What *Bruen* Requires: In Defense of As-Applied Challenges to 18 U.S.C. § 922(g)(1) and How to Avoid the Errors of the Pre-*Bruen* Balancing Test

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I. Introduction

The Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen* revolutionized Second Amendment jurisprudence.[1] The Court rejected means-end scrutiny and held the government may justify gun control laws only by showing they are consistent with the nation's historical tradition for firearm regulation. In *United States v. Rahimi*, the Court refined the *Bruen* analysis while affirming and embedding the historical tradition test into its jurisprudence.[2] In the eighteen months since *Rahimi*, lower courts have applied the Court's recalibrated instructions to the ever-growing morass of Second Amendment litigation. They have faced questions about the sort of scrutiny that applies to firearm regulations, the interpretation of *District of Columbia v. Heller*, the level of generality courts ought to apply to historical analogues, and the weight of the government's burden to present historical analogues.[3]

This paper will assess the Supreme Court's Second Amendment test from *Bruen* and *Rahimi*, and then evaluate how the lower courts are using the test to treat as-applied challenges to 18 U.S.C. § 922(g)(1), which bars felons from owning and possessing firearms.[4] There is a split in the circuit courts regarding such challenges.[5] I argue the *Bruen*/*Rahimi* test requires courts to

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[1] 597 U.S. 1 (2022). *See also* Jacob D. Charles, *The Dead Hand of A Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 78 (2023) ("*Bruen*, in short, is a constitutional kaleidoscope. Holding the opinion up to the light, turning it over at different angles—each new view reveals something important about the shifting methodological commitments of the current Justices and the possible changes on the horizon for extant constitutional law.").

[2] 602 U.S. 680, 691–92 (2024).

[3] *See* Andrew Willinger, *History and Tradition As Heightened Scrutiny*, 60 WAKE FOREST L. REV. 415, 429–36 (2025); Thomas Moy, *By Scalpel or Chainsaw: The Status of Pre*-Bruen *Case Law in the Lower Courts*, 74 DUKE L.J. 1347, 1357–59 (2025); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 150–51, 168–72 (2023); *see generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (interpreting the Second Amendment).

[4] 18 U.S.C.A. § 922(g)(1) (West).

[5] *See* United States v. Duarte, 137 F.4th 743, 747–48 (9th Cir. 2025) (describing the split between the 4th, 8th, 9th, 10th, and 11th circuits and the 3d, 5th, and 6th circuits regarding as-applied challenges to 922(g)(1)).

consider as-applied challenges to 922(g)(1), rather than categorically excluding felons from the Second Amendment.

The Court developed the *Bruen* test in response to lower courts overreading dicta from *Heller*. Now, courts should avoid making a similar mistake in altering the *Bruen*/*Rahimi* framework and placing presumption and subtext over rule and text.

II. Second Amendment in Context: *Heller*, *Bruen*, and *Rahimi*

a. The Rule from *Heller*

The text of the Second Amendment provides "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."[6] This short phrase has long been the subject of litigation and scholarly conversation, but rarely the subject of Supreme Court jurisprudence.[7] For the first two hundred years of the Amendment's history, the Court's precedent interpreting the Second Amendment was confined to Reconstruction and New Deal era decisions declining to abrogate state firearm regulations.[8] That changed in 2008, in *District of Columbia v. Heller*,[9] when the Court announced a definitive rule of interpretation for the text of the Second Amendment.[10]

In a majority opinion authored by Justice Antonin Scalia, the Court in *Heller* held the text of the Second Amendment enshrined a preexisting individual right to keep and bear arms,

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[6] U.S. CONST. amend. II.
[7] *See Heller*, 554 U.S. 570 at 619–26.
[8] *See generally* United States v. Cruikshank, 92 U.S. 542 (1875) (holding the Second Amendment restricted the federal government, not state government); Presser v. Illinois, 116 U.S. 252 (1886) (holding a state law prohibiting militia groups from associating together without license from the governor was constitutional); Miller v. Texas, 153 U.S. 535 (1894) (holding the Second Amendment does not prevent states from restricting firearms).
[9] 554 U.S. 570, 573 (2008) (distinguishing *Cruikshank* and *Presser* by interpreting their holdings under the right to assemble and the Fourteenth Amendment, and distinguishing *Miller* by interpreting it to limit the type of weapons used, not the individual right to arms).
[10] *Id.* at 592.

including firearms.[11] Two years later, in *McDonald v. City of Chicago* the Court incorporated the right against the states, holding it was among the "fundamental rights necessary to our system of ordered liberty."[12]

Heller "caused a sea change in the constitutional landscape."[13] The Court declared an individual right to keep and bear arms but avoided a comprehensive analysis "of the full scope of the Second Amendment[,]" instead considering only the core of the Second Amendment—the right to self-defense.[14] The Court explicitly did not prohibit the government from regulating arms: like other enumerated rights, the right enshrined in the Second Amendment is "not unlimited."[15]

The Court stated its opinion should not "cast doubt on longstanding prohibitions" that were "presumptively lawful."[16] The Second Amendment protects arms in common use, but does not protect "those weapons not typically possessed by law-abiding citizens for lawful purposes"[17] or "dangerous and unusual weapons."[18] Laws prohibiting handguns in the home (as in *Heller*) plainly burdened conduct protected by the Second Amendment and there was no need for further scrutiny—the government simply could not justify such a burden on a constitutional right.[19], Furthermore, any law implicating the Second Amendment right could not be subject to rational

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[11] *Id.*
[12] McDonald v. Chicago, 561 U.S. 742, 778 (2010).
[13] Kevin G. Schascheck, *In Keeping with* Heller, 73 BUFF. L. REV. 617, 620 (2025).
[14] *Heller*, 554 U.S. at 626–28. *See generally* David B. Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235 (2008) (discussing the connection between the Second Amendment and the natural law right to self-defense).
[15] *Heller*, 554 U.S. at 595, 626.
[16] *Id.* at 626–27 n.26.
[17] *Id.* at 625 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148–49 (5th ed, 1769)).
[18] *Id.* at 627; *see generally* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. LEGIS. 223 (2024) (categorizing and cataloguing firearm regulations in Anglo- and colonial America).
[19] *Heller*, at 628–29.

basis review.[20] By definition, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[21]

Heller presented the broad contours of the individual right. Two questions left to the lower courts were (1) how precisely to scrutinize particular firearm regulations beyond the kind actually evaluated in *Heller*; and (2) what the exceptions were, if any, to the *Heller* rule and what rendered a regulation "presumptively lawful[.]"[22]

1. Scrutiny, Balancing, and the Core of the Right: The Two-Part Test

Lower courts applying the *Heller* framework faced an essential interpretive question: "how to determine whether federal laws at bar comport with the Second Amendment."[23] The Court was unambiguous about what lower courts should *not* do,[24] but did not prescribe a standard of review under which to evaluate challenged laws.[25] It is not unconventional for the Supreme Court to leave the job of putting meat on the bone to the lower courts.[26] In regular fashion, the lower courts applied the *Heller* test and "filled the analytical vacuum."[27]

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[20] *Id.* at 629 n.27 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).
[21] *Id.* at 636.
[22] *Id.* at 626–28 n.26 (listing "presumptively lawful regulatory measures . . . as examples" of "longstanding prohibitions" the Court was not calling into question). *See*, *e.g.*, United States v. Marzzarella, 614 F.3d 85, 90–92 (3d Cir. 2010) (debating first how to scrutinize regulations and then considering how to apply *Heller*'s presumptively lawful language).
[23] Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) [hereinafter *NRA v. BATF*].
[24] *See Heller*, 554 U.S. at 628–29 n.27 (rejecting rational basis review), 634–35 (rejecting the dissent's "interest-balancing inquiry").
[25] *Marzzarella*, 614 F.3d at 92–93, 95 ("*Heller* did not prescribe the standard applicable to the District of Columbia's handgun ban. Instead, it held that '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights [the ban] ... would fail constitutional muster.'") (citations omitted)); *see also* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 296 (2009) (arguing *Heller* forced courts to weigh competing interests despite purporting to bar such interest balancing).
[26] *See*, *e.g.*, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977); *see also* Richard L. Pacelle, Jr. & Barry W. Pyle, *Issue Emergence and Evolution in the US Supreme Court, in* OPEN JUDICIAL POLITICS (Rorie Spill Solberg & Eric Waltenburg, eds., 2021) ("When legal issues are new or when existing rules are incomplete, courts of appeals help with filling gaps or providing a foundation."), https://open.oregonstate.education/open-judicial-politics/chapter/issue-emergence-supreme-court/ [https://perma.cc/GJE9-G6LL].
[27] *NRA v. BATF*, 700 F.3d at 194 (citing decisions from the 3d, 4th, 6th, 7th, 10th, and D.C. circuits applying *Heller*).

What emerged was a two-step inquiry, pioneered by the Third Circuit:[28] first, assess whether the challenged regulation regulates conduct within the scope of the Second Amendment, thereby burdening the individual right recognized in *Heller*. If not, there is no further inquiry required. If so, then determine how to scrutinize the regulation. "[T]he level of scrutiny depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[29] A law placing a severe burden on the "right at the core of the Second Amendment"[30] triggers strict scrutiny. A law that does not so encroach the right at the core (or that does so less severely) triggers intermediate scrutiny.[31] The more lenient scrutiny need not be specifically *intermediate*, but it did need to be more rigorous than rational basis review, because *Heller* explicitly stated such a relaxed standard could not be used to evaluate a "specific, enumerated right."[32]

Ultimately, eleven out of the twelve circuits adopted the two-step framework modeled in *Marzzarella*—all but the Eighth, which did not explicitly reject the framework.[33] The Third Circuit in *Marzzarella* provided the roadmap: (1) consider historical and traditional reasons why the challenged regulation categorically does not implicate the right identified in *Heller*, and then (2)

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[28] *Marzzarella*, 614 F.3d at 89 ("As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges.").
[29] United States v. Chester, 628 F.3d 673, 682–83 (4th Cir. 2010); *see* Moy, *supra* note 3, at 1352–53.
[30] *NRA v. BATF*, 700 F.3d at 195; *see Chester*, 628 F.3d at 682–83; Heller v. District of Columbia, 670 F.3d 1244, 1257 (D.C. Cir. 2011) [hereinafter *Heller II*] ("[A] regulation that imposes a less substantial burden should be proportionately easier to justify.").
[31] United States v. Skoien, 587 F.3d 803, 813–14 (7th Cir. 2009), *rev'd en banc on other grounds*, 614 F.3d 638 (7th Cir. 2010) [hereinafter *Skoien II*] ("A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.").
[32] *Heller*, 554 U.S. at 628–29 n.27; *see NRA v. BATF*, 700 F.3d at 195 (suggesting that regardless of the label for the court's scrutiny it needed to be less strict when applied to a law "that does not encroach on the core of the Second Amendment.").
[33] Charles, *supra* note 1, at 85 ("Eleven of the twelve geographic circuits expressly adopted it, and no federal court of appeals to confront the question rejected the two-part framework."); *see* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 18–19 n.4 (2022); *id.* at 103 (Breyer, J., dissenting).

proceed to the second step of the test "in an abundance of caution" to apply either intermediate or strict scrutiny.[34] This belt-and-suspenders approach allowed courts to uphold regulations without explicitly stating whether they did so by applying intermediate scrutiny or by applying categorical exceptions from the individual right recognized in *Heller*.[35] It also meant courts rarely struck down firearm regulations.[36]

2. The Exceptions from *Heller*

Heller recognized the individual right to keep and bear arms had substantive limits.[37] Justice Scalia offered a list of regulations the Court was not per se displacing in *Heller*, stating:

> . . . nothing in [the Court's] 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.[38]

In a footnote, the Court stated the list of "presumptively lawful regulatory measures" was exemplary, not exhaustive.[39] And, arguably, because the identified exceptions were neither at issue nor necessary to strike down the challenged regulation in *Heller*, the list was dicta.[40] How were

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[34] *See*, *e.g.*, *NRA v. BATF*, 700 F.3d at 204.
[35] See *infra* subsection II.a.2.
[36] Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1496 (2018); *see also* Adam M. Samaha & Roy Germano, *Judicial Ideology Emerges, at Last, in Second Amendment Cases*, 13 CHARLESTON L. REV. 315, 345 (2018) ("The most recent data indicate . . . judge ideology has become a significant predictor of judge votes in civil gun rights cases.").
[37] *Heller*, 554 U.S. at 595; *Bruen*, 597 U.S. at 21.
[38] *Heller*, 554, U.S. at 626–27.
[39] *Id.* at 627 n.26.
[40] Brannon P. Denning & Glenn H. Reynolds, Heller, *High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1259 (2009); *see*, *e.g.*, *Skoien II*, 614 F.3d at 639–40; United States v. Khami, 362 F. App'x 501, 508 (6th Cir. 2010) (holding the *Heller* presumptions were dicta, albeit notable and persuasive dicta); Hollis v. Lynch, 827 F.3d 436, 448 (5th Cir. 2016); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009) (Tymkovich, C.J., concurring); *but see* United States v. Huet, 665 F.3d 588, 600 (3d Cir. 2012) (disagreeing with sister circuit precedent and holding the "presumptively lawful" language as controlling); Bonidy v. U.S. Postal Serv., 790 F.3d 1121, 1124 (10th Cir. 2015) ("Although one could argue that language was dicta, it was in fact an important emphasis upon the narrowness of the holding itself and it directly informs the holding in [*Heller*]"); United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (holding the presumption language was not dicta because the Court's own limitations on its holding are integral to its holding); *see also* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1355–63 (2009) (predicting that "the *Heller* dicta will likely be treated as law for all practical purposes . . .").

lower courts to assess whether a given regulation qualified for such a presumption? Were they required to categorically uphold, for example, regulations barring the mentally ill from firearm possession, or was this merely a rebuttable presumption? The Court eschewed specific instructions, letting the question develop before re-entering the fray.[41] In *McDonald v. City of Chicago*, as the Court incorporated the Second Amendment against the states, the Court repeated but did not expound on the presumptively lawful regulations, stating *Heller* did not "cast doubt on such longstanding regulatory measures."[42]

In addition to a measure of ambiguity, the "presumptively lawful" exceptions lacked clear historical and originalist justification.[43] Scholars cheering Justice Scalia's textualist interpretive work cast a doubtful eye toward the exceptions.[44] Rather than instituting a test solely based on "whether those who ratified the Constitution thought a ban on a particular type of weapon was contrary to the right to keep and bear arms[,]" the Court based its decision on what weapons were in common use and were not unusual.[45]

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[41] *See generally* Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 HASTINGS L.J. 1371 (2009) (arguing the Court did not provide a standard of scrutiny for the presumptively lawful regulations); *see also* E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) (explaining the Court allows difficult issues to mature before weighing in); *see generally* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923 (2009) (considering that *Heller* may have decided the core meaning of the Second Amendment, but left other issues to lower courts).

[42] 561 U.S. 742, 786 (2010).

[43] Lund, *supra* note 40, at 1355–63 (criticizing both the *Heller* majority's "dubious obiter dicta pronouncing on the constitutionality of a wide range of gun control regulations" and Justice Scalia's analysis of the D.C. handgun ban as insufficiently originalist); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1564 (2009) ("The Court didn't give any substantive explanation for why the types of laws mentioned in the laundry list were constitutional aside from a description of them as 'longstanding.'"); Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731–32 (2012) ("The scholarly research on the [historical justifications for the exceptions] is therefore inconclusive at best.") (internal quotations omitted).

[44] Lund, *supra* note 40, at 1356–57; Larson, *supra* note 41, at 1373 ("The Court's claim about the need to 'expound upon the historical justifications for the exceptions' in a later case seems inconsistent with a stark interpretation/construction dichotomy"); Philip J. Cook et al., *Gun Control After* Heller*: Threats and Sideshows from A Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1064–65 (2009) (questioning what interpretive methodology the Court could have used to develop the "presumptively lawful" exceptions).

[45] Winkler, *supra* note 43, at 1560–61 ("[A] right is supposed to define the scope of contemporary government regulation. In the *Heller* world—or should that be the Heller world?—contemporary regulation defines the scope of the right . . . [R]ather than defer to the original understanding, the majority opinion looks to contemporary government regulation. This sounds a lot like a right evolving with the times—that is, a living Constitution.").

Even if *Heller* did not bind courts to apply the exceptions, it provided some measure of guidance to the lower courts as they began working out the doctrine.[46] And scholars and judges quickly recognized the exceptions as key to analyzing the constitutionality of gun regulations.[47] If the government could shoehorn a given regulation into one of *Heller*'s "presumptively lawful" buckets, it effectively provided an end run around directly countering the individual right and applying intermediate or strict scrutiny. According to empirical analysis of state and federal courts applying *Heller* conducted by Eric Ruben and Joseph Blocher, 60% of court decisions on Second Amendment challenges after *Heller* expressly cited the "presumptively lawful" exceptions.[48]

Despite their popularity, there was no universal answer on where the "presumptively lawful" exceptions fit in the *Marzzarella* two-step test: were they declaring such regulations categorical exceptions to the Second Amendment right, or suggesting they could pass "any standard of scrutiny"[49] (either due to historical pedigree or the impossibly heavy interests at work)?[50] Circuits struggled with the ambiguity.[51] As the First Circuit stated in 2011, "[t]he full

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[46] *Id.* at 1574–75 ("The laundry list, misplaced as it was in the opinion, has provided lower courts with at least some of the guidance that the Supreme Court is institutionally charged with giving."); Ruben & Blocher, *supra* note 36, at 1439–41.

[47] Glenn H. Reynolds & Brannon P. Denning, Heller*'s Future in the Lower Courts*, 102 NW. U. L. REV. COLLOQUY 406, 410 (2008) (noting that few federal firearm laws appeared truly vulnerable after *Heller*); Ruben & Blocher, *supra* note 36, at 1489 (providing an empirical analysis of case citations to the Court's "presumptively lawful" paragraph in *Heller*); *see also* Winkler, *supra* note 43, at 1561 ("[W]hile forcefully declaring an individual right to keep and bear arms, the Court suggests that nearly all gun control laws currently on the books are constitutionally permissible. Hardliners in the gun rights community cannot help but be disappointed with their triumph."); Wilkinson, *supra* note 25, at 283–85 (outlining the issues courts faced applying the "presumptively lawful" categories).

[48] Ruben & Blocher, *supra* note 36, at 1489.

[49] *See* District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

[50] *See* Larson, *supra* note 41, at 1374–76.

[51] *See*, *e.g.*, United States v. Booker, 644 F.3d 12, 23 (1st Cir. 2011) ("the Court itself acknowledged that it had not left the law 'in a state of utter certainty.'") (quoting *Heller*, 554 U.S. at 635); United States v. Decastro, 682 F.3d 160, 165 (2d Cir. 2012) (using the exceptions to establish a burden balancing test for Second Amendment challenges); United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010) ("We recognize the phrase 'presumptively lawful' could have different meanings under newly enunciated Second Amendment doctrine"); United States v. Masciandaro, 638 F.3d 458, 466 (4th Cir. 2011), *abrogated by* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) ("Not only did the *Heller* Court not define the outer limits of Second Amendment rights, it also did not address the level of scrutiny that should be applied to laws that burden those rights"); *NRA v. BATF*, 700 F.3d at 196 ("We admit that it is difficult to map *Heller*'s 'longstanding,' 'presumptively lawful regulatory measures' onto this two-step framework. It is difficult to discern whether 'longstanding prohibitions' . . . by virtue of their

significance of these pronouncements is far from self-evident." The Seventh Circuit read the Court's statements as informative, not dispositive, stating *Heller* "is not a comprehensive code; it is just an explanation for the Court's disposition. Judicial opinions must not be confused with statutes . . . .[52] The Fourth Circuit agreed, placing *Heller*'s "presumptively lawful" language belonged in step two: "The Court's use of the word 'presumptively' suggests . . . [the examples] may not be a limitation on the scope of the Second Amendment, but rather on the analysis to be conducted *with respect to the burden on that right*."[53] The First and Seventh Circuits concurred: overreading the precautionary language threatened to turn the analysis into rational basis review, which the Court explicitly rejected.[54]

Meanwhile, the Third Circuit held the "longstanding prohibitions" were exceptions to the Amendment.[55] The court equated them to restrictions on dangerous and unusual weapons, which the Supreme Court stated were not protected by the Second Amendment.[56] The Eighth Circuit agreed: "[i]t seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right."[57] This reading placed some teeth on the first step of the two-step framework: the government could show a challenged law was presumptively lawful and then the burden shifted to the challenger to rebut the presumption.[58]

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presumptive validity, either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny") (cleaned up); *Skoien II*, 614 F.3d at 639–40.

[52] *Skoien II*, 614 F.3d at 639–40 ("[T]hese passages . . . . are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open. The language we have quoted warns readers not to treat Heller as containing broader holdings than the Court set out to establish[.]")

[53] *Masciondaro*, 638 F.3d at 472 (quoting *Heller*, 554 U.S. at 626, n.26) (emphasis added).

[54] *Skoien II*, 614 F.3d at 640; *Booker*, 644 F.3d at 23. *See also Bonidy*, 790 F.3d at 1136, n.7 (Tymkovich, J., concurring in part and dissenting in part) (warning that the majority's reasoning "overreads *Heller*'s dicta.").

[55] *Marzzarella*, 614 F.3d at 91.

[56] *Id.* (citing *Heller*, 554 U.S. at 2815–16).

[57] United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) (citing *id.*).

[58] *Heller II*, 670 F.3d at 1253.

Methodological ambiguity obscured the underlying conclusion of the *Heller* court: the Second Amendment installed an individual right to keep and bear arms, and such a right could not be brushed aside by regulators or by courts. In the subsequent morass, few courts granted relief to challengers under the Second Amendment. Analysis by Eric Ruben and Joseph Blocher found 9% of Second Amendment challenges brought between 2008 and 2016 were successful.[59] More specifically, when a court applied intermediate scrutiny or some hybrid scrutiny, the challenge was successful 10% and 11% of the time, respectively.[60] Nonetheless, the Supreme Court stood by as lower courts worked, electing to let the doctrine ripen before speaking again.

b. The Historical Tradition Analysis in *Bruen*

After fourteen years, the Supreme Court in *Bruen* rejected the two-step test.[61] The Court declared the test contained "one step too many" and found it inconsistent with the holding from *Heller* and the Court's jurisprudence governing enumerated rights. Instead, the government must demonstrate "how" and "why" any infringement on conduct protected by the Second Amendment is consistent with the nation's "historical tradition of firearm regulation."[62]

The *Bruen* majority opinion, authored by Justice Clarence Thomas, rooted the historical tradition test in *Heller*'s methodology.[63] Like *Heller*, the *Bruen* test began with a textual analysis and then moved to the "historical background of the Second Amendment."[64] Justice Thomas surveyed the same sources as *Heller* and concluded "*Heller* and *McDonald* expressly rejected the application of any 'judge-empowering interest-balancing inquiry'" and explicitly rejected the

[59] Ruben & Blocher, *supra* note 36, at 1473–74.
[60] *Id.* at 1495–96 (also finding that challenges receiving strict scrutiny were only successful nineteen percent of the time).
[61] New York State Rifle & Pistol Ass'n., Inc. v. Bruen, 597 U.S. 1, 17 (2022).
[62] *Id.* at 17, 19.
[63] *Id.* at 19–20.
[64] *Id.* at 20 (citing *Heller*, 554 U.S. at 576–77, 600–05).

approach preferred by the dissenters in *Heller* advocating for intermediate scrutiny.[65] However, rather than blanket implementing strict scrutiny, the Court held *Heller*'s analysis turned on the history of the right to keep and bear arms.[66]

The regulation at issue in *Bruen* was a New York state statute that required a license for possession of a firearm outside the home and required "proper cause" for a license to issue.[67] After rejecting any sort of balancing inquiry and explaining the historical tradition inquiry, Justice Thomas applied the standard to the regulation in New York. It cleared the first step easily: not only did the parties not dispute this question, but there is no distinction in the Second Amendment between carry inside and outside the home.[68]

The next thirty-five pages of the opinion were devoted to step two: if the New York regulation was consistent with the Nation's historical tradition of firearm regulation. Taking on the arguments by the state, the Court painstakingly evaluated English common law examples and principles,[69] early American colony laws and practices,[70] post-ratification state statutes,[71] nineteenth-century regulations,[72] Reconstruction-era regulations,[73] and Western territorial laws.[74]

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[65] *Id.* at 22–23 (citing *Heller*, 554 U.S. at 628–34 and *McDonald*, 561 U.S. at 790–91); *cf. Marzzarella*, 614 F.3d at 97 (finding that some Second Amendment challenges might receive intermediate scrutiny).
[66] *See id.* at 35–37 ("[T]o the extent later history contradicts what the text says, the text controls.").
[67] *Id.* at 11–12.
[68] *Id.* at 31–33 ("The Second Amendment's plain text thus presumptively guarantees petitioners . . . right to 'bear' arms in public for self-defense.").
[69] *Id.* at 39–46 ("At the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection.").
[70] *Id.* at 46–49 ("At most, respondents can show that colonial legislatures sometimes prohibited the carrying of 'dangerous and unusual weapons'—a fact we already acknowledged in *Heller*.").
[71] *Id.* at 49–50 ("A by-now-familiar thread runs through these three statutes: They prohibit bearing arms in a way that spreads 'fear or 'terror' among the people.").
[72] *Id.* at 50–60 ("[H]istory reveals a consensus that States could *not* ban public carry altogether.").
[73] *Id.* at 60–66 ("[W]hile we recognize the support that postbellum Texas provides for respondents' view, we will not give disproportionate weight to a single state statute and a pair of state-court decisions.").
[74] *Id.* at 66–70 ("Absent any evidence explaining why these unprecedented prohibitions on all public carry were understood to comport with the Second Amendment, we fail to see how they inform 'the origins and continuing significance of the Amendment.'").

And despite some countervailing examples and potentially relevant analogues, the Court held the State had failed to meet its burden—the sweeping nature of New York's public carry limitation had little basis in "the Anglo-American history of public carry."[75] Thus, the New York law failed the Court's reconstructed test.

The Court's reliance on history in *Bruen* was sharply criticized by scholars and judges alike for the majority's understanding of *Heller*, the rebuilt historical tradition framework, and the Court's evaluation of historical sources using that framework.[76] Lower courts worried about the scope and feasibility of the historical inquiries.[77]

Bruen also did not illuminate the Court's understanding of the "presumptively lawful" language in *Heller*. In a concurring opinion, Justice Brett Kavanaugh, joined by Chief Justice John Roberts, emphasized the Court was not displacing the limitations on the Second Amendment

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[75] *Id.* at 70.

[76] *See*, *e.g.*, Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of* New York State Rifle & Pistol Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1, 7–8 (2023); Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 CLEV. ST. L. REV. 623, 628–30 (2023); Conner Greene, *The Second Amendment's Domestic Violence Problem: How* Rahimi *Exposes the Flaws of* Bruen*'s Problematic Historical Analogue Test*, 72 CLEV. ST. L. REV. 937, 950–52 (2024); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 371–75 (2022) (Breyer, J., dissenting); *History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the American Historical Association and the Organization of American Historians*, AM. HIST. ASS'N (July 6, 2022), https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah/ [https://perma.cc/L796-Z8KV] (arguing the majority opinion in *Dobbs* misappropriated and adequately considered its own cited historical sources); *see also* Blocher & Ruben, *supra* note 3 at 102–03 (2023) (noting that critiques of a history-based methodology track those of originalism as an interpretive practice); *but see* George A. Mocsary, *In Denial About the Obvious: Upending the Rhetoric of the Modern Second Amendment*, CATO SUP. CT. REV., 2023-2024 201, 221–22 (noting critics of the *Bruen* test had not criticized the use of history in the pre-*Bruen* test and arguing the Court's broad scope was necessary because lower courts had abused the pre-*Bruen* means-end scrutiny test).

[77] *See*, *e.g.*, United States v. Bartucci, 658 F. Supp. 3d 794, 800 (E.D. Cal. 2023) ("[T]he unique test the Supreme Court announced in *Bruen* does not provide lower courts with clear guidance as to how analogous modern laws must be to founding-era gun laws."); United States v. Sing-Ledezma, 706 F. Supp. 3d 650, 655 (W.D. Tex. 2023) (asking "the Supreme Court to resolve the many unanswered questions" in *Bruen*), *rev'd on other grounds*, United States v. Sing-Ledezma, No. 24-50022, 2024 WL 5318254, at *1 (5th Cir. 2024); United States v. Love, 647 F. Supp. 3d 664, 670 (N.D. Ind. 2022) (by "announcing an inconsistent and amorphous standard, the Supreme Court has created mountains of work for district courts…"). *See also* Charles, *supra* note 1, at 92–93 (arguing there is no reason to think the *Bruen* test is more administrable or consistent than the one it replaced).

identified by *Heller*.[78] But presumably at least some of "longstanding prohibitions" fit the *Bruen* "historical tradition" framework.[79] Perhaps such regulations are presumptively lawful *because* they are "longstanding" and rooted in the nation's historical tradition.[80] However, the language was not at issue in *Bruen* and was largely glossed over by the Court, once again left to wander through wooly world of the nation's district courts.[81]

At bottom, *Bruen* clearly rejected the test adopted by the circuit courts but replaced it with another convoluted test.[82] The Court's inquiry relied on history to determine both the existence and scope of the right to keep and bear arms. But in its effort to treat the Second Amendment on par with other enumerated rights, the Court's sweeping language arguably "rendered the right to bear arms the most protected of rights in the Constitution."[83] Regardless of how the "historical tradition" test compared to strict or intermediate scrutiny, Second Amendment litigation exploded

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[78] *Bruen*, 597 U.S. at 80–81 (Kavanaugh, J., concurring); *see also* Blocher & Ruben, *supra* note 3, at 127 ("[Justice Kavanaugh's] reassurances signal that the Supreme Court may be willing to uphold gun regulations outside the strict parameters of the Court's historical-analogical test—including those recognized as 'presumptively lawful' in *Heller*. What this means for the viability of pre-*Bruen* cases that relied on this passage in *Heller* remains somewhat unclear.").

[79] Blocher & Ruben, *supra* note 3, at 127; *see generally* Randy E. Barnett, Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 464–67 (2023) (providing five possible interpretations of *Bruen*'s use of history).

[80] *See* Charles, *supra* note 1, at 128–32.

[81] *Bruen*, 597 U.S. at 30 (mentioning the "longstanding" prohibitions identified in *Heller*, but only to discuss historical analogues for "sensitive place" gun restrictions); *see* Charles, *supra* note 1, at 131-32 (noting disagreement in the lower courts regarding how *Bruen* treated the presumptively lawful categories from *Heller*); Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post*-Bruen*: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20, 40–42 (2024) (suggesting *Bruen*'s "under-specificity" permitted judges to gloss over the "presumptively lawful" language from *Heller*).

[82] Charles, *supra* note 76, at 667, 675–78 (arguing *Bruen*'s approach to history and tradition is unworkable and poorly constructed); Blocher & Ruben, *supra* note 3, at 133–36 (noting the difficulty of managing a test that demands respect for historical analogy and precedent which has already analogically interpreted that same history).

[83] Khiara Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 69–70 (2022).

after *Bruen*,[84] and judicial ideology generally proved outcome-determinative.[85] Thus, the Court picked up the issue again two years later.

c. *Rahimi*'s Affirmation, Clarification, and Modification

In *United States v. Rahimi*,[86] the Supreme Court affirmed and utilized the historical tradition test from *Bruen* to uphold 18 U.S.C. 922(g)(8),[87] which bars the possession of firearms from persons subject to a restraining order due to domestic violence or threats. Chief Justice John Roberts wrote for the 8-1 majority, finding 922(g)(8) relevantly similar to "founding era regimes in both why and how it burdens the Second Amendment right."[88] The Court showed no signs of reversing course from *Bruen*.[89] Nevertheless, the Court slightly modified the application of the *Bruen* framework: a challenged regulation need only "comport with the principles underlying the Second Amendment" to survive the historical tradition test.[90]

Zackey Rahimi was indicted for possessing a firearm under 18 U.S.C. 922(g)(8) because he was subject to a domestic violence restraining order for threatening to shoot his intimate partner when he subsequently violated the order and was arrested for assault with a deadly weapon.[91] The Fifth Circuit held 922(g)(8) violated the Second Amendment facially and as applied to Rahimi because (1) the regulation burdened conduct covered by the Amendment, and (2) the government failed to show sufficiently relevant historical analogues to 922(g)(8)'s infringement on the right to

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[84] Ruben & Blocher, *supra* note 36, at 1487; Ruben, Smart & Rowhani-Rahbar, *supra* note 81, at 29–32 (finding more Second Amendment claims in the single calendar year following *Bruen* than the first three years following *Heller*).
[85] *See* Ruben, Smart & Rowhani-Rahbar, *supra* note 81, at 42–46 (finding judicial ideological trends on granting relief under the Second Amendment consistent with the pre-*Bruen* balancing test).
[86] 602 U.S. 680, 693 (2024).
[87] 18 U.S.C.A. § 922(g)(8) (West 2024).
[88] *Rahimi*, 602 U.S. at 698.
[89] Mocsary, *supra* note 76, at 213–14, 230 ("*Rahimi* shows that *Bruen* is easy to apply if one does so in good faith."); Mark W. Smith, *Much Ado About Nothing:* Rahimi *Reinforces* Bruen *and* Heller, 2024 HARV. J.L. & PUB. POL'Y: PER CURIAM 1–2, 1 (2024).
[90] *Rahimi*, 602 U.S. at 692; Moy, *supra* note 3, at 1357.
[91] *Rahimi*, 602 U.S. at 686–89.

keep and bear arms based on a judicial order that he was a credible threat to the physical safety of his partner.[92]

The Supreme Court reversed and remanded, finding the Fifth Circuit had overread *Bruen* and transformed the analysis into a search for a historical twin.[93] Further, Chief Justice Roberts noted the Fifth Circuit was not alone: "some courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber."[94]

Although the Court propounded the same standard as *Bruen*,[95] Justice Roberts performed the analysis at a higher level of abstraction. Whereas the *Bruen* majority opinion (like subsequent lower court decisions) disclaimed the need for a "historical twin" and then faulted the government for, effectively, failing to identify a historical twin, Justice Roberts extracted a generally applicable principle from the historical record and then compared that principle against the challenged law.[96] The *Bruen* analysis is not a hunt for a historical twin; it is a hunt to illuminate the scope of the right enshrined in the Second Amendment according to the original intent and meaning of the text.[97] So framed, the analysis does not demand the government point to some sufficient number of 18th and 19th century gun laws and does not reject a defendant's claim merely because of some outlier territorial regulation with similar phrasing. Instead, courts must examine the underlying

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[92] *Id.* at 689 (citing United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), *and rev'd and remanded*, 602 U.S. 680 (2024)).
[93] *Id.* at 701.
[94] *Id.* at 691–92 (neither the Second Amendment nor its limitations were constrained by what existed at the founding because "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.").
[95] *See id.* at 711 (Gorsuch, J., concurring) ("[I]f reasonable minds can disagree whether § 922(g)(8) is analogous to past practices originally understood to fall outside the Second Amendment's scope, we at least agree that is the only proper question a court may ask.").
[96] *Id.* at 693–700 (majority opinion).
[97] *See id.* at 737–38 (Barrett, J., concurring); Mocsary, *supra* note 76 at 227–28 ("A historical approach focuses on 'laws, practices, and understandings' from the relevant periods to discern textual meaning and embodied principles.").

principles—the "how" and "why" of a given regulation—and apply that reasoning to demonstrate that the challenged regulation does not abridge the right enshrined in the text.[98]

Based on the arguments of the parties and the record below, the Court considered two major historical analogues: surety laws[99] and so-called "going armed laws."[100] The Fifth Circuit had demanded the government demonstrate these analogues operated in the same way and for the same purpose as 922(g)(8). But the Court held these analogues "confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed."[101] At a higher level of generality, the Supreme Court found an applicable principle: the government could disarm clearly dangerous persons.[102]

However, *Rahimi* did not provide litigants or lower courts with answers to all of their questions.[103] In a concurring opinion to *Rahimi*, Justice Ketanji Brown Jackson opined that "[c]onsistent analyses . . . are likely to remain elusive" because of unresolved questions like "[w]ho is protected by the Second Amendment, from a historical perspective?" and "[t]o what conduct does the Second Amendment's plain text apply?"[104] Further, as in *Bruen*, the court did not explain how or why certain regulations are presumptively lawful, nor what analytical work that presumption does in the historical tradition test.

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[98] *Rahimi*, 602 U.S. at 692 ("Why and how the regulation burdens the right are central to this inquiry."); *id.* at 738–40 (Barrett, J., concurring) ("[a]nalogical reasoning under *Bruen* demands a wider lens: Historical regulations reveal a principle, not a mold.")
[99] *Id.* at 695.
[100] *Id.* at 697.
[101] *Id.* at 698.
[102] *Id.*; *see also* Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 251 (2020) ("The historical justification the Supreme Court relied on to declare felon bans 'presumptively lawful' must be the tradition of disarming violent and otherwise dangerous--not merely unvirtuous--persons.").
[103] *See Rahimi*, 602 U.S. at 692, n.1 (recognizing "the ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope[,]" and electing not to resolve that dispute.).
[104] *Rahimi*, 602 U.S. at 745–46 (Jackson, J., concurring).

Perhaps the Court will continue to weigh in on Second Amendment doctrine over the next several terms.[105] But until then, lower courts will continue to read the tea leaves of the Court's decisions to develop the historical tradition test. As after *Heller*, they will likely coalesce around particular methods for understanding *Bruen* and *Rahimi*. But they ought to avoid the mistakes of the pre-*Bruen* circuit decisions interpreting *Heller*: apply the test rather than searching for ways to avoid the test.

III. Analysis

In *Rahimi*, as in *McDonald*[106] and *Bruen*,[107] the Court pointed to *Heller*'s "presumptively lawful" regulation language to suggest that the right to keep and bear arms is not unlimited.[108] Justice Roberts cited these exceptions to suggest there was no "categorical rule" prohibiting "regulations that forbid firearm possession in the home."[109] Perhaps this suggests the Court reads the *Heller* exceptions as binding law—not mere dicta. But the Court also seemed to fold the exceptions into the history and tradition analysis: such regulations are "presumptively lawful" *because they pass the historical tradition test*.[110] A ban on felons possessing arms has significant pedigree,[111] perhaps suggesting it is a part of the nation's tradition for regulating firearms. Therefore, the statute is arguably constitutional *not* because it is categorically exempt from Second Amendment analysis, but because it meets the text, history, and tradition requirements.

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[105] *See*, *e.g.*, United States v. Hemani, No. 24-40137, 2025 WL 354982 (5th Cir. Jan. 31, 2025), *cert. granted*, No. 24-1234, 2025 WL 2949569 (U.S. Oct. 20, 2025) (cert. granted on the question of whether 18 U.S.C. 922(g)(3) violates the Second Amendment as applied to the defendant, who violated the provision against possessing a firearm as a user or addict of a controlled substance).

[106] McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) ("*Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'").

[107] *Bruen*, 597 U.S. at 21.

[108] *Rahimi*, 602 U.S. at 690–91.

[109] *Id.* at 699.

[110] *See id.* at 699–700 (explaining that *Heller* did not establish a categorical rule against regulations and emphasizing that such regulations are *presumptively* lawful).

[111] *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1589–90 (2022).

To evaluate this question, the rest of this paper considers several circuit decisions handling as-applied challenges to 18 U.S.C. § 922(g)(1). While lower courts have spilled much ink considering whether the "presumptively lawful" regulations are exempt from the *Bruen* test,[112] this paper presents only a selection from the circuit split to exhibit how these courts are wrestling with the issue. After *Heller*, lower courts relied heavily on *Heller*'s dicta to formulate the two-step test rejected in *Bruen*. Now, they should avoid making the same mistake: relying on *Heller*'s dicta as a way to categorically avoid the historical tradition test in as-applied challenges—"*Rahimi* and *Bruen* require more."[113]

a. Arguments Over the Constitutional Validity of 18 U.S.C § 922(g)(1)

18 U.S.C. § 922(g)(1) prohibits the possession of firearms for persons convicted of "a crime punishable by imprisonment for a term exceeding one year."[114] It is the descendant of the National Firearms Act of 1938, which disarmed any individual convicted of a "crime of violence."[115] Such crimes included "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking[,] assault with intent to kill, commit rape, or rob[,] assault with a dangerous weapon, or assault with intent to commit any offense publishable by imprisonment for more than one year."[116] In 1961, the statute was expanded to its contemporary command disarming violent and nonviolent felons alike.[117]

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[112] Ruben, Smart & Rowhani-Rahbar, *supra* note 81, at 29–32 (finding more Second Amendment claims in the single calendar year following *Bruen* than the first three years following *Heller*); Ruben & Blocher, *supra* note 36, at 1489 (finding sixty percent of court decisions on Second Amendment challenges after *Heller* expressly cited the "presumptively lawful" exceptions).

[113] United States v. Jackson, 121 F.4th 656, 659 (8th Cir. 2024) (Stras, J., dissental).

[114] 18 U.S.C. § 922(g)(1).

[115] An Act to Regulate Commerce in Firearms, ch. 850, § 1(6), 52 Stat. 1250 (1938).

[116] *Id.*

[117] An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342 § 2, 75 Stat. 757, 757 (1961).

The constitutional validity of 18 U.S.C. 922(g)(1) is not a new topic. Even before the Court decided *Bruen* and reworked Second Amendment jurisprudence, courts disagreed on the scope and application of 922(g)(1).[118] As courts increasingly turned to the *Marzzarella* two-step framework, the government parried such challenges through two chief arguments: (1) laws burdening felons did not actually burden conduct within the Second Amendment because, per *Heller*, the Second Amendment protects "law-abiding" citizens,[119] and (2) even if 922(g)(1) burdens conduct under the Second Amendment, laws burdening felons receive less stringent scrutiny because they do not burden the "core" of the right (generally meaning self-defense).[120] But after *Bruen* rejected the *Marzzarella* framework, these arguments had to evolve.

Challenges to 922(g)(1) cover a gamut of theoretical questions about the Second Amendment. Who has Second Amendment rights? What does it take to remove them? What role does pre-*Bruen* (and even pre-*Heller*) precedent play in the analysis? What deference does a court owe legislatures in assessing who is a felon (and therefore stripped of their Second Amendment rights)? This paper, however, focuses on a narrower question: what role do the *presumptively lawful* categories play in the Second Amendment framework after *Bruen* and *Rahimi*? Can courts use the ostensible *Heller* exceptions to categorically uphold 922(g)(1), or must they conduct the *Bruen*/*Rahimi* analysis as applied to each challenger?

The root of this inquiry is the still-undecided question from *Heller* and *Bruen*: are regulations identified in *Heller* presumptively lawful *by definition*,[121] or presumptively lawful

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[118] *See* Stevenson, *supra* note 111, at 1579–80; 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, 1730–31 (2018) (some courts held the statute facially invalid, but some considered as-applied challenges to the ban from particular defendants).

[119] *See* District of Columbia v. Heller, 554 U.S. 570, 625 (2008).

[120] *Id.* at 628.

[121] See *infra* subsection III.a.1.

because they fit into the nation's historical tradition of regulation?[122] While both present plausible readings of *Heller*, this paper concludes the best way for lower courts post-*Bruen* and *Rahimi* to avoid the errors of lower courts post-*Heller* is to take the Court at its word and apply the *Bruen* analysis, rather than searching for ways to categorically avoid the Court's analysis.

1. Casts No Doubt: The Case for a Categorical Exception

The argument in favor of upholding 922(g)(1) as a class-wide restriction on felons' Second Amendment rights turn on two positions. First, the Supreme Court has consistently noted the Second Amendment has limits[123] and has consistently affirmed *Heller*'s declaration that the Court was not "cast[ing] doubt on [the] longstanding prohibitions on the possession of firearms by felons."[124] Second, the nation's historical tradition of firearm regulation provides legislatures the authority to disarm those who are not "law-abiding"[125] and courts must defer to that authority. To the extent that *Heller* stated such regulations were merely "presumptively" constitutional, the Court was acknowledging that a felon possession was not at issue in *Heller*.[126]

These positions enable lower courts to unconditionally uphold 922(g)(1), even after *Bruen* rejected the two-step framework. To the extent the *Bruen* test applies, it is in the first step of the analysis: whether the Second Amendment is burdened by 922(g)(1). Further, some circuit courts

[122] See *infra* subsection III.a.2.
[123] *See supra* sections II.b–c; *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 80–81 (2022) (Kavanaugh, J., concurring) (noting there are a variety of lawful restrictions on the Second Amendment).
[124] *Heller*, 554 U.S. at 626; United States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2024), *cert. denied,* 145 S. Ct. 2708 (2025).
[125] *Jackson*, 110 F.4th at 1127; United States v. Duarte, 137 F.4th 743, 752 (9th Cir. 2025); United States v. Hunt, 123 F.4th 697, 705–06 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 2756 (2025).
[126] *Jackson*, 110 F.4th at 1128–29 ("We think it more likely that the Court presumed that the regulations are constitutional because they are constitutional, but termed the conclusion presumptive because the specific regulations were not at issue").

have held that *Bruen* and *Rahimi* did not completely abrogate pre-existing precedent foreclosing as-applied challenges to 922(g)(1), thereby requiring them to reject as-applied challenges.[127]

i. Eighth Circuit: United States v. Jackson

The Eighth Circuit Court of Appeals rejected defendant Edell Jackson's claim that 922(g)(1) was either facially unconstitutional or unconstitutional as applied to him.[128] Jackson had previously been convicted for selling controlled substances in 2011 and 2012.[129] In 2021, he was arrested for possessing a firearm in violation of 922(g)(1).[130] Jackson appealed, arguing, in part, 922(g)(1) was "unconstitutional as applied to him, because his drug offenses were 'non-violent' and [did] not show that he [was] more dangerous than the typical law-abiding citizen."[131] The court rejected Jackson's argument, relying heavily on the Supreme Court's "assurances"[132] that neither the individual right to keep and bear arms nor the newly calibrated *Bruen* test displaced "longstanding prohibitions" against felon firearm possession.[133] The court observed "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)."[134] Rather, the court treated the constitutionality of bars against felons or mentally ill persons possessing firearms as settled law.

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[127] Vincent v. Bondi, 127 F.4th 1263, 1265 (10th Cir. 2025) ("*Rahimi* doesn't clearly abrogate the presumptive validity of § 922(g)(1)"); United States v. Dubois, 139 F.4th 887, 893 (11th Cir. 2025) ("Because the Supreme Court 'made it clear in *Heller* that its holding did not cast doubt' on felon-in-possession prohibitions . . . *Bruen* could not have clearly abrogated our precedent upholding section 922(g)(1)"). *But see* United States v. Williams, 113 F.4th 637, 648 (6th Cir. 2024) (pre-*Bruen* precedent on § 922 is no longer applicable).

[128] *Jackson*, 110 F.4th at 1125.

[129] *Id.* at 1122.

[130] *Id.*

[131] *Id.* at 1125.

[132] *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008); McDonald v. City of Chicago, 561 U.S. 741, 786 (2010) (plurality opinion).

[133] *Jackson*, 110 F.4th at 1125 ("The decision in *Bruen*, which reaffirmed that the right is 'subject to certain reasonable, well-defined restrictions,' did not disturb those statements or cast doubt on the prohibitions") (internal citation omitted).

[134] *Id.*

The panel emphasized two historical justifications: (1) Anglo-American governments have long disarmed certain criminals despite recognizing rights to self-defense,[135] and (2) even if the exceptions to the right only spring out of the *dangerousness* of the challenger, legislatures traditionally regulate firearm possession by class or category "based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed."[136] Even if the specific crime for which Edell Jackson was convicted was, arguably, not dangerous, the Constitution authorizes legislatures to make that assessment categorically. In other words: "history demonstrates that there is no requirement for an individualized determination of dangerousness as to each person in a class of prohibited persons. Not all persons disarmed . . . were violent or dangerous persons."[137]

The Eighth Circuit denied Jackson rehearing en banc.[138] In an opinion dissenting from the denial of rehearing, Judge Stras excoriated the majority for "turn[ing] constitutional law upside down, insulating felon-dispossession laws from Second Amendment scrutiny of *any* kind."[139] Relying only on pre-*Bruen* dicta, the Eighth Circuit was transforming "*presumptively* constitutional to *always* constitutional."[140] Judge Stras referenced rulings from the Third, Fifth, and Sixth Circuit Courts of Appeals entertaining as-applied challenges to 922(g)(1), arguing *Jackson* was a "post-*Rahimi*" outlier.[141] But not for long.

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[135] *Id.* at 1126.
[136] *Id.* at 1128 ("Congress operated within this historical tradition when it enacted § 922(g)(1) to address modern conditions.").
[137] *Id.*
[138] United States v. Jackson, 121 F.4th 656 (8th Cir. 2024).
[139] *Jackson*, 121 F.4th at 658 (Stras, J., dissental).
[140] *Id.*
[141] *Id.*; see *infra* subsection III.a.2.

ii. Fourth Circuit: United States v. Price *and* United States v. Hunt

In 2022, Randy Price was charged with 18 U.S.C. § 922(k) for possessing a firearm with an erased serial number.[142] In August 2024, the Fourth Circuit Court of Appeals, sitting en banc, upheld his conviction, interpreting *Bruen* to hold "that the limitations on the scope of the Second Amendment right identified in *Heller* are inherent in the text of the amendment."[143] Therefore, such exceptions to the Second Amendment are not subject to *Bruen*'s second step.

Four months after *Price*, the Fourth Circuit rejected defendant Matthew Hunt's claim that 922(g)(1) was either facially unconstitutional or unconstitutional as applied to him.[144] In 2017, Hunt was convicted of felony breaking and entering.[145] In 2021, prosecutors used that conviction as the predicate offense for a conviction under 922(g)(1).[146] The Fourth Circuit rejected Hunt's appeal invoking *Bruen* and *Rahimi* because (1) Fourth Circuit precedent in *Price* foreclosed as-applied challenges to 922(g)(1) and that precedent was harmonious with *Bruen* and *Rahimi*,[147] and (2) nothing in *Bruen* or *Rahimi* altered *Heller*'s statement that felon in possession regulations were "presumptively lawful[.]"[148] The panel went on: "[e]ven if Section 922(g)(1) did regulate activity within the scope of the Second Amendment," Hunt's challenge would fail *Bruen* step two. [149] But the crux of the holding was simpler: as the Fourth Circuit already decided in *Price*, nothing in *Heller*, *Bruen*, or *Rahimi* required the court to engage the defendant's as-applied challenge because

[142] United States v. Price, 111 F.4th 392 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 1891, 221 L. Ed. 2d 583 (2025).
[143] *Id.* at 400–01.
[144] United States v. Hunt, 123 F.4th 697 (4th Cir. 2024), *cert. denied*, 145 S. Ct. 2756 (2025).
[145] *Id.* at 700–01.
[146] *Id.* at 701.
[147] *Id.* at 705.
[148] *Id*. at 703.
[149] *Id.* at 705.

the challenged regulation was one of the "restrictions on firearms possession" that was "presumptively lawful."[150]

The *Hunt* court held 922(g)(1) was a categorical exception to the Second Amendment because it "[arose] from the historical tradition" for firearm regulation.[151] In other words, the "pre-existing right codified in the Second Amendment" inherently *did not include* felons, and therefore, 922(g)(1) could not burden conduct under the Second Amendment.[152] This analysis, borrowing from the first step in the *Marzzarella* test, simply asks whether the Second Amendment is implicated.[153] Rather than using the historical tradition test to define the scope of the enumerated right, the court in *Hunt* used it to determine whether Hunt, as a felon, even had the right.

iii. Tenth Circuit: Vincent v. Bondi *and* United States v. Warner

After *Rahimi*, Melynda Vincent sued Attorney General Pam Bondi to restore her Second Amendment rights, claiming her conviction under 922(g)(1) was unconstitutional as applied to her because she was convicted of a nonviolent felony: bank fraud.[154] The Tenth Circuit Court of Appeals rejected Melynda Vincent's suit, relying on circuit precedent from 2009[155] which held 922(g)(1) was constitutional because of the Supreme Court's statement in *District of Columbia v. Heller* that it was not "cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons."[156] Because the court could find nothing in *Bruen* or *Rahimi* abrogating its prior

[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *See* United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010) ("Our threshold inquiry, then, is whether [the statute] regulates conduct that falls within the scope of the Second Amendment.").
[154] Vincent v. Bondi, 127 F.4th 1263, 1264 (10th Cir. 2025).
[155] *See id.* (citing United States v. McCane, 573 F.3d 1037 (10th Cir. 2009)).
[156] *Vincent*, 127 F.4th at 1265 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

precedent, it categorically held 922(g)(1) constitutional as applied to all persons convicted of felonies.[157]

In *United States v. Warner*, one month after the Tenth Circuit decided *Vincent*, defendant Charles Warner argued disarming him under 922(g)(1) violated his Second Amendment rights because his nonviolent felony convictions were decades old, did not subject him to terms of imprisonment, and would only be treated as misdemeanors under contemporary state law.[158] The panel in *Warner* held the *Vincent* court's decision controlled Second Amendment challenges under 922(g)(1): such challenges must fail because the statute is constitutional as applied to all nonviolent felons.[159] Despite "the shifting Second Amendment landscape[,]" the Tenth Circuit squarely and categorically foreclosed challenges to the constitutionality of 922(g)(1).[160]

iv. Ninth Circuit: United States v. Duarte

The Ninth Circuit Court of Appeals, sitting en banc, rejected defendant Steven Duarte's claim that 922(g)(1) was unconstitutional as applied to him because he was a nonviolent offender.[161] The court, citing other circuit courts considering the same issue, held 922(g)(1) was categorically not unconstitutional when applied to felons, violent or otherwise.[162]

Similar to other circuits,[163] the Ninth Circuit first held neither *Bruen* nor *Rahimi* altered the Court's prior statements regarding prohibitions against felons possessing firearms and agreed with the Eighth Circuit that "there is no need for felony-by-felony litigation regarding the

[157] *Id.* at 1265–66.
[158] United States v. Warner, 131 F.4th 1137 (10th Cir. 2025).
[159] *Id.* at 1148–49.
[160] *Id.*
[161] United States v. Duarte, 137 F.4th 743 (9th Cir. 2025).
[162] *Id.* at 761–62 ("History does not require 'felony-by-felony litigation' to support the application of 922(g)(1)") (quoting United States v. Jackson, 110 F.4th 1120, 1125 (8th Cir. 2024)).
[163] *See, e.g.*, United States v. Jackson, 110 F.4th 1120, 1126–29 (8th Cir. 2024); United States v. Hunt, 123 F.4th 697, 705–08 (4th Cir. 2024); *cf.* Vincent v. Bondi, 127 F.4th 1263, 1265 (10th Cir. 2025) (categorically denying as-applied challenges due to circuit precedent and declining to consider the historical inquiry at all).

constitutionality of § 922(g)(1)."[164] Then, to gild the lily, the court applied *Bruen*'s second step and found there is a historical tradition for disarming felons like Steven Duarte.[165] *Bruen* did not abrogate *Heller*'s presumptions on longstanding prohibitions and limited its scope to "law-abiding citizens[,]" further supporting a felon exemption from the individual right.[166] These "assurances" from the Supreme Court "recognize a historical tradition of firearm regulation that supports the categorical application of § 922(g)(1) to felons like Duarte."[167]

Although the court considered the historical evidence supporting the constitutionality of 922(g)(1), it did so only to "confirm" its interpretation of "the Supreme Court's articulation of Second Amendment rights."[168] Nothing in *Bruen* or *Rahimi* altered the Ninth Circuit's pre-existing precedent "that felons are *categorically different* from the individuals who have a fundamental right to bear arms."[169]

Concurring in part and dissenting in part, Judge Lawrence VanDyke criticized the en banc majority opinion for "applying *Heller*'s dicta uncritically[.]"[170] If laws like 922(g)(1) are *presumptively lawful*, that implies there are applications where they are *unlawful*. According to Judge VanDyke, the circuit court's decision to rely "on *Heller*'s 'presumptively lawful' language once more to adopt a per se rule upholding felon-in-possession bans" merely evaded the *Bruen*

[164] *Duarte*, 137 F.4th at 752 (quoting *Jackson*, 110 F.4th at 1125).
[165] *Id.* at 755.
[166] *Id.* at 750–52.
[167] *Id.* at 753.
[168] *Id.* at 752.
[169] *Id.* at 750 (quoting United States v. Vongxay, 594 F.3d 1111, 1114–15 (9th Cir. 2010)) (emphasis added).
[170] *Id.* at 782 (VanDyke, J., concurring in part and dissenting in part).

test.[171] Such evasion serves to grant legislators "carte blanche authority to disarm any disfavored groups."[172] Instead, 922(g)(1) should be "subject to the full scope of *Bruen*'s test."[173]

v. Eleventh Circuit: United States v. Dubois

In *United States v. Dubois*, the Eleventh Circuit Court of Appeals held, on remand from the Supreme Court in light of *Rahimi*, that neither *Bruen* nor *Rahimi* abrogated circuit precedent denying as-applied challenges to 922(g)(1).[174] Because such precedent categorically exempted felon dispossession regulations from the Second Amendment, the court rejected Andre Dubois's as-applied challenge outright and declined to consider whether 922(g)(1) violated Dubois's Second Amendment rights.[175] As a threshold matter, felons like Dubois are "categorically disqualified from exercising their Second Amendment right[s.]"[176] The court derived this rule from *United States v. Rozier*,[177] which considered a similar as-applied challenge to 922(g)(1) after *Heller*. There, the court read *Heller*'s exceptions as "not dicta"[178] and upheld 922(g)(1) because "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment."[179]

Although the court in *Dubois* recognized *Bruen*'s complete rejection of means end scrutiny, it held the Supreme Court was largely relying on *Heller* and therefore adopted *Heller*'s limitations to the Second Amendment. Neither *Bruen* nor *Rahimi* expressly rejected the Eleventh Circuit's rule categorically upholding felon dispossession regulations, and therefore neither decision

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[171] *Id.* at 782–84 (citing United States v. Williams, 113 F.4th 637, 692 (6th Cir. 2024)).
[172] *Id.* at 801.
[173] *Id.* at 784 ("[O]ur court places more weight on these passing references than the Court itself did.") (citing Kanter v. Barr, 919 F.3d 437, 445 (7th Cir. 2019)).
[174] United States v. Dubois, 139 F.4th 887 (11th Cir. 2025).
[175] *Id.* at 893–94 (determining the court is bound by circuit precedent to uphold 922(g)(1)).
[176] *Id.* at 893.
[177] 598 F.3d 768 (11th Cir. 2010).
[178] *Id.* at 771 n.6.
[179] *Dubois*, 139 F.4th at 891 (quoting *Rozier*, 598 F.3d at 771).

completely abrogated the Circuit's precedent. In a closing paragraph, the court posited its hands were tied by precedent absent clearer direction from the Supreme Court: "[w]e require clearer instruction from the Supreme Court before we may reconsider the constitutionality of section 922(g)(1)."[180]

Like the Tenth Circuit in *Vincent*, the Eleventh Circuit panel declined to assess the historical tradition supporting the application of 922(g)(1) against Dubois. Rather, the court held it was enough that *Rozier*, relying on *Heller*'s "assurances[,]" directly foreclosed such challenges.[181]

2. Deprivation Without Analogy: The Case for Utilizing the *Bruen* test in As-Applied Challenges

On the other side of the split, circuits permitting former felon defendants to bring as-applied challenges to 922(g)(1) under the Second Amendment do so to avoid overreading the Court's precedents and to follow the Court's express rules rather than the gloss of its dicta.[182] The argument hinges on the *Bruen*/*Rahimi* framework superseding both *Heller*'s dicta supporting 922(g)(1) and prior circuit precedent categorically upholding 922(g)(1). Absent those threshold problems, the analysis can proceed to the *Bruen*/*Rahimi* test: (1) does 922(g)(1) burden the challenger's Second Amendment rights, and (2) can the government show that such a burden is consistent with the principles underlying the nation's historical tradition of firearm regulation? Without *Heller*'s "presumptively lawful" exceptions, the first step is simple—922(g)(1) certainly implicates conduct

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[180] *Id.* at 894.
[181] *Id.*
[182] Range v. Att'y Gen. United States, 124 F.4th 218, 225–27 (3d Cir. 2024) (discussing past circuit court errors and explaining why the Second Amendment covers a felon defendant); *see generally* United States v. Smith, 2026 WL 248330 (S.D. Ill. Jan. 30, 2026) (holding § 922(g)(8) is unconstitutional *both* facially and as applied to the felon defendant. The district court held there was no presumption against felons having Second Amendment rights, and then considered whether § 922(g)(1) was "consistent with the Nation's historical tradition of firearm regulation" and held that it was not because the government failed to present historical analogues that imposed a "comparable burden on the Second Amendment right of convicted felons to keep and bear arms[.]" The Seventh Circuit has not fully addressed the issue post-*Rahimi*).

covered by the Second Amendment.[183] Then, the court can turn to the government's historical justifications for applying 922(g)(1).

This method implements the historical tradition test in the second step of the *Bruen* analysis, rather than the first.[184] Like the Supreme Court held in *Rahimi*, at a high level of generality the government may be able to fulfill its burden and show a historical tradition of regulation. But the government cannot "effectively declare" a contemporary regulation constitutional and avoid its burden under *Bruen*.[185] Instead, courts may determine "individuals with Second Amendment rights may . . . be denied possession of a firearm"[186] under the *Bruen* test, but they may not determine individuals simply do not have Second Amendment rights.

i. Sixth Circuit: United States v. Williams

In United States v. Williams, a Sixth Circuit panel affirmed the conviction of Erick Williams under 922(g)(1).[187] Because Williams had multiple convictions for aggravated robbery, the court held applying the statute against him was consistent with the nation's historical tradition for prohibiting dangerous persons from possessing a firearm.[188] However, the majority explicitly held both (1) pre-existing Sixth Circuit precedent regarding 922(g)(1)'s constitutionality was

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[183] *See id.* at 226–28 (dismissing the government's claim that felons are not part of "the people" protected by the Second Amendment); United States v. Diaz, 116 F.4th 458, 466 (5th Cir. 2024) (same).
[184] United States v. Diaz, 116 F.4th 458, 466–67 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2822, (2025) (the defendant's felon status is relevant at the second *Bruen* step, not the first).
[185] New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 31 (2022); *see* United States v. Jackson, 121 F.4th 656, 660 (8th Cir. 2024) (Stras, J., dissental); United States v. Duarte, 137 F.4th 743, 791 (9th Cir. 2025) (VanDyke, J., concurring in part and dissenting in part) ("[T]here is no historical basis, for Congress to effectively declare that committing a crime punishable by imprisonment for a term exceeding one year, will result in permanent loss of one's Second Amendment right simply because that is how Congress defined a felony in § 922(g)(1)") (citation modified).
[186] *Range*, 124 F.4th at 226–27 (citing Binderup v. Att'y Gen. United States , 836 F.3d 336, 344 (3d Cir. 2016); Kanter v. Barr, 919 F.3d 437, 451–53 (7th Cir. 2019) (Barrett, J., dissenting). *See generally* Lorentson, *supra* note 118 (arguing for as-applied challenges to explicate ambiguity from *Heller*).
[187] United States v. Williams, 113 F.4th 637 (6th Cir. 2024).
[188] *Id.* at 661–62.

inapplicable under the "new analytical framework" set out in *Bruen* and *Rahimi*,[189] and (2) "the presumptively lawful language of *Heller*" could not categorically foreclose an as-applied challenge to 922(g)(1).[190] Felon in possession laws were not before the court in *Heller* or *McDonald*, and the Sixth Circuit's pre-*Bruen* precedent "relied on *Heller*'s one-off reference to felon-in-possession statutes" rather than historical analysis.[191] Therefore, after *Bruen* and *Rahimi*, the court needed to reassess its Second Amendment analysis, not reaffirm old precedent that relied on inapposite dicta.

The panel, citing decisions in the Tenth and Eleventh Circuits,[192] distinguished its holding from its sister circuits, suggesting they overread the Supreme Court's invocation of "law-abiding, responsible citizens" and misconstrued the individualized nature of the right to keep and bear arms.[193] The Court's past references to "law-abiding" and "responsible" suggested "the class of ordinary citizens who undoubtedly enjoy the Second Amendment right" rather than a limit on the right.[194] The right to bear arms, derivative of the right to self-defense, is an individual right, not a right conferred according to some class.[195] To adjudicate such rights, "courts should make fact-specific dangerousness determinations after taking account of the unique circumstances of the individual, including details of his specific conviction" rather than searching for categorical exclusions.[196]

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[189] *Id.* at 647–48.
[190] *Id.* at 644, 646 ("We see things a bit differently than some of our sister circuits . . . .").
[191] *Id.* at 648 ("Our circuit's pre-*Bruen* decisions . . . simply relied on *Heller*'s one-off reference to felon-in-possession statutes. Those precedents are therefore inconsistent with *Bruen*'s mandate to consult historical analogs.").
[192] *See* United States v. Dubois, 94 F.4th 1284, 1293 (11th Cir. 2024); Vincent v. Garland, 80 F.4th 1197, 1200–02 (10th Cir. 2023); *see also supra* subsection III.a.1 (describing the argument for categorically excepting felons from the Second Amendment).
[193] *Williams*, 113 F.4th at 646.
[194] *Id.* at 646–47 (quoting United States v. Rahimi, 602 U.S. 680, 701–02 (2024)).
[195] *Id.* at 647 ("A felon might lose the right to vote. But that does not mean the government can strip them of their right to speak freely, practice the religion of their choice, or to a jury trial.").
[196] *Id.* at 663.

ii. Third Circuit: United States v. Moore and *Range v. Attorney General United States*

In 2021, Diontai Moore pled guilty to violating 922(g)(1) after possessing a handgun despite having previously served several years' imprisonment for drug trafficking convictions.[197] Moore filed an appeal to the Third Circuit that 922(g)(1) was unconstitutional as applied to him because the government could not show relevantly similar historical analogues to his conviction.[198] The court quickly held Moore's challenge passed step one of the *Bruen* analysis: "[a]s an adult citizen, Moore is one of the 'people' whom the Second Amendment presumptively protects. And the charge at issue punishes Moore for quintessential Second Amendment conduct: possessing a handgun."[199] The court refused to even consider whether Moore was categorically excluded from the Second Amendment due to his felon status. Instead, it moved to step two: the government had to demonstrate disarming Moore under 922(g)(1) was consistent with the nation's historical tradition for regulating firearms.[200] The government met its burden by pointing to colonial-era laws requiring convicts to forfeit certain property upon their conviction—it was consistent with the nation's historical tradition for firearm regulations to disarm convicts like Moore.[201]

Four months after *Moore*, the Third Circuit sitting en banc in *Range v. Attorney General United States* came to a similar conclusion: the defendant, Bryan Range, was not categorically barred from the Second Amendment merely because of his conviction for making false statements to obtain food stamps in violation of Pennsylvania law.[202] Although his conviction was punishable by up to five years' imprisonment and therefore qualified as a predicate offense under 922(g)(1),

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[197] United States v. Moore, 111 F.4th 266, 267–68 (3d Cir. 2024), *cert. denied*, 145 S. Ct. 2849 (2025).
[198] *Id.* at 268.
[199] *Id.* at 269 (citing Lara v. Comm'r Pa. State Police, 91 F.4th 122, 127 (3d Cir. 2024)).
[200] *Id.* ("The Government bears the burden of justifying its regulation.").
[201] *Id.* at 271–72 ("[T]he early American forfeiture laws . . . yield the principle that a convict may be disarmed while he completes his sentence and reintegrates into society. And this principle justifies applying § 922(g)(1) to Moore.").
[202] Range v. Att'y Gen. United States, 124 F.4th 218, 232 (3d Cir. 2024).

the court declined to "defer blindly to § 922(g)(1) in its present form"[203] and ultimately held the government could not identify historical tradition supporting Range's conviction under 922(g)(1).[204]

The court refused to blanket exclude felons from Second Amendment rights and refused to blanket defer to Congress's determination that felons may be disarmed. Such deference would "contravene *Heller*'s reasoning that 'the enshrinement of constitutional rights necessarily takes certain policy choices off the table.'"[205] The court analogized to prisoners who are not categorically excluded from the First Amendment on account of their prisoner status, even though they have a severely limited right to peaceably assemble.[206]

Addressing *Heller*'s assurances in favor of "longstanding prohibitions on the possession of firearms by felons" the court held the government failed to show such sweeping language could actually apply to someone with Range's record.[207] The court noted the criminal histories of the challengers in *Heller*, *McDonald*, and *Bruen* were not at issue, and therefore the court's statements about law-abiding citizens were only dicta.[208]

iii. Fifth Circuit: United States v. Diaz

In *United States v. Diaz*, the Fifth Circuit upheld the conviction of Ronnie Diaz, Jr., under 922(g)(1).[209] Diaz had convictions for car theft and evading arrest, but argued there was no historical analogue supporting his permanent disarmament for such offenses.[210] The court held the

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[203] *Id.* at 230.
[204] *Id.* at 230–32.
[205] *Id.* at 228 (citing District of Columbia v. Heller, 554 U.S. 570, 636 (2008)); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 26 (2022) (guarding against judicial deference to legislative interest balancing).
[206] *See Range*, 124 F.4th at 226 (considering felons' rights under the First and Fourth Amendments).
[207] *Id.* at 228, 232.
[208] *Id.* at 226.
[209] United States v. Diaz, 116 F.4th 458 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2822 (2025).
[210] *Id.* at 462.

government satisfied its burden, but stressed its ruling was not premised on Diaz's felon classification: "[s]imply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny."[211]

Although the historical tradition for firearm regulation supported disarmament for the crimes on Diaz's record, the court only made that determination by conducting the full *Bruen* analysis.[212] The scope of the Second Amendment could not rely on Congress's definition of "felon."[213] To the extent Diaz's status as a felon animated the Second Amendment analysis, it did so in *Bruen*'s second step, not "in considering the Second Amendment's initial applicability."[214] The court declined to rely on Supreme Court dicta to categorically exempt *Diaz* from the Second Amendment.

b. Don't Swallow the Rule: Why *Williams*, *Diaz*, and *Range* Get It Right.

The text of the Second Amendment installs an individual right to keep and bear arms. The scope of the right captured by this text is illuminated by the nation's historical tradition for firearm regulation. Nothing in this analysis ought to categorically exempt the government from meeting its burden to justify any infringements on that right. Implementing threshold exemptions from the *Bruen* test maroons the historical tradition analysis in *Bruen*'s first step[215] and makes the same mistake lower courts made after *Heller*: using dicta as an end around the rule.[216]

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[211] *Id.* at 469 ("[W]e emphasize that our holding is not only premised on the fact that Diaz is a felon.").
[212] *See id.* at 466 n.2 ("We . . . believe that a full historical analysis is required.").
[213] *Id.* at 469.
[214] *Id.* at 467.
[215] *See* United States v. Price, 111 F.4th 392, 402 (4th Cir. 2024) (concluding *Bruen*'s first step is outcome-determinative for as-applied challenges to 922(g)(1)).
[216] *See* United States v. Marzzarella, 614 F.3d 85, 91 (3d Cir. 2010) (scrutinizing *Heller* and finding exceptions to the right based on the Court's syntax); *see also* Mark W. Smith, *Dangerous, but Not Unusual: Mistakes Commonly Made by Courts in Post*-Bruen *Litigation*, 22 GEO. J.L. & PUB. POL'Y 599, 618–19 (2024) (criticizing pre-*Bruen* courts for relying on *Heller*'s dicta and arguing courts post-*Rahimi* cannot rely on *Heller*'s dicta to avoid "the legal spadework required by *Heller* and *Bruen*.").

Circuit courts upholding categorical exceptions to the Second Amendment mention and occasionally even rely on some sort of historical analysis or inquiry.[217] But they flip the *Bruen* test around: rather than first asking if the challenged regulation burdens the Second Amendment and then asking the government to identify how the regulation comports with the principles underlying the Second Amendment,[218] these courts apply the historical inquiry in the *first* step. They point to historical firearm regulations to suggest modern regulations simply do not burden the defendant's Second Amendment rights. This is a misapplication of the rules from both *Heller* and *Bruen*/*Rahimi*. Casting the Second Amendment in this light requires judges to make significant assumptions about what the Court intended by "presumptively lawful"[219] and permits the government to nullify a substantial part of their burden under the *Bruen*/*Rahimi* framework.

Permitting the government to skirt past the rules based on presumptions, mis-applied precedent, and dicta sets poor precedent. It ignores *Bruen*'s directive to treat the right to bear arms on par with other enumerated rights and enables the government to lean on defendants' rights without doing the work of justification. These mechanics will have substantive effects, particularly if the Court continues to expand its text, history, and tradition originalism into other arenas, like First Amendment law.[220]

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[217] *See supra* subsections III.a.1.i; III.a.1.ii; III.a.1.iv.

[218] *See* United States v. Rahimi, 602 U.S. 680, 691–92 (2024); *cf.* United States v. Jackson, 110 F.4th 1120, 1125–29 (8th Cir. 2024) (conducting a historical analysis to determine whether the challenger was of a class that has Second Amendment rights, rather than whether the government can meet its burden to show a tradition of firearm regulations relevantly similar to 922(g)(1)).

[219] *Jackson*, 110 F.4th at 1128–29 (scrutinizing *Heller*'s dicta to assess what precisely the Court meant by *presumptively* lawful).

[220] *See* Vidal v. Elster, 602 U.S. 286, 300–01 (2024) (implementing, albeit narrowly, history and tradition in the First Amendment context for trademark issues); *see also* Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After* Bruen, 18 DUKE J. CONST. L. & PUB. POL'Y 59 (2023) (considering how text, history, and tradition inquiries would work in First Amendment cases and the drawbacks therein); Barnett & Solum, *supra* note 79, at 472 (considering the influence of history and tradition in *Kennedy v. Bremerton Sch. Dist.*).

It is plausible that such litigation will slow the government's ability to convict under 922(g)(1).[221] But it can hardly be said that the Supreme Court instituted the *Bruen* test because they believed it best served judicial or prosecutorial economy, or that such interests should overcome lower courts' responsibilities to faithfully apply the Court's framework.[222]

Although many of the felons who might challenge the constitutionality of 922(g)(1) would lose because of some "relevantly similar" regulatory analogue[223] courts should not presume away the government's burden to prove their authority to burden an enumerated right.[224] Contrary to the Eighth Circuit panel's conclusion, if the government is unable to justify its infringement on the Second Amendment in each defendant's case, then courts ought to conduct "felony-by-felony litigation[.]"[225] There is no basis for transforming the "presumptively constitutional to always constitutional."[226]

IV. Conclusion

Permitting as-applied challenges to 922(g)(1) is not due to any "special affection[s] for felons[.]"[227] Rather, it takes the text of the Second Amendment and the Supreme Court decisions interpreting that text at their word. If the government bears the burden of proving their actions

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[221] *Jackson*, 110 F.4th at 1125 n.2 (noting that a rule requiring case-by-case analysis to assess whether a felony is sufficiently violent "would substantially invalidate the provision enacted by Congress.").
[222] *See* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 76–78 (Alito, J., concurring) (arguing the dissent places too much priority on pragmatism and too little priority on protecting the right codified in the Second Amendment).
[223] *Id.* at 29 (majority opinion); *see* United States v. Diaz, 116 F.4th 458, 467–70 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2822 (2025) (upholding Diaz's conviction under § 922(g)(1) because the government presented relevantly similar historical analogues demonstrating a tradition of disarming persons with convictions similar to Diaz's predicate felony convictions); *see also Rahimi*, 602 U.S. at 692, 698 (upholding 18 U.S.C. § 922(g)(8) because it is relevantly similar to common law surety and going armed regulations).
[224] *Diaz*, 116 F.4th at 469 ("Simply classifying a crime as a felony does not meet the level of historical rigor required by *Bruen* and its progeny").
[225] *Jackson*, 110 F.4th at 1125.
[226] United States v. Jackson, 121 F.4th 656, 658 (8th Cir. 2024) (Stras, J., dissental).
[227] *Id.* at 656.

comport with the principles underlying the Second Amendment, then courts should require the government to meet that burden.

What *Rahimi* demonstrates, in part, is that the *Bruen* test can work at the proper level of abstraction. Just like the *Heller* court promised, the right to keep and bear arms is not unlimited. Those limits, however, are found in the nation's historical tradition for firearm regulation. *Bruen* leaves no space for categorical exemptions based on a judge's assessment of pre-*Bruen* dicta.[228]

The method preferred by a plurality of circuits[229] descends from the pre-*Bruen* two step analysis, where courts first assessed the historical and traditional reasons why a regulation categorically does not burden conduct under the Second Amendment before applying intermediate or strict scrutiny. But this inquiry can, at most, only present a *presumption* that a defendant burdened by the regulation is not covered by the Second Amendment.[230] It cannot foreclose a defendant from challenging the regulation and demonstrating that, as applied to him, the government cannot meet its burden under the *Bruen*/*Rahimi* test. Otherwise, the as-applied challenge, which is the Supreme Court's preferred vehicle for constitutional challenges,[231] collapses under the weight of categorical exemptions to the Second Amendment.

The way the plurality of circuits read and apply *Bruen*/*Rahimi* in 922(g)(1) challenges raises red flags because it is similar to how post-*Heller* lower courts emphasized the wrong aspects of the Court's ruling to create a test that the Court soundly rejected fourteen years later.[232] In light

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[228] *See Diaz*, 116 F.4th at 469.
[229] See *supra* subsection III.a.1 *et seq*.
[230] *Jackson*, 121 F.4th at 658.
[231] *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored."); *see also* United States v. Rahimi, 602 U.S. 680, 713 (2024) (Gorsuch, J., concurring) ("Our resolution of Mr. Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in 'particular circumstances.'").
[232] New York State Pistol & Rifle Ass'n, Inc. v. Bruen, 597 U.S. 1, 23–24 (2022); *Rahimi*, 602 U.S. at 712 (Gorsuch, J., concurring).

of this, courts should be wary of relying so heavily on *Heller*'s dicta as a way to avoid conducting the *Bruen* test.[233] Instead, let historical tradition do the analytical work where it belongs: in step two of the *Bruen* framework, not as a threshold exemption to an enumerated right.

[233] *Jackson*, 121 F.4th at 658 (Stras, J., dissental) ("Clinging to a recycled line from *District of Columbia v. Heller* is no excuse . . . For one thing, this line is dictum because it tells us what *Heller* did not do rather than what it did. For another, it is just a presumption") (internal citations omitted).