from receiving firearms that have been transported in interstate or foreign commerce.[100] While the prohibition appears broad, Congress has provided a list of exceptions to the rule.[101] Section 921(a)(20) provides that the term

> "crime punishable by imprisonment for a term exceeding one year" does not include—any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.[102]

94. *History of Gun-Control Legislation*, *supra* note 80.

95. *See id.* (illustrating that this was the first time the felon-in-possession prohibition appeared in United States statutory law); *see also* 82 Stat. at 197 (stating that the purpose of the act is "[t]o assist State and local governments in reducing the incidence of crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government, and for other purposes").

96. § 901(a)(2), 82 Stat. at 225. Because of Congress's power to regulate interstate commerce under Article I, Section 8 of the United States Constitution, Congress found it important to exert "[f]ederal control over interstate and foreign commerce in these weapons . . . ." *See* § 901(a)(3), 82 Stat. at 225; *see also* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .").

97. *See* 18 U.S.C. § 922(g)(1).

98. *See id.*

99. *Id.*

100. *See id.*

101. *See* 18 U.S.C. § 921(a)(20).

102. *Id.*

Furthermore, any conviction that has been expunged, set aside, or pardoned, or any conviction for which the individual has had civil rights restored, unless the expungement, pardon, or restoration of civil rights specifically prohibits that individual from possessing, transporting, shipping, or receiving firearms, is not considered a conviction under § 921(a)(20).[103] For individuals that do not fall under one of these exceptions, Congress has provided additional, but unfortunately ineffective,[104] administrative relief.[105]

3. Ineffective Administrative Relief

As a counter to the felon-in-possession prohibition, Congress provided an avenue for individuals, who had their Second Amendment rights taken away erroneously,[106] to seek administrative relief.[107] A person prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may apply to the Attorney General of the United States for relief from the felon-in-possession ban.[108] Section 925(c) provides that the Attorney General may grant relief if the individual's "record and reputation"[109] establishes that they "will not be likely to act in a manner dangerous to the public safety and that the granting of the relief would not be contrary to the public interest."[110] Should the Attorney General be satisfied that granting relief to the individual does not impose a risk of danger to the public or otherwise adversely harm the public interest, the individual's Second Amendment rights will be restored.[111] Should the

103. *See* 18 U.S.C. § 921(a)(20) (flush language); *see also* 18 U.S.C. § 921(a)(3), (16) (stating that "firearm" prohibition does not include "antique firearms"). Additionally, § 922(g)(9)'s ban on those convicted of a misdemeanor charge of domestic violence will apply regardless of the sentence to be imposed. *See* 18 U.S.C. § 922(g)(9).

104. *See infra* Section II.B.3.

105. *See* 18 U.S.C. § 925A; *see also* 27 C.F.R. § 478.144 (2020).

106. *See* 18 U.S.C. § 925A. An individual can have their right to possess a firearm taken away erroneously through a clerical error by a state or political subdivision, or by an error in the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act. *See* 18 U.S.C. § 925A(1). Additionally, an erroneous deprivation can also occur if the individual was deprived of the right to own a firearm under § 922(g) or (n), but, in fact, was not subject to deprivation according to those provisions. *See* 18 U.S.C. § 925A(2).

107. *See* 18 U.S.C. § 925(c); *see also* 27 C.F.R. § 478.144.

108. *See* 18 U.S.C. § 925(c); *see also* 27 C.F.R. § 478.144. Congress transferred this authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives. *See* 27 C.F.R. § 178.144(b) ("An application for such relief shall be filed, in triplicate, with the Director. It shall include information required by this section and such other supporting data as the Director and the Applicant deem appropriate.").

109. 18 U.S.C. § 925(c).

110. *Id.*

111. *See id.*

application be denied, the individual may still petition a United States district court for review.[112]

Later, in 1992, Congress prohibited the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") from delegating any portion of its budget "to investigate or act upon applications for relief from federal firearms disabilities submitted by individuals."[113] The Committee on Appropriations in both the House and Senate made several conclusions when deciding to deny appropriations of the budget to 18 U.S.C. § 925(c) investigations.[114] The Committees concluded that conducting 18 U.S.C. § 925(c) investigations proved laborious for ATF agents to undertake, and thus, taxpayer funds would be better served fighting violent crime.[115] In addition, a House Report from 1995 cited the many instances in which felons had their Second Amendment rights restored and went on to commit violent crimes.[116] By illuminating the issue of potential recidivism, the House Committee expressed concern that the program created under § 925(c) could threaten public safety.[117] Therefore, until such a time when Congress permits the ATF to appropriate a portion of its budget to investigations into erroneous firearm possession deprivations, the ATF may not pursue any applications seeking federal firearm disability relief.[118] Thus, the courts are the only potential avenue for aggrieved citizens to seek relief.[119]

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112. *See id.*

113. *Is There a Way for a Prohibited Person to Restore Their Right to Receive or Possess Firearms and Ammunition?*, ATF.GOV (Aug. 21, 2019), https://bit.ly/3nw0T3g.

114. *See* H.R. REP. No. 102-618, at 14 (1992); S. REP. NO. 102-353, at 13 (1992); H.R. REP. NO. 104-183, at 15 (1995).

115. *See* H.R. REP. NO. 102-618, at 14 ("The Committee believes that the $3.75 million and the 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by ATF in fighting violent crime."); S. REP. NO. 102-353, at 13 ("The Committee believes that the approximately 40 man-years spent annually to investigate and act upon these investigations and applications would be better utilized to crack down on violent crime."); *see also* H.R. REP. NO. 104-183, at 15 ("There is no reason to spend the Governments' time or taxpayer's money to restore a convicted felon's right to own a firearm.").

116. *See* H.R. REP. NO. 104-183, at 15.

117. *See id.*; s*ee also* H.R. REP. NO. 102-618, at 14 ("After ATF agents spend many hours investigating a particular applicant for relief, there is no way to know with any certainty whether the applicant is still a danger to public safety. Needless to say, it is a very difficult task. Thus, officials are now forced to make these decisions knowing that a mistake could have devastating consequences for innocent citizens."); S. REP. NO. 102-353, at 13 ("This is a very difficult and subjective task which could have devastating consequences for innocent citizens if the wrong decision is made.").

118. *See* Granting of Relief; Federal Firearms Privileges, 82 Fed. Reg. 39134 (Aug. 17, 2017) ("Since 1992, Congress has prohibited ATF from expending appropriated funds to investigate or act upon applications for relief from federal firearms disabilities.").

119. *See infra* Section II.C.

C. A Breakdown of the Circuit Split

Because administrative relief to the felon-in-possession prohibition is not adequately budgeted for,[120] and because the Supreme Court in *Heller* stated that the Second Amendment grants an "individual right to keep and bear arms,"[121] as-applied challenges to 18 U.S.C. § 922(g)(1) have begun to appear in the lower courts.[122] While *Heller* made clear that preventing non-law-abiding citizens from owning and possessing firearms is generally constitutional,[123] many lower courts have left open the possibility for challenges to the prohibition on an as-applied basis,[124] thus forming a circuit split.

1. Circuits That Have Refused to Entertain As-Applied Challenges

The federal circuit courts of appeals have taken many different approaches when deciding as-applied challenges to the felon-in-possession prohibition.[125] While some circuits have entertained the validity of as-applied challenges,[126] the Tenth, Fifth, Ninth, Eleventh, and Fourth Circuits have foreclosed as-applied challenges entirely.[127]

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120. *See supra* Section II.B.3.

121. District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

122. *See, e.g.*, Holloway v. Att'y Gen. United States, 948 F.3d 164, 177 (3d Cir. 2020); Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019); Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019); Hamilton v. Pallozzi, 848 F.3d 614, 626 (4th Cir. 2017); Binderup v. Att'y Gen. United States, 836 F.3d 336, 356 (3d Cir. 2016); United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010); United States v. McCrane, 573 F.3d 1037, 1047 (10th Cir. 2009).

123. *See supra* Section II.A.2. Every circuit to address the issue has upheld the felon-in-possession prohibition on its face. *See* United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013); United States v. Moore, 666 F.3d 313, 318 (4th Cir. 2012); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011); United States v. Rozier, 598 F.3d 768, 770–71 (11th Cir. 2010); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010); United States v. McCrane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009).

124. *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019); Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019); United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011).

125. *See* 18 U.S.C. § 922(g)(1); *see also supra* note 122 (illustrating how many circuits have considered the issue of the validity of as-applied challenges to 18 U.S.C. § 922(g)(1)).

126. *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019); Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019); Binderup v. Att'y Gen. United States, 836 F.3d 336, 356 (3d Cir. 2016); United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011).

127. *See* Hamilton v. Pallozzi, 848 F.3d 614, 626 (4th Cir. 2017); United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010); United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010); United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010); United States v. McCrane, 573 F.3d 1037, 1047 (10th Cir. 2009).

The Tenth Circuit, in *United States v. McCrane*,[128] became the first circuit to reject an as-applied challenge to 18 U.S.C. § 922(g)(1).[129] McCrane was convicted for being a felon-in-possession after a police officer found a firearm in his car.[130] McCrane challenged the validity of 18 U.S.C. § 922(g)(1), stating that the statute was unconstitutional under the Second Amendment in light of the Supreme Court's decision in *Heller*.[131] The court, relying exclusively on *Heller*, reasoned that "[t]he Supreme Court explicitly states in *Heller* that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.'"[132] Therefore, the Tenth Circuit rejected McCrane's challenge to 18 U.S.C. § 922(g)(1).[133]

The Fifth Circuit has also rejected as-applied challenges to 18 U.S.C. § 922(g)(1).[134] In *United States v. Scroggins*,[135] Scroggins argued that his felon-in-possession of a firearm conviction violated his Second Amendment rights under *Heller* because his predicate conviction did not show violent intent.[136] The court disagreed and held that § 922(g)(1) did not violate Scroggins's Second Amendment rights because the Fifth Circuit's precedent foreclosed such an argument.[137] The court reasoned that its pre-*Heller* decisions held that "criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate [the Second Amendment]."[138] In addition, the court pointed to the fact that "*Heller* states that the opinion should not 'be taken to cast doubt on long-standing prohibitions on possession of firearms by felons.'"[139] Under that reasoning, the Fifth Circuit rejected as-applied challenges to 18 U.S.C. § 922(g)(1).[140]

The Ninth Circuit has also rejected as-applied challenges to the felon-in-possession prohibition.[141] In *United States v. Vongxay*,[142] Vongxay was convicted of two counts of car burglary and one count of drug possession,[143] which disqualified him from possessing a firearm under 18

128. *McCrane*, 573 F.3d 1037 (10th Cir. 2009).
129. *See id.* at 1047.
130. *See id.* at 1038–39.
131. *See id.* at 1047.
132. *Id.* (citing District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).
133. *See id.*
134. *See* United States v. Scroggins, 599 F.3d 433 (5th Cir. 2010).
135. *See id.*
136. *See id.* at 451.
137. *See id.*
138. *Id.*
139. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).
140. *See id.*
141. *See* United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010); *see also* 18 U.S.C. § 922(g)(1).
142. *Vongxay*, 594 F.3d at 1111.
143. *See id.* at 1114.

U.S.C. § 922(g)(1).[144] The court rejected Vongxay's as-applied challenge to 18 U.S.C. § 922(g)(1).[145] The court made no distinction between violent and non-violent crimes and concluded that because felons are categorically different from the individuals who have the right to keep and bear arms, barring as-applied challenges to § 922(g)(1) does not run afoul of the Second Amendment.[146] Thus, the Ninth Circuit foreclosed as-applied challenges.[147]

Like the Ninth Circuit, the Eleventh Circuit foreclosed as-applied challenges to § 922(g)(1) in *United States v. Rozier*.[148] In that case, Rozier brought a challenge to the felon-in-possession prohibition after being convicted of illegally possessing a firearm.[149] Prior to Rozier's arrest, he had several felony drug convictions on his record.[150] Rozier challenged the validity of his felon-in-possession conviction on the grounds that § 922(g)(1) is unconstitutional under the Second Amendment.[151] Rozier contended that because he intended to use the firearm for self-defense in his home, *Heller* rendered § 922(g)(1) unconstitutional as applied to him.[152] The Eleventh Circuit flatly rejected the as-applied challenge[153] and opined that *Heller* "suggests that statutes disqualifying felons from possessing a firearm *under any and all circumstances* do not offend the Second Amendment."[154] Therefore, the opinion demonstrates that the Eleventh Circuit explicitly rejects as-applied challenges to 18 U.S.C. § 922(g)(1).[155]

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144. *See id.*

145. *See id.* at 1118 ("In sum, we hold that § 922(g)(1) does not violate the Second Amendment as it applies to Vongxay, a convicted felon.").

146. *See id.* at 1115.

147. In support for its conclusion that felons are categorically different from individuals who possess the right to keep and bear arms, the court made several points supporting this rationale. *See id.* at 1115, 1118. Principally, the court reasoned that the Second Amendment has been tied to the concept of a virtuous citizenry and thus the right does not preclude disarming unvirtuous citizens, such as felons. *See id.* at 1118. Additionally, the court foreclosed the defendant's challenge under *Heller*'s presumptively lawful regulatory measures language. *See id.* at 1115 (citing District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

148. United States v. Rozier, 598 F.3d 768, 771 (11th Cir. 2010).

149. *See id.* at 770.

150. *See id.* at 769 (stating that one of the collateral consequences for these prior felony convictions was being precluded from possessing any type of firearm under federal law).

151. *See id.* at 770.

152. *See id.*

153. *See id.* at 771 ("[S]tatutory restrictions of firearm possession, such as § 922(g)(1), are a constitutional avenue to restrict the Second Amendment right of certain classes of people. Rozier, by virtue of his felony conviction, falls within such a class.").

154. *Id.* (emphasis added).

155. *See id.* ("*Heller* stated that 'nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . .' This language suggests that statutes disqualifying felons from possessing a firearm under any and all

The Fourth Circuit is the final circuit to reject as-applied challenges to 18 U.S.C. § 922(g)(1).[156] In *Hamilton v. Pallozzi*, the appellant, Hamilton, was a convicted felon in Virginia.[157] The Virginia courts, however, restored Hamilton's right to own a firearm.[158] Hamilton's prior convictions in Virginia encompassed credit card fraud, theft, and forgery.[159] When Hamilton became a resident of Maryland, Hamilton wanted to obtain a permit to buy and possess a handgun and a long gun.[160] Previously, the Fourth Circuit left open the possibility for successful as-applied challenges to 18 U.S.C. § 922(g)(1) to be brought.[161] The Fourth Circuit, however, foreclosed that possibility in its entirety by holding that a felony conviction removes an individual "from the class of law-abiding, responsible citizens for the purposes of the Second Amendment."[162] The court rejected the argument that the conviction of a non-violent felony places an individual outside the class of prohibited individuals.[163] Therefore, in the Fourth Circuit, any person convicted of a felony may not bring an as-applied challenge to restore Second Amendment rights.[164] Other circuits, however, have left as-applied challenges open for consideration.[165]

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circumstances do not offend the Second Amendment." (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008))).

156. *See* Hamilton v. Pallozzi, 848 F.3d 614, 626 (4th Cir. 2017).

157. *See id.* at 617.

158. *See id.*

159. *See id.* at 618.

160. *See id.* Due to prior convictions in Virginia, 18 U.S.C. § 922(g)(1) barred Hamilton from buying a handgun in Maryland. *See id.* Notably, Hamilton was unable to possess firearms in Maryland unless he got a full pardon from the Governor of Virginia. *See id.*; *see also* 18 U.S.C. § 921(a)(20) (stating that receiving a pardon for an otherwise disqualifying conviction is an exception to the prohibition in § 922(g)(1)).

161. *See Hamilton*, 848 F.3d at 622–23 (recognizing the possibility of a successful as-applied challenge to felon disarmament under the presumption of lawfulness language espoused in *Heller*).

162. *Id.* at 626.

163. *See id.* at 625. It is important to note that the court does not address state law misdemeanors that might otherwise fall within the definition of "felon" for the purposes of 18 U.S.C. § 922(g)(1). *Id.* at 622–29; *see also* 18 U.S.C. § 921(a)(20). The court only goes as far as to say that those convicted of a "state law felony" generally cannot be said to be inside the protected class of law-abiding citizens. *See Hamilton*, 848 F.3d at 625.

164. *See Hamilton*, 848 F.3d at 626.

165. *See infra* Section II.C.2.

2. Circuits That Have Left As-Applied Challenges Open for Consideration

The federal circuit courts of appeals have not universally denied as-applied challenges by felons.[166] The First,[167] D.C.,[168] and Seventh[169] Circuits have all considered as-applied challenges, but none of these circuits have ever actually restored the Second Amendment rights of any challenger.[170] The Third Circuit stands alone as the only federal circuit court of appeals to restore a previously prohibited individual's Second Amendment rights.[171] An overview of the First, D.C., Seventh, and Third Circuits' decisions is thus essential to understand the bases for which as-applied challenges are advocated for.[172]

a. The First Circuit: *United States v. Torres-Rosario*

In *Torres-Rosario*, while executing a search warrant, police officers found a loaded firearm under Torres-Rosario's mattress.[173] Thereafter, a jury convicted Torres-Rosario for being a felon-in-possession of a firearm in violation of 18 U.S.C. § 922(g)(1).[174] On appeal, the First Circuit decided whether 18 U.S.C. § 922(g)(1), as applied to Torres-Rosario, was unconstitutional under the Second Amendment.[175]

Ultimately, the court rejected Torres-Rosario's as-applied challenge, reasoning that his drug dealing indicated a high probability of violence in the future.[176] The court, however, did leave open the possibility for successful as-applied challenges for convictions predicated on other crimes.[177] In doing so, the court, unlike the courts in decisions discussed

166. *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019); Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019); Binderup v. Att'y Gen. United States, 836 F.3d 336, 356 (3d Cir. 2016); United States v. Torres-Rosario, 658 F.3d 110, 113 (1st Cir. 2011).

167. *Torres-Rosario*, 658 F.3d at 110.

168. *Medina*, 913 F.3d at 152.

169. *Kanter*, 919 F.3d at 437.

170. *See Kanter*, 919 F.3d at 451; *Medina*, 913 F.3d at 160; *Torres-Rosario*, 658 F.3d at 113.

171. *See Binderup*, 836 F.3d at 336.

172. *See infra* Sections II.C.2.a–d.

173. *See Torres-Rosario*, 658 F.3d at 112.

174. *Id.* The predicate offenses for which Torres-Rosario was prohibited under § 922(g)(1) from possessing a firearm were drug offenses. *See id.* at 113.

175. *Id.*

176. *See id.* ("In all events, two of Torres-Rosario's prior convictions were for serious drug offenses—distribution and possession with intent to distribute Class A controlled substances—and drug dealing is notoriously linked to violence . . . . Assuming arguendo that the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban, drug dealing is not likely to be among them.").

177. *See id.* ("But—given the 'presumptively lawful' reference in *Heller*—the Supreme Court may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban.").

previously,[178] took the "presumptively lawful"[179] reference in *Heller* to mean that "the Supreme Court may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban."[180] Thus, while declining to do so in *Torres-Rosario*, the First Circuit left open the possibility for successful as-applied challenges to be brought under the right circumstances.[181]

b. The D.C. Circuit: *Medina v. Whitaker*

While taking a slightly different approach, the District of Columbia Circuit has also left open the possibility for successful as-applied challenges to 18 U.S.C. § 922(g)(1).[182] In *Medina*, Medina was convicted in 1990 for making a false statement on a bank loan in California, a crime punishable by up to 30 years in prison.[183] Medina wanted to own a firearm for self-defense and recreation, but his felony conviction for making a false statement on a bank loan prohibited Medina from doing so under § 922(g)(1).[184] Medina challenged the validity of 18 U.S.C. § 922(g)(1) as applied to him.[185] The D.C. Circuit rejected Medina's as-applied challenge on the theory that, as a convicted felon, Medina fell outside of the class of "virtuous citizens" that removes a person from the scope of protections of the Second Amendment.[186] In addition, the court turned to *Heller*'s language and stated that there was no reason to believe that the Supreme Court in *Heller* meant to limit felons to only "dangerous individuals."[187]

178. *See supra* Section II.C.1.

179. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

180. *Torres-Rosario*, 658 F.3d at 113.

181. *See id.* ("Assuming *arguendo* that the Supreme Court might find some felonies so tame and technical as to be insufficient to justify the ban, drug dealing is not likely to be among them.").

182. *See* Medina v. Whitaker, 913 F.3d 152, 157 (D.C. Cir. 2019).

183. *Id.* at 154. Medina had several interactions with the law in the mid-1990s that included pleading guilty to three misdemeanor counts of making a false statement on a game license application. *See id.* At the time of the commencement of this litigation, Medina had no further additions to his criminal record. *See id.*

184. *See id.*

185. *Id.* at 157; *see also* Schrader v. Holder, 704 F.3d 980, 991 (D.C. Cir. 2013) (leaving open the possibility for successful as-applied challenges).

186. *See Medina*, 913 F.3d at 159 ("'[V]irtuous citizen' theory is drawn from 'classical republican political philosophy' and stresses that the 'right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue.'" (quoting Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995))). The D.C. Circuit did not adopt this theory outright but reasoned that it serves as persuasive evidence that the scope of the Second Amendment was meant to exclude more than just those individuals who could be dangerous. *See id.*

187. *See id.* ("On balance, the historical evidence and the Supreme Court's discussion of felon disarmament laws leads us to reject the argument that non-dangerous felons have a right to bear arms.").

While apparently subscribing to the view that felons do not enjoy the protections of the Second Amendment, the D.C. Circuit declined to decide whether a felon could nonetheless be counted as a "law-abiding, responsible citizen"[188] when the individual can factually distinguish their conviction from those that are normally subject to the prohibition.[189] Thus, in the D.C. Circuit, a prohibited felon may still succeed on an as-applied challenge under the right circumstances.[190]

c. The Seventh Circuit: *Kanter v. Barr*

The Seventh Circuit has also allowed as-applied challenges to the felon-in-possession prohibition.[191] In *Kanter*, § 922(g)(1) barred Kanter from possessing a firearm because he had a prior felony conviction for mail fraud.[192] Kanter challenged the law as applied to his mail fraud conviction, and the Seventh Circuit held that the felon dispossession statute did not violate the Second Amendment as applied to him.[193] In so holding, the Seventh Circuit applied a two-step analysis.[194] The first step is to ask whether the regulated activity falls within the scope of Second Amendment protections.[195] If the Second Amendment protects the activity, the government, at step two, has the burden of justifying the law under a heightened standard of scrutiny.[196]

At step one, the court concluded that the historical evidence was inconclusive as to whether felons were categorically excluded from the scope of the Second Amendment.[197] Nonetheless, the court proceeded to step two and resolved the case using intermediate scrutiny.[198] Under step two, the court determined that the government's interest in preventing gun violence and keeping firearms away from persons expected to misuse them is significant and that prohibiting nonviolent felons from possessing

188. *Id.* at 160 ("We need not decide today if it is ever possible for a convicted felon to show that he may still count as a 'law-abiding, responsible citizen.'").

189. *See id.*

190. *See id.*

191. *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019).

192. *See id.* at 438.

193. *See id.* at 451 ("In sum, the government has established that the felon dispossession statutes are substantially related to the important government objective of keeping firearms away [from] those convicted of serious crimes. Because Kanter was convicted of a serious federal felony for conduct broadly understood to be criminal, his challenge to the constitutionality of § 922(g)(1) is without merit.").

194. *See id.* at 445–50.

195. *See id.*

196. *See id.* at 441–42.

197. *See id.* at 447 (explaining the disagreement about whether felons were historically considered to be outside of the protections of the Second Amendment).

198. *See id.* at 442, 447 (stating that intermediate scrutiny requires "the government to show that the challenged statute is substantially related to an important government objective").

firearms is substantially related to that interest.[199] Therefore, while the court left open the possibility of approving as-applied challenges in the future, the court denied Kanter's as-applied challenge.[200] Although the First, D.C., and Seventh Circuits have yet to approve an as-applied challenge, the Third Circuit, in contrast, has approved an as-applied challenge.[201]

d. The Third Circuit: *Binderup v. Attorney General United States*

The Third Circuit is the only circuit court of appeals to restore an individual's Second Amendment rights as a result of an as-applied challenge to the felon-in-possession law.[202] In *Binderup*, two individuals, Binderup and Suarez, were convicted of state misdemeanors in Maryland and Pennsylvania[203] that were punishable by more than two years imprisonment.[204] Binderup and Suarez, as a result of their convictions, were therefore barred from possessing firearms.[205] Binderup and Suarez challenged 18 U.S.C. § 922(g)(1) as being unconstitutional as applied to them.[206] A divided *en banc* court sided with Binderup and Suarez and held that § 922(g)(1) was unconstitutional as applied to them.[207] The court used a two-step framework it had established in an earlier decision.[208] Under

199. *See id.* at 448. In making this conclusion, the court pointed out that nonviolent offenders have a higher recidivism rate than the general population and a large percentage of nonviolent offenders later commit crimes that are violent. *See id.*

200. *See id.* at 451.

201. *See infra* Section II.C.2.d.

202. *See* Binderup v. Att'y Gen. United States, 836 F.3d 336, 356 (3d Cir. 2016) (restoring Appellants' Second Amendment rights); *see also* Lorentson, *supra* note 64, at 1735–37.

203. Daniel Binderup pled guilty to corrupting a minor for having a sexual relationship with a 17-year-old female employee. *See id.* at 340. This offense was a misdemeanor subject to a term of imprisonment of five years. *See id.* Julio Suarez pled guilty to a misdemeanor offense for unlawfully carrying a firearm without a license. *See id.* This misdemeanor offense had a potential imprisonment term of up to three years. *See id.* State misdemeanors fall under the prohibition of 18 U.S.C. § 922(g)(1) when the offense carries a potential imprisonment term of more than two years. *See* 18 U.S.C. § 925(a)(20).

204. *See Binderup*, 836 F.3d at 340.

205. *See id.*; *see also* 18 U.S.C. § 922(g)(1); 18 U.S.C. § 921(a)(20) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include . . . any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.").

206. *See Binderup*, 836 F.3d at 340.

207. *See id.* at 356.

208. *See id.* at 346–47; *see also* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.").

this two-step framework, the court first determines whether the law at issue burdens a Second Amendment right.[209] For the court to find that a law burdens a felon's Second Amendment right, the challenger: "(1) must identify the traditional justification for excluding from Second Amendment protections the class of which he appears to be a member; and (2) present facts about himself and his background that distinguish his circumstances from those of persons normally in the historically barred class."[210] Should the challenger show that § 922(g)(1) burdens a Second Amendment right, the court will then consider whether § 922(g)(1) survives heightened scrutiny.[211]

In *Binderup*, the court first concluded that because *Heller* states that "longstanding prohibitions on the possession of firearms by felons" are "presumptively lawful,"[212] and both Binderup and Suarez are "felons"[213] within the meaning of § 922(g)(1), the burden was on Binderup and Suarez to establish that they fell outside of the historically barred class (felons).[214] The court then analyzed whether Binderup and Suarez's circumstances were enough to distinguish them from the historically barred class.[215] In recognizing that the Second Amendment historically was thought to apply to virtuous citizens, the court determined that unvirtuous citizens, for the purposes of the felon ban, were those convicted of "serious crimes."[216] Thus, Binderup and Suarez would be considered outside of the historically barred class if their convictions were not considered serious crimes.[217]

In applying the seriousness framework, the court held that Binderup and Suarez's convictions were not "serious" crimes.[218] The court reasoned that the crimes were not "serious" because Pennsylvania and Maryland classified the offenses as misdemeanors, which are typically considered less serious than felonies.[219] Additionally, the crimes lacked violence,

209. *See Binderup*, 836 F.3d at 347.
210. *Id.* at 347 (citing Marzzarella, 614 F.3d at 174–74).
211. *See id.* at 353.
212. District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . or laws imposing conditions and qualifications on the commercial sale of arms."); *Heller*, 554 U.S. at 627 n.26 ("We identify these presumptively lawful regulatory measures only as examples . . . .").
213. *See* 18 U.S.C. § 921(a)(20).
214. *See Binderup*, 836 F.3d at 347–48.
215. *See id.* at 349–50.
216. *See id.* at 351.
217. *Id.* at 350.
218. *See id.* at 353.
219. *See id.* at 351.

Binderup and Suarez each received a minor sentence, and no cross-jurisdictional consensus existed regarding the seriousness of the crimes.[220]

Next, the court moved to step two and applied intermediate scrutiny to § 922(g)(1).[221] In applying intermediate scrutiny, the *Binderup* majority stated that the government failed to meet its burden of proof in showing "a substantial fit between the continuing disarmament of the [c]hallengers"[222] and the government's interest of promoting public safety.[223] The court reasoned that because the government did not provide any "meaningful evidence" to justify the idea that Binderup and Suarez were likely to use firearms for unlawful means, the government failed to meet its burden.[224] Thus, the court held that § 922(g)(1) was unconstitutional as applied to Binderup and Suarez and subsequently restored their Second Amendment rights.[225]

While the circuit split over the constitutionality of as-applied challenges to 18 U.S.C § 922(g)(1) only affects a portion of the population, this split creates the issue of felons having different Second Amendment rights depending on which circuit court they can bring an as-applied challenge in, if at all.[226]

III. ANALYSIS

The constitutionality of as-applied challenges to 18 U.S.C. § 922(g)(1) has confounded the circuit courts of appeals.[227] Prohibiting 18 U.S.C. § 922(g)(1) as-applied challenges is consistent with: (1) the Supreme Court's decisions in *Heller* and *McDonald*;[228] (2) the historical understandings as to who the Second Amendment's protections apply to;[229] and (3) the two-step framework used by the circuit courts of appeals in deciding Second Amendment issues.[230] Thus, as-applied challenges to the federal firearms prohibition of 18 U.S.C. § 922(g)(1) for convicted felons should not be heard by courts.

220. *See id.* at 352; *see also* Holloway v. Att'y Gen. United States, 948 F.3d 164, 177 (3d Cir. 2020) (denying as-applied challenge because driving under the influence at the highest blood alcohol content, a misdemeanor in Pennsylvania, was a serious crime under *Binderup*).

221. *See Binderup*, 836 F.3d at 353.

222. *Id.* at 356.

223. *See id.*

224. *See id.* at 353–55. (concluding that the studies provided by the government were not compatible with the individual circumstances of Binderup and Suarez).

225. *See id.* at 356.

226. *See supra* Section II.C.

227. *See supra* Section II.C.

228. *See infra* Section III.A.

229. *See infra* Section III.B.

230. *See infra* Section III.B.

A. Consistency with Heller *and* McDonald

Principally, courts should prohibit as-applied challenges to 18 U.S.C. § 922(g)(1) for convicted felons because prohibiting felons from bringing as-applied challenges aligns with Supreme Court Second Amendment jurisprudence.[231] In *Heller*, the Supreme Court discerned the Second Amendment as an individual right with the core purpose of allowing "law-abiding, responsible citizens to use arms in defense of hearth and home."[232] The Court's decision in *Heller* to use language in the opinion such as "law-abiding" and "responsible" indicates that the majority in the *Heller* decision would acquiesce to the theory that felons do not enjoy the same access to the right to possess a firearm as persons who are "law-abiding"[233] and "responsible."[234]

Furthermore, Justice Scalia,[235] the author of the majority opinion in *Heller*, was known for his attention to detail and precision in writing.[236] Therefore, Justice Scalia would not have chosen the words "law-abiding" and "responsible" without sufficient reason.[237] Had Justice Scalia believed that the protections of the Second Amendment applied to all citizens, he

231. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ."); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons . . . .'" (quoting *Heller*, 554 U.S. at 626–27)).

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

233. *Id.*

234. *Id.*

235. Associate Justice Antonin Scalia was born March 11, 1936, in Trenton, New Jersey. *See* Maria Garcia & Amisha Padnani, *Justice Antonin Scalia: His Life and Career*, N.Y. TIMES (Feb. 14, 2016), https://nyti.ms/3oOBwKz. Justice Scalia was a professor of law at the University of Chicago before being appointed to the United States Court of Appeals for the District of Columbia Circuit by President Ronald Reagan in 1982. *See id.* Four years later, President Reagan nominated Scalia to the United States Supreme Court. *See id.* Justice Scalia served on the Court until his death on February 13, 2016. *See id.*

236. *See generally Words at Play: Antonin Scalia v. Merriam-Webster, The Time Scalia Took on the Dictionary*, MERRIAM-WEBSTER, https://bit.ly/38t7Bl0 (last visited Jan. 8, 2021) (discussing Justice Scalia's connection to the dictionary and describing his dispute with Merriam-Webster over the meaning of the word "modify"); Alec Carp, *Writing with Antonin Scalia, Grammar Nerd*, THE NEW YORKER (July 16, 2012), https://bit.ly/3iGHsmt (explaining an instance in which Justice Scalia spent the first part of a conversation at a meeting praising a magazine article he read on English grammar and usage); Jeet Heer, *Antonin Scalia Is the Supreme Court's Greatest Writer*, THE NEW REPUBLIC (June 26, 2015), https://bit.ly/3qLk5Le (praising Justice Scalia's skill as a writer).

237. *See Words at Play: Antonin Scalia v. Merriam-Webster*, *supra* note 236; Carp, *supra* note 236; Heer, *supra* note 236.

would not have qualified his statement with the "law-abiding" and "responsible" language.[238]

Additionally, other language in the *Heller* and *McDonald* opinions indicates that the categorical denial of as-applied challenges to 18 U.S.C. § 922(g)(1) by convicted felons does not run afoul of the Constitution.[239] In describing that the right in *Heller* "is not unlimited,"[240] the Court flatly stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."[241] While this statement is dicta, this fact alone should not diminish its persuasive value because the statement indicates that the Court would be accepting of a prohibition on as-applied challenges.[242] Additionally, since *Heller*, the Court has backed the constitutionality of measures that prohibit firearm possession by felons.[243] Therefore, while the Court has never addressed the issue of as-applied challenges to 18 U.S.C. § 922(g)(1), the Court's own precedents indicate that the Court views felons as not being entitled to the same rights under the Second Amendment as "law abiding" and "responsible" citizens.[244] In light of the Court's precedents and endorsement of firearm prohibitions on convicted felons,[245] as-applied challenges should not be entertained until the Supreme Court or Congress say otherwise.

B. Failing the Two-Step Framework

Not only would prohibiting as-applied challenges to 18 U.S.C. § 922(g)(1) align with *Heller* and *McDonald*, but these challenges' inability to pass the Second Amendment's analytical framework further warrants their prohibition.[246] As previously illustrated, when evaluating Second

238. *See* William Safire, *On Language; Scalia v. Merriam-Webster*, N.Y. TIMES (Nov. 20, 1994), https://nyti.ms/3usKEHU; Carp, *supra* note 236; Heer, *supra* note 236.

239. *See* McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) ("*Heller* . . . did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" (quoting *Heller*, 554 U.S. at 626–27)).

240. *Heller*, 554 U.S. at 626. ("Like most rights, the right secured by the Second Amendment is not unlimited.").

241. *Id.*

242. *See id.*

243. *See* Folajtar v. Att'y Gen. United States, 980 F.3d 897, 901 (2020) ("Indeed, the Supreme Court has repeatedly endorsed the constitutionality of measures prohibiting firearm possession by felons after *Heller*."); *see also McDonald*, 561 U.S. at 786 ("*Heller* . . . did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons.'" (quoting *Heller*, 554 U.S. at 626–27)); N.Y. St. Rifle & Pistol Ass'n, Inc. v. N.Y., 140 S. Ct. 1525, 1540–41 (2020) (Alito, J., dissenting) ("We recognized that history supported the constitutionality of some laws limiting the right to possess a firearm, such as laws . . . prohibiting possession by felons and other dangerous individuals.").

244. *See Heller*, 554 U.S. at 635.

245. *See id.* at 627 n.26; *see also supra* note 243.

246. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

Amendment claims, courts generally follow a two-step analytical process.[247] Under this Second Amendment analytical framework, courts will first ask whether the challenged law imposes a burden on conduct that falls within the scope of the Second Amendment's protection.[248] If the challenger is a member of a class of individuals historically barred from the protections of the Second Amendment, then the law imposes a burden on conduct that falls outside of the Second Amendment, and the challenge fails.[249] In order for a member of a historically barred class to gain Second Amendment protection, the challenger must "identify the traditional justification for excluding from Second Amendment protections the class of which she appears to be a member, and then present facts about [her]self and [her] circumstances [that distinguish her] from those of persons in the historically barred class."[250] If the challenger cannot differentiate themself from the historically barred class, then that individual's challenge fails, and there is no need to subject the challenged law to scrutiny.[251]

Courts should not entertain as-applied challenges to 18 U.S.C. § 922(g)(1) because doing so is a fruitless expedition.[252] The historical underpinnings as to the class of citizens that the protections of the Second Amendment were meant to protect suggests that challenges to 18 U.S.C. § 922(g)(1) should always fail step one of the analytical framework that the lower courts use to decide Second Amendment inquiries.[253] Several circuit

247. *See, e.g.*, *Marzzarella*, 614 F.3d at 89 ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid."); Kanter v. Barr, 919 F.3d 437, 445–50 (2019) (applying two-step framework); Binderup v. Att'y Gen. United States, 836 F.3d 336, 346–47 (2016) (applying two-step framework to felons convicted of state law misdemeanors); Holloway v. Att'y Gen. United States, 948 F.3d 164, 172 (2020) (stating that *Binderup* held that the two-step *Marzarella* framework applies to all Second Amendment challenges); *Folajtar*, 980 F.3d at 901 (applying framework to nonviolent felony).

248. *See Marzzarella*, 614 F.3d at 89.

249. *See id.*

250. *Folajtar*, 980 F.3d at 901 (citing *Binderup*, 836 F.3d at 347).

251. *See Folajtar*, 980 F.3d at 901; *Binderup*, 836 F.3d at 357; *Holloway*, 948 F.3d at 172.

252. *See infra* Section III.B.

253. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 491–92 (2004) (discussing that one of the most important eighteenth-century contexts for understanding the right to keep and bear arms was that of civic obligation and historians have long recognized the Second Amendment's strong connection to civic virtue); Saul Cornell, *"Don't Know Much About History" The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002) (stating that the civic right to keep and bear arms "was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner"); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626–27 (2000)

courts of appeals[254] and many scholars[255] have presented the idea that historically, the right to keep and bear arms only applies to citizens who were "virtuous."[256] While acceptance of the "virtuous citizen" theory is not universal,[257] many courts have adopted this deep-rooted historical theory.[258] Therefore, courts should still give the "virtuous citizen" theory significant weight.

Under the "virtuous citizen theory," as-applied challenges to 18 U.S.C. § 922(g)(1) should always fail step one of the two-step framework because the prohibition does not burden conduct falling within the scope of the protections of the Second Amendment.[259] As stated in *Heller*, the core of the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[260] Therefore, by virtue of these individuals being labeled as felons,[261] they are unvirtuous citizens, not part of the protected class, and thus should always fail step one of the analytical framework.[262] Therefore, because as-applied challenges should always fail step one, courts should not entertain these proceedings.

(explaining that the citizen whom the Founders wanted to see armed was a citizen of republican virtue); Reynolds, *supra* note 186, at 480 (discussing that the right to keep and bear arms was connected to virtuous citizens).

254. *See Folajtar*, 980 F.3d at 902 (quoting *Binderup*, 836 F.3d at 348) (explaining that in looking at the historical justifications for limiting the right to keep and bear arms, the Third Circuit and many scholars have agreed "that 'the right to keep and bear arms was tied to the concept of virtuous citizens.'"); Medina v. Whitaker, 913 F.3d 152, 159 (D.C. Cir. 2019) ("'virtuous citizen' theory is drawn from 'classical republican political philosophy' and stresses that the 'right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who . . . are deemed incapable of virtue.'" (quoting Reynolds, *supra* note 186, at 480 (1995))); Hamilton v. Pallozzi, 848 F.3d 614, 625 (4th Cir. 2017); United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010).

255. *See supra* note 253.

256. *See supra* notes 253–54.

257. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 451 (2019) (Barrett, Cir. J., dissenting) (stating that founding-era legislatures did not strip felons of the right to keep and bear arms solely because of their status as felons and that history demonstrates that legislatures only had the power to prohibit firearm possession from those who are dangerous); Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 282 (2020) (discussing that no court, or any source a court has cited, has discussed a law that disarmed unvirtuous citizens).

258. *See Vongxay*, 594 F.3d at 1115; *Hamilton*, 848 F.3d at 625; *Medina*, 913 F.3d at 159.

259. *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010).

260. District of Columbia v. Heller, 554 U.S. 570, 635 (2008) ("And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

261. *See* 18 U.S.C. §§ 922(g)(1), 925(a)(20).

262. *See Vongxay*, 594 F.3d at 1115.

C. Issues with Consistent Application

As-applied challenges to 18 U.S.C. § 922(g)(1) by convicted felons should also be prohibited because of their potential for inconsistent application. The Third Circuit's approach illustrates the inconsistent application of as-applied challenges. While the Third Circuit's approach is unique,[263] it indicates how courts would continue to decide as-applied challenges if permitted. Every circuit that has heard an as-applied challenge to 18 U.S.C. § 922(g)(1) has either refused to consider the challenge altogether[264] or dismissed the challenge on other grounds.[265] The Third Circuit stands out as the only circuit to restore previously prohibited individuals' Second Amendment rights.[266]

In the *Binderup* decision, the Third Circuit implemented the use of a serious crime test to determine whether or not the challenger was part of the unvirtuous citizenry historically barred from possessing firearms.[267] Under that standard, the court opined that those convicted of serious crimes are deemed unvirtuous citizens and are thus outside the protection of the Second Amendment.[268] The serious crime test takes into account a myriad of factors in making this determination.[269] Factors considered in *Binderup* include: the crime's classification as a felony or misdemeanor; whether the crime involved violence; the sentence received; and any cross-jurisdictional consensus regarding the seriousness of the offense.[270]

Out of the nine circuit courts of appeals that have dealt with as-applied challenges to 18 U.S.C. § 922(g)(1),[271] the Third Circuit's implementation of the "serious" crime standard for use in step one of the analytical framework stands alone.[272] The *Binderup* decision, which is composed of numerous concurring and dissenting opinions, created a new standard of law but did not create a clear test to determine a crime's

263. The Third Circuit is the only circuit court of appeals to use a "serious" crime analysis. *See* Binderup v. Att'y Gen. United States, 836 F.3d 336, 349 (3d Cir. 2016); Holloway v. Att'y Gen. United States, 948 F.3d 164, 173 (3d Cir. 2020); Folajtar v. Att'y Gen. United States, 980 F.3d 897, 900 (3d Cir. 2020).

264. *See supra* Section II.C.1.

265. *See supra* Sections II.C.2.a–c.

266. *See Binderup*, 836 F.3d at 356–57 (restoring state law misdemeanants' rights to possess a firearm).

267. *See id.* at 350.

268. *See id.* at 351–52.

269. *See id.*

270. *See id.*; *see also* Holloway v. Att'y Gen. United States, 948 F.3d 164, 173–77 (3d Cir. 2020) (considering dangerousness of the offense as a factor); Folajtar v. Att'y Gen. United States, 980 F.3d 897, 903 (3d Cir. 2020) (holding that the classification of the offense as a "felony" is typically conclusive into the analysis of whether a crime is "serious").

271. *See supra* Section II.C.

272. *See supra* Section II.C.2.d.

classification as serious or not.[273] In addition, when the court in *Binderup* decided that persons who commit serious offenses—rather than every person that could fall under the felon dispossession prohibition[274]—are removed from the class of citizens protected by the Second Amendment,[275] the court cited to no primary source of law that uses a seriousness standard, and the court's citations to secondary authority vaguely reference seriousness in passing.[276]

Furthermore, courts should not follow the serious crime standard because of the standard's vagueness and potential for inconsistent application.[277] For example, in *Holloway*, the Third Circuit used *Binderup* to determine whether driving under the influence at the highest blood alcohol content was a serious crime.[278] The *Holloway* court, in making its seriousness determination, focused on factors different from those used in *Binderup*.[279] The difference in the factors used in *Holloway* and *Binderup* illustrates the malleability of the Third Circuit's standard and highlights the concern that the widespread allowance of as-applied challenges could lead to inconsistent outcomes. While the Third Circuit's most recent decision in *Folajtar* held that the legislature's designation of an offense as a felony is generally conclusive in determining whether the offense is serious enough to warrant preclusion from Second Amendment protections,[280] this holding merely adds an additional factor to be

273. *See Binderup*, 836 F.3d at 336.

274. *See* 18 U.S.C. § 922(g)(1) ("It shall be unlawful for any person—who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to 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."); 18 U.S.C. § 921(a)(20) ("[C]rime punishable by imprisonment for a term exceeding one year does not include—any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.").

275. *See Binderup*, 836 F.3d at 348 ("The category of 'unvirtuous citizens' is thus broader than violent criminals; it covers any person who has committed a serious criminal offense, violent or nonviolent.").

276. *See id.* at 348–49 (discussing the rationale for why those who commit serious crimes are severable from the group of felons encompassed by the felon-in-possession prohibition).

277. *See id.* at 351 (stating that the serious crime standard is not a fixed criteria).

278. Holloway v. Att'y Gen. United States, 948 F.3d 164, 173–77 (3d Cir. 2020) (focusing on the factors of dangerousness of the offense, the maximum possible penalty imposed, label of the offense as either a misdemeanor or felony, and cross-jurisdictional consensus in determining the seriousness of a crime).

279. *Compare Holloway*, 948 F.3d at 173–76 (using factors such as dangerousness of the offense, maximum possible penalty imposed, label of the offense as either a misdemeanor or felony, and cross-jurisdictional consensus), *with Binderup*, 836 F.3d at 351–52 (using factors of indication of violence, the sentence actually received, label of the offense, and cross-jurisdictional consensus of seriousness).

280. *See* Folajtar v. Att'y Gen. United States, 980 F.3d 897, 903 (3d Cir. 2020).

considered and will likely not have a significant effect on the varied outcomes likely to result.[281] Thus, while the Third Circuit's approach to as-applied challenges to 18 U.S.C. § 922(g)(1) is unique, the approach illustrates how inconsistently these challenges are implemented and further justifies their prohibition.[282]

D. Recommendation

Should the Supreme Court decide whether convicted felons can challenge the constitutionality of 18 U.S.C. § 922(g)(1) on an as-applied basis,[283] the Supreme Court should hold that prohibiting convicted felons from making as-applied challenges does not violate the Second Amendment. In doing so, the Court should adopt the positions taken in the Fourth,[284] Fifth,[285] Ninth,[286] Tenth,[287] and Eleventh Circuits.[288] Courts should not entertain as-applied challenges to 18 U.S.C. § 922(g)(1) because the prohibition does not run afoul of *Heller* and *McDonald*;[289] felons are unvirtuous citizens who are outside of the Second Amendment's protections;[290] and the continued allowance of as-applied challenges will lead to inconsistent outcomes.[291] Until the Supreme Court holds that prohibiting as-applied challenges does not violate the Second Amendment, individual circuit courts should prohibit them. Furthermore, if the Supreme Court determines that the felon prohibition in 18 U.S.C. § 922(g)(1) is too broad, Congress should amend the statute because the legislative branch of the federal government is far better equipped than the courts to resolve a sensitive issue of public policy.[292]

281. *See id.*

282. *Compare Holloway*, 948 F.3d at 173–76 (considering a myriad of factors), *with* Folajtar, 980 F.3d at 903 (relying primarily on offense classification).

283. *See* Holloway v. Att'y Gen. United States, 948 F.3d 164 (3d Cir. 2020), *cert. denied*, 209 L. Ed. 2d 546 (2021); Folajtar v. Att'y Gen. United States, 980 F.3d 897 (3d Cir. 2020), *cert denied*, 209 L. Ed. 2d 546 (2021).

284. *See* Hamilton v. Pallozzi, 848 F.3d 614, 626 (4th Cir. 2017).

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

286. *See* United States v. Vongxay, 594 F.3d 1111, 1118 (9th Cir. 2010).

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

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

289. *See supra* Section III.A.

290. *See supra* Section III.B.

291. *See supra* Section III.C.

292. *See* Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (stating that the legislature is far better equipped to make policy judgments concerning the danger of firearm possession and how best to combat those risks). The specific ways in which Congress could amend 18 U.S.C. § 922(g)(1) are beyond the scope of this Comment.

IV. CONCLUSION

Mass shootings and gun violence have thrust gun control into the forefront of political debate.[293] 18 U.S.C. § 922(g)(1)'s felon-in-possession ban, a longstanding legislative measure, stands as an important pillar in the United States' effort to mitigate firearm violence, and the courts should not disturb the validity of this legislation through the continued allowance of as-applied challenges.[294]

Courts should view as-applied challenges to 18 U.S.C. § 922(g)(1) by convicted felons as unnecessary, fruitless claims.[295] Every circuit across the United States has upheld 18 U.S.C. § 922(g)(1) on its face,[296] and only the Third Circuit has restored the Second Amendment rights of a previously barred felon.[297] In addition, prohibiting as-applied challenges aligns with the Supreme Court's decisions in *Heller* and *McDonald*, the historical understandings as to who the Second Amendment's protections should apply to, and the two-step framework used by the circuit courts of appeals.[298]

Following the approaches used by those circuits that entertain as-applied challenges would be an unwise approach likely to lead to wide ranging and inconsistent outcomes.[299] Congress, not courts, should champion and clarify the issue of whether a prohibited felon should be able to regain their Second Amendment rights.[300] Should Congress find 18 U.S.C. § 922(g)(1) to be too broad, Congress should amend § 922(g)(1) rather than allow the federal courts to painstakingly apply the law to an endless array of federal and state offenses.[301] The time is now for the courts across the country to put an end to this needless litigation and prohibit as-applied challenges to 18 U.S.C. § 922(g)(1) for convicted felons.[302]

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293. *See supra* Section I.
294. *See supra* Section II.B.
295. *See supra* Section III.B.
296. *See* United States v. Bogle, 717 F.3d 281, 281–82 (2d Cir. 2013); United States v. Moore, 666 F.3d 313, 318 (4th Cir. 2012); United States v. Joos, 638 F.3d 581, 586 (8th Cir. 2011); United States v. Rozier, 598 F.3d 768, 770–71 (11th Cir. 2010); United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010); United States v. McCrane, 573 F.3d 1037, 1047 (10th Cir. 2009); United States v. Anderson, 559 F.3d 348, 352 (5th Cir. 2009).
297. *See supra* Section II.C.2.d.
298. *See supra* Part III.
299. *See supra* Section III.C.
300. *See supra* Section III.D.
301. *See supra* Section III.D.
302. *See supra* Part III.