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18 U.S.C. § 922(g)(1) Under Attack: The Case for As-Applied Challenges to the Felon-in-Possession Ban

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18 U.S.C. § 922(G)(1) UNDER ATTACK: THE CASE
FOR AS-APPLIED CHALLENGES TO THE
FELON-IN-POSSESSION BAN

*Kari Lorentson**

INTRODUCTION

In 2008, the landmark decision announced in *District of Columbia v. Heller* established that the Second Amendment protects the individual right of “law-abiding . . . citizens to use arms in defense of hearth and home.”¹ One decade has now passed since *Heller* was decided, but the Supreme Court has remained largely silent about the scope and applicability of the Second Amendment.² Lower courts, as a result, have been left to grapple with the silence. Courts of appeals have formulated frameworks to apply in cases involving constitutional challenges to firearm regulations. This Note will evaluate a current split in the federal courts of appeals—a divide about whether courts should entertain as-applied challenges to the felon-in-possession ban codified in 18 U.S.C. § 922(g)(1). This Note will examine most closely a recent decision from the Third Circuit, *Binderup v. Attorney General*,³ and contemplate the court’s analysis as a potential framework to apply going forward.

Part I of this Note outlines the relevant statutory scheme governing the felon-in-possession ban, along with its applicable exceptions. Part II surveys landmark Supreme Court precedent related to the Second Amendment—namely, *District of Columbia v. Heller* and *McDonald v. City of Chicago*. In Part

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

2 Of the nine Justices on the Court, Justice Thomas has most forcefully denounced the Court’s failure to resolve legal questions related to the Second Amendment. In a recent denial of a petition for a writ of certiorari, Justice Thomas, in dissent, lamented: “We have not heard argument in a Second Amendment case for nearly eight years. And we have not clarified the standard for assessing Second Amendment claims for almost 10 [years].” *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) (citing *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting from denial of certiorari)).

3 836 F.3d 336 (3d Cir. 2016).

III, this Note conducts an overview of the current circuit split percolating in the courts of appeals. Part IV presents a rationale and justification for permitting judicial review of as-applied challenges to § 922(g)(1). Finally, Part V provides a critique of the *Binderup* analysis and puts forth an alternative standard to analyze similar cases.

I. THE STATUTORY SCHEME OF FEDERAL FIREARM REGULATIONS

A. Statutory Scheme

Federal firearm regulations were not commonplace until the beginning of the twentieth century.⁴ With the advent of the reform-oriented Progressive Era, crime was perceived “both as a major problem and as a national one.”⁵ In 1927, the first federal statute to regulate firearms outlawed the shipment of concealable firearms by way of the United States Postal Service.⁶ Then in the 1930s, congressional action initiated a wave of new legislation, including the National Firearms Act of 1934⁷ and the Federal Firearms Act of 1938.⁸ The National Firearms Act dealt largely with licensing and taxation regulations.⁹ The Federal Firearms Act of 1938 extended that regulatory scheme: in addition to expanding the scope of licensing provisions for dealers and manufacturers operating in interstate commerce, the 1938 Act, for the first time, criminalized the possession of firearms (that had been shipped in interstate commerce) by individuals who had been convicted of “crime[s] of violence.”¹⁰ And thus began the federal firearms ban against individuals who had “violen[t]” criminal histories¹¹—a statutory scheme that continues on robustly today.

Congress enacted a second wave of gun control regulation in the 1960s, in part, as a response to the assassinations of President John F. Kennedy, Robert Kennedy, and Martin Luther King Jr.¹² Just over two months after King was fatally shot, President Johnson signed the Omnibus Crime Control

4 David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 589–90 (1987).

5 *Id.* at 590.

6 *Id.* at 589–90 (citing 18 U.S.C. § 1715 (1982)).

7 National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934); *see also History of Gun-Control Legislation*, WASH. POST (Dec. 22, 2012), https://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3-11e2-9a42-d1ce6d0ed278_story.html?utm_term=.eb1c4d2a05ad (“Spurred by the bloody ‘Tommy gun’ era ushered in by Al Capone, John Dillinger, Baby Face Nelson, Pretty Boy Floyd, and Bonnie and Clyde . . . Roosevelt mount[ed] a ‘New Deal for Crime.’”).

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

9 *See generally* 48 Stat. 1236.

10 § 2, 52 Stat. at 1251.

11 *Id.*

12 *See Hardy, supra* note 4, at 601–02; *see also History of Gun-Control Legislation, supra* note 7.

and Safe Streets Act of 1968 into law.¹³ The Act's congressional findings note that the "ease with which [criminals] can acquire firearms . . . is a significant factor in the prevalence of lawlessness and violent crime in the United States."¹⁴ The Act made it "unlawful for any person who is under indictment or who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from shipping, transporting, or receiving any firearm or ammunition that has been shipped via interstate or foreign commerce.¹⁵

The felon-in-possession ban remains part of the U.S. Code today. As presently codified, 18 U.S.C. § 922(g)(1) makes it "unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to *possess* a firearm that has "been shipped or transported in interstate or foreign commerce."¹⁶

B. *Exceptions to the Federal Firearms Ban*

Section 922(g)(1) does not exist without exceptions. These exemptions can be divided into three categories: (1) type of firearm, (2) type of offense, and (3) type of offender.

The first exception—type of firearm—is a narrow one. For purposes of the ban, antique firearms are not considered "firearms" within the meaning of the Act.¹⁷ In other words, individuals who would otherwise be banned from possessing a firearm may possess antique firearms, so long as the gun was manufactured in or before 1898, or serves as a replica thereof.¹⁸

The second type of exception exempts certain offenses from triggering the firearm ban. Section 922(g)(1) does not apply to "offenses relating to the regulation of business practices" like "antitrust violations" and "unfair trade practices."¹⁹ Additionally, misdemeanor state offenses punishable by a term of imprisonment of two years or less do not implicate the § 922(g)(1) ban on firearm possession.²⁰ Taken together, the felon-in-possession ban

13 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197.

14 § 901, 82 Stat. at 225.

15 § 922(e)–(f), 82 Stat. at 230–31. Commonplace in the United States is a distinction between two categories of crimes: misdemeanors and felonies—felonies being those with the possibility of punishment by death or imprisonment exceeding one year. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.6(a) (2d ed. 2003).

16 18 U.S.C. § 922(g)(1), (9) (2012). Misdemeanor convictions for crimes of domestic violence, notwithstanding the potential sentence length, are also covered under the ban. *Id.* § 922(g)(9). Additionally, any state misdemeanor offense (notwithstanding whether it is related to domestic violence) with a potential sentence of two years or more activates the firearm prohibition for the convicted individual. *Id.* § 921(a)(20)(B).

17 *Id.* § 921(a)(3), (16).

18 *Id.*

19 *Id.* § 921(a)(20)(A).

20 *Id.* § 921(a)(20)(B). However, § 922(g)(9) maintains that the ban still applies to those who have been "convicted in any court of a misdemeanor crime of domestic violence" regardless of the potential sentence to be imposed. *Id.* § 922(g)(9).

applies to individuals convicted of: (1) any (state or federal) felony punishable by a term exceeding one year *or* (2) any misdemeanor punishable by a term exceeding two years.

Finally, the third type of exception relates to the offender. Section 921(a)(20) provides that individuals who have a qualifying conviction are excluded from the ban if: (1) they were pardoned, (2) their civil rights were restored, or (3) their conviction was expunged.²¹ This exception, however, does not apply where the “pardon, expungement, or restoration of civil rights expressly provides that the person may not . . . possess . . . firearms.”²² The statutory scheme also leaves open the possibility for *any* disabled individual to seek administrative relief. The discretionary exception in 18 U.S.C. § 925 authorizes the Attorney General to grant firearm-disability relief.²³

C. *Administrative Relief from Federal Firearm Disability*

Pursuant to the statutory scheme thus far discussed in Part I, Congress expressly codified an administrative route for seeking firearm-disability relief.²⁴ In particular, § 925(c) provides that where a person is prohibited from possessing a firearm because of § 922(g) restrictions, that person may seek relief from the Attorney General.²⁵ The Attorney General subsequently transferred that authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).²⁶ When considering whether to grant relief, Congress outlined various factors to evaluate. These factors include (1) the “applicant’s record and reputation,” (2) whether the applicant is “likely to act in a manner dangerous to public safety,” and (3) whether providing relief to an applicant would be “contrary to the public interest.”²⁷

21 *See id.* § 921(a)(20).

22 *Id.* The Supreme Court held that for the purposes of the civil rights restoration exception, this does not cover offenders whose civil rights were never stripped in the first place—i.e., if a defendant never lost his civil rights, those rights cannot be “restored,” and the ban would still apply. *See Logan v. United States*, 552 U.S. 23, 26–27 (2007). Civil rights, although not defined in § 921(a)(20), include the right to (1) vote, (2) hold public office, and (3) serve on a jury. *Id.* at 28 (citing *Caron v. United States*, 524 U.S. 308, 316 (1998)).

23 18 U.S.C. § 925(c).

24 *See id.*

25 *Id.* (“A person who is prohibited from possessing . . . firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to . . . possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant’s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.”).

26 27 C.F.R. § 178.144 (1996).

27 18 U.S.C. § 925(c). A 2014 draft of ATF’s Application for Restoration of Firearms Privileges consists of a four-page application requiring the applicant to provide a host of information. *Application for Restoration of Firearms Privileges, ATF Form 3210.1*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 2014), <https://www.atf.gov/file/115766/download>. The relevant form requires the applicant to provide information on

Section 925(c) further provides individuals the opportunity to file a petition for review in a federal district court if administrative relief is denied.²⁸ District courts, at their discretion, may “admit additional evidence where failure to do so would result in a miscarriage of justice.”²⁹

Congress, however, has blockaded this route to relief for more than a quarter of a century. Since 1992, the disability-relief provision in § 925(c) has been “rendered inoperative”³⁰ by Congress’s refusal to appropriate funds for the ATF to “investigate or act upon [relief] applications.”³¹ A Senate Committee Report advanced two reasons justifying cutting off appropriations: first, members of Congress feared the potential harmful consequences of restoring gun rights to violent individuals, and second, the laborious task of conducting the investigations consumed “approximately 40 man-years” each year.³²

The § 925(c) appropriations ban continues to this day.³³ The ATF’s website notifies visitors that individuals “convicted of Federal offenses [and seeking relief] must apply for a Presidential Pardon” through the Depart-

topics including, but not limited to: (1) identification verification, (2) residency, (3) employment history, (4) arrest and conviction records, (5) parole and probation officer contact information, (6) character references, and (7) a variety of yes/no questions related to other restrictions in § 922(g). *Id.* Due to an appropriations ban for this program, the ATF website currently advises visitors with federal convictions to “apply for a Presidential Pardon via . . . the Department of Justice.” *ATF Form F 3210.1—No Longer Available*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/firearms/docs/form/application-restoration-firearms-privileges-atf-form-32101/download> (last visited Feb. 20, 2018).

28 18 U.S.C. § 925(c).

29 *Id.* Presumably, additional evidence requested by the court could either be aggravating information in opposition to lifting the disability, or evidence in support of the applicant’s upstanding character.

30 *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007).

31 *Id.* (quoting *United States v. Bean*, 537 U.S. 71, 74–75 (2002)).

32 S. REP. NO. 102-353, at 19–20 (1992). The corresponding House Committee Report noted similar concerns. In particular, the House Committee “believe[d] that the \$3.75 million and 40 man-years annually spent investigating and acting upon these applications for relief would be better utilized by [the] ATF in fighting violent crime.” H.R. REP. NO. 102-618, at 14 (1992).

33 WILLIAM J. KROUSE, CONG. RESEARCH SERV., R44189, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (ATF): FY2016 APPROPRIATIONS 15 (2015). When the ATF’s relief program was in effect, the Agency from 1968 to 1982 processed 22,969 applications—and of those applications, 7581 individuals’ firearms rights were restored. *Id.* Interestingly, Congress has continued to provide appropriations to accommodate administrative relief for corporations convicted of qualifying crimes. *See Granting of Relief; Federal Firearms Privileges*, 82 Fed. Reg. 39,134 (Aug. 17, 2017) (granting firearm relief to Action Manufacturing Company). “[S]ince 1993 Congress has authorized ATF to expend appropriated funds to investigate and act upon applications filed by corporations for relief from Federal firearms disabilities.” *Id.*

ment of Justice.³⁴ In light of this administrative impasse, individuals have understandably turned to the courts for relief.³⁵

II. THE SECOND AMENDMENT AND SUPREME COURT JURISPRUDENCE: ESTABLISHING AN INDIVIDUAL RIGHT

Congress constructed the regulatory scheme discussed in Part I decades before the Supreme Court decided its landmark Second Amendment cases. Not until 2008 did the Supreme Court settle the following question: Does the Second Amendment provide a constitutional protection for the individual unconnected with service in the militia? In *District of Columbia v. Heller*,³⁶ the Supreme Court's 5–4 majority opinion answered that question in the affirmative. Although *Heller*, and subsequently, *McDonald v. City of Chicago*, helped to define the scope of the Second Amendment, language in both decisions has sparked questions relating to the constitutionality of the federal firearm regulatory regime.

A. *Establishing an Individual Right: District of Columbia v. Heller*

Heller involved a challenge to a District of Columbia statutory scheme that “generally prohibit[ed] the possession of handguns” by making it a crime to carry unregistered firearms, while also prohibiting the registration of handguns.³⁷ Dick Heller was a D.C. special police officer who challenged the firearm prohibition after the District of Columbia refused to grant him a registration certificate to keep a handgun at home.³⁸ At issue in the case was whether the Second Amendment afforded an individual right, or if the text of the amendment applied “only . . . in connection with militia service.”³⁹ Justice Scalia, writing for the majority, held that the “Second Amendment confer[s] an *individual* right to keep and bear arms”⁴⁰ unconnected to militia service.⁴¹ “[A]t the core of the Second Amendment is ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’”⁴²

That constitutional guarantee, though, ought not to be construed as an unlimited liberty: “[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation.”⁴³ What, though, were the parameters the Court had in mind? Justice Scalia surveyed the potential limits to the Second Amendment. Appealing to the historical practices that permitted firearms regulations, Scalia wrote: “From Blackstone

34 ATF Form F 3210.1—No Longer Available, *supra* note 27.

35 See *infra* Part III.

36 554 U.S. 570 (2008).

37 *Id.* at 574–75.

38 *Id.* at 575.

39 *Id.* at 577.

40 *Id.* at 595 (emphasis added).

41 *Id.* at 610 (citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820)).

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

43 *Heller*, 554 U.S. at 595.

through the 19th-century cases,” the right to keep and bear arms had not been construed so broadly as to apply to any manner and any purpose.⁴⁴ Most relevant to this Note is Scalia’s next assurance:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the *possession of firearms by felons* and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁴⁵

Because *Heller* addressed a Second Amendment challenge in the context of District of Columbia’s statutory code, the question remaining after *Heller* was how its holding affected the states.

B. *A Case of Incorporation: McDonald v. City of Chicago*

Just two years after *Heller*, the Supreme Court heard another Second Amendment challenge to a firearms regulation scheme—not unlike that which was presented in *Heller*. *McDonald v. City of Chicago*⁴⁶ involved a challenge to firearms regulations in Chicago and the nearby municipality of Oak Park, Illinois.⁴⁷ This time, the question before the Court was whether the Second Amendment should be incorporated to the states through the Fourteenth Amendment.⁴⁸ In another 5–4 divided decision, the slim majority incorporated the Second Amendment and struck down the regulations.⁴⁹ Justice Alito, writing the opinion for the Court, held that the “Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”⁵⁰ Post-*McDonald*, the Second Amendment’s protection of the individual right to keep and bear arms applies equally to both federal and state action.

Like in *Heller*, the *McDonald* majority cast no doubt on the legality of longstanding regulations for gun control, and “repeat[ed] those assurances” in its opinion.⁵¹ The *McDonald* Court included language confirming that regulations keeping felons from firearm possession were presumptively constitutional, noting that “incorporation [of the Second Amendment did] not imperil every law regulating firearms.”⁵²

Neither *Heller* nor *McDonald* seems to seriously question the constitutionality of the felon-in-possession ban—largely because of Justice Scalia’s dicta assuring that such a prohibition was presumptively lawful.⁵³ Neverthe-

44 *Id.* at 626.

45 *Id.* at 626–27 (emphasis added).

46 561 U.S. 742 (2010).

47 *Id.* at 750.

48 *Id.*

49 *Id.*

50 *Id.* at 791.

51 *Id.* at 786; see *supra* note 45 and accompanying text.

52 *Id.* at 786.

53 See *supra* notes 43–45 and accompanying text.

less, litigants have challenged the constitutionality of 18 U.S.C. § 922(g)(1). At the federal appellate level, nearly every circuit has rejected a facial challenge to the constitutionality of § 922(g)(1).⁵⁴ What is less certain, however, is how courts should address as-applied attacks on § 922(g)(1).

Courts of appeals continue to grapple with the interplay between federal firearms regulations and the individual right declared in *Heller*. This Note by no means intends to survey all the various developments of Second Amendment jurisprudence in our post-*Heller* state. Rather, Part III of this Note will explore, specifically, a current circuit split: whether individuals barred from firearm possession pursuant to 18 U.S.C. § 922(g)(1) may successfully challenge their disability to firearm possession on an *as-applied* basis.

III. CIRCUIT SPLIT: A DIVIDE IN COURTS' APPROACHES TO AS-APPLIED CHALLENGES

Although *Heller* and *McDonald* made clear that the Second Amendment protects an individual right, the scope of the protection percolates as an unresolved legal issue in the lower courts. As mentioned above, there is no serious doubt that the felon-in-possession ban, on its face, is constitutionally valid,⁵⁵ but circuit courts remain unreconciled as to whether individuals can successfully challenge this prohibition on an as-applied basis. This Part will survey the appellate courts' decisions and examine the arguments proffered for, and against, entertaining as-applied challenges to § 922(g)(1). In particular, this Note will give considerable attention to a recent Third Circuit decision, *Binderup v. Attorney General*, the first case of its kind to restore firearm privileges through the use of a § 922(g)(1) as-applied challenge.⁵⁶

54 In *United States v. Bogle*, the per curiam decision rejected a facial challenge to § 922(g)(1), noting that its opinion would "join every other circuit to consider the issue in affirming that § 922(g)(1) is a constitutional restriction." 717 F.3d 281, 281–82 (2d Cir. 2013) (per curiam); see also *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013); *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012); *United States v. Joos*, 638 F.3d 581 (8th Cir. 2011); *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Carey*, 602 F.3d 738 (6th Cir. 2010); *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009). The unanimity of the circuit court decisions lends formidable support to the argument that the felon-in-possession ban, on its face, poses no serious affront to the Second Amendment.

55 See *supra* note 54 and accompanying text.

56 *Binderup v. Att'y Gen.*, 836 F.3d 336 (3d Cir. 2016), cert. denied sub nom. *Sessions v. Binderup*, 137 S. Ct. 2323 (2017); see also Eugene Volokh, *Can Some People Who Have Finished Their Felony Sentences Recover Their Second Amendment Rights?*, WASH. POST: VOLOKH CONSPIRACY (Sept. 7, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/07/can-some-people-who-have-finished-their-felony-sentences-recover-their-second-amendment-rights/?utm_term=.c9a1e8ea1b3d.

A. Circuit Courts Refusing to Entertain § 922(g)(1) As-Applied Challenges

Not all circuit courts have offered a warm welcome to the possibility of striking down the felon-in-possession ban on an as-applied basis. As highlighted in a note on this topic, multiple circuits have seemingly issued “[p]remature foreclosure[s]”⁵⁷ to the feasibility of these challenges, either expressly or impliedly.⁵⁸ More specifically, five circuit courts have held that § 922(g)(1) passes constitutional muster in *all* circumstances, regardless of the crime committed or circumstances involved.⁵⁹

1. Fourth Circuit: *Hamilton v. Pallozzi*

Of the five circuits rejecting as-applied challenges to the felon-in-possession ban, the Fourth Circuit’s decision⁶⁰ is most recent. Appellant Hamilton was a convicted felon who had pleaded guilty to three Virginia felonies: credit card theft, credit card forgery, and credit card fraud.⁶¹ Although the Fourth Circuit had previously left open the door for the possibility of as-applied challenges for felon disarmament statutes,⁶² the *Hamilton* court closed that opportunity in its totality for any challenge predicated on a felony conviction.⁶³ Judge Floyd, who wrote the opinion for the three-judge panel, held: “[W]e simply hold that conviction of a felony necessarily removes one from the class of ‘law-abiding, responsible citizens’ for the purposes of the Second Amendment,”⁶⁴ thereby removing the potential for *any* felon to restore his firearm right via litigation.

2. Fifth Circuit: *United States v. Scroggins*

In *United States v. Scroggins*, Scroggins argued that § 922(g)(1) violated his Second Amendment rights under *Heller* because his predicate criminal

57 Alexander C. Barrett, Note, *Taking Aim at Felony Possession*, 93 B.U. L. REV. 163, 183–85 (2013).

58 See *id.* at 183.

59 *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 500 (2017) (mem.); *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010); *Rozier*, 598 F.3d at 772; *Vongxay*, 594 F.3d at 1118; *McCane*, 573 F.3d at 1047; see also THOMAS M. KECK, JUDICIAL POLITICS IN POLARIZED TIMES 91 (2014).

60 *Hamilton*, 848 F.3d 614.

61 *Id.* at 618.

62 *Id.* at 622–23.

63 *Id.* at 626.

64 *Id.* Nevertheless, the language in *Hamilton*, perhaps, does not go so far as to hold that misdemeanants with a sentencing possibility of two years or more would also be precluded from as-applied challenges. The language of the holding applies specifically to “state law felon[s].” *Id.* at 629. Not surprisingly, gun-rights activist groups took issue with the outcome in *Hamilton*. See, e.g., *A Fourth Circuit Trifecta: New Rulings Confirm Need for Judges Who Respect Second Amendment*, NRA-ILA (Feb. 24, 2017), <https://www.nraila.org/articles/20170224/a-fourth-circuit-trifecta-new-rulings-confirm-need-for-judges-who-respect-second-amendment>.

conviction showed no violent intent.⁶⁵ In rejecting this claim, Judge Elrod, like Judge Floyd in the Fourth Circuit, held that “criminal prohibitions on felons (violent or nonviolent) possessing firearms [do] not violate” the Second Amendment.⁶⁶ This holding thereby precludes felons, even nonviolent ones, from having their firearms privileges restored in the Fifth Circuit.

3. Ninth Circuit: *United States v. Vongxay*

In the Ninth Circuit, the court in *United States v. Vongxay* rejected the defendant’s claim that § 922(g)(1), as applicable to him, violated his Second Amendment right.⁶⁷ Vongxay’s criminal history involved three nonviolent convictions: two car burglary convictions and one drug possession violation.⁶⁸ *Vongxay* appears to leave no room open for as-applied challenges for people like the defendant: “[F]elons are categorically different from the individuals who have a fundamental right to bear arms.”⁶⁹

4. Tenth Circuit: *United States v. McCane*

United States v. McCane involved an appeal by a defendant convicted of unlawfully possessing a firearm because of his felon status.⁷⁰ In *McCane*, the majority quickly disposed of the § 922(g)(1) challenge by citing the proposition in *Heller* that states “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.”⁷¹ Legal commentary has critiqued the *McCane* analysis as making a “short work” out of a conceivable constitutional inquiry.⁷²

5. Eleventh Circuit: *United States v. Rozier*

Lastly, *United States v. Rozier*⁷³ most explicitly rejects § 922(g)(1) as-applied challenges by felons. In *Rozier*, the defendant had multiple federal narcotics convictions on his record, and on direct appeal for his conviction for possessing a firearm, he challenged the constitutionality of the felon-in-possession ban.⁷⁴ In affirming the district court’s decision, the three-judge

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

66 *Id.*

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

68 *Id.* at 1114.

69 *Id.* at 1115. Professor William Merkel considers this decision to result from an application of the rational basis test for the Second Amendment. See William G. Merkel, *Uncoupling the Constitutional Right to Self-Defense from the Second Amendment: Insights from the Law of War*, 45 CONN. L. REV. 1809, 1820 n.33 (2013).

70 *United States v. McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009).

71 *Id.* at 1047 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

72 Stephen C. Mouritsen, Note, *United States v. McCane: Judge Tymkovich Questions Heller’s Disarming Dicta*, 2010 BYU L. REV. 183, 191 (noting that “[t]he court likewise made short work of *McCane*’s invitation to call into question the validity of 18 U.S.C. § 922(g)(1)” and “merely responded by recapitulating the *Heller* dictum”).

73 598 F.3d 768 (11th Cir. 2010).

74 *Id.* at 769–70.

panel proffered decisive language suggesting that no felon could *ever* overcome the statutory prohibition of firearm possession: the language in *Heller* “suggests that statutes disqualifying felons from possessing a firearm under *any and all circumstances* do not offend the Second Amendment.”⁷⁵

B. Circuit Courts Considering § 922(g)(1) As-Applied Challenges

Not all courts of appeals have so adamantly foreclosed the opportunity for felons to challenge their firearm-possession disability. Indeed, in more recent years, several circuits have asserted the proposition that, in some cases, as-applied challenges to § 922(g)(1) might comport with Second Amendment liberties. This Section provides an overview of these circuit courts’ approaches.

1. The D.C. Circuit: *Schrader v. Holder*

The D.C. Circuit in *Schrader v. Holder*⁷⁶ left open the possibility for successful as-applied challenges in future cases. Judge Tatel wrote for the three-judge panel including himself, Judge Williams, and Judge Randolph.⁷⁷ *Schrader* had been convicted of Maryland common-law misdemeanors of assault and battery in 1968.⁷⁸ On appeal, *Schrader* challenged the constitutionality of § 922(g)(1)’s application against the *class* of common-law misdemeanants.⁷⁹ The court applied an intermediate-scrutiny review of the firearm ban, but ultimately upheld § 922(g)(1) on its face.⁸⁰

Judge Tatel, however, took notice that sprinkled throughout *Schrader*’s brief appeared to be an argument that the felon-in-possession ban, as applied to *Schrader* individually, would fail constitutional muster.⁸¹ Ultimately, the three-judge panel refused to rule on this argument because it was not brought before the district court, but nevertheless, Judge Tatel’s dictum indicates that the D.C. Circuit might be willing, in future cases, to entertain as-applied challenges:

Were this argument properly before us, *Heller* might well dictate [another] outcome. According to the complaint’s allegations, *Schrader*’s offense occurred over forty years ago and involved only a fistfight. *Schrader* received no jail time, served honorably in Vietnam, and, except for a single traffic violation, has had no encounter with the law since then. To the extent that these allegations are true, we would hesitate to find *Schrader* outside the class of “law-abiding, responsible citizens” whose possession of firearms is, under *Heller*, protected by the Second Amendment.⁸²

75 *Id.* at 771 (emphasis added).

76 704 F.3d 980 (D.C. Cir. 2013).

77 *Id.* at 982.

78 *Id.* at 983.

79 *Id.* at 983–84.

80 *Id.* at 988–91.

81 *Id.* at 991.

82 *Id.* at 991 (citations omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

Judge Tatel's dicta alludes to several relevant factors to consider for individual as-applied challenges: (1) time between the offense and the challenge, (2) severity of offense, (3) sentence imposed, (4) recidivism, and (5) military service, or more broadly construed, evidence of civic engagement.⁸³ Although this issue was not decided by the court, Judge Tatel seems to suggest that, taken in the totality, these factors would be relevant when determining whether an individual could successfully challenge § 922(g)(1).

2. The Seventh Circuit: Potential for Nonviolent Felons

The Seventh Circuit has also acknowledged the possibility for felons to successfully challenge the felon-in-possession ban on an individual basis.⁸⁴ In *United States v. Williams*, Judge Kanne put forward a framework to analyze as-applied challenges by adopting the intermediate-scrutiny standard of review.⁸⁵ In *Williams*, the underlying facts of the case involved a robbery conviction resulting from a crime so violent that it required the victim to receive sixty-five stitches.⁸⁶ Because of the crime's violent nature, the court rejected Williams's as-applied challenge.⁸⁷ However, the court left open the possibility of success for future plaintiffs, noting that "§ 922(g)(1) may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent."⁸⁸

Litigants have taken note of the *Williams* decision. Most recently in the U.S. District Court for the Southern District of Illinois, a judge granted summary judgment in favor of a plaintiff's as-applied challenge to § 922(g)(1).⁸⁹ Mr. Hatfield was convicted twenty-eight years ago for lying on forms he submitted pursuant to the Railroad Unemployment Insurance Act. He received no jail time for the offense and in the meantime has maintained a spotless record.⁹⁰ The court in *Hatfield v. Sessions* applied a two-part test to resolve the case. First, the court concluded that people like Hatfield—felons convicted of nonviolent offenses—are not "categorically unprotected by the Second Amendment."⁹¹ Second, the court applied a level of scrutiny somewhere between strict and intermediate scrutiny. In doing so, the court concluded that the government lacked an "extremely strong" interest in prohibiting gun ownership from the class of "non-violent felons who received no prison time and a small monetary fine."⁹² Professor Eugene Volokh commented at an earlier stage in this litigation that if this case is appealed to the

83 See *id.*

84 See *Baer v. Lynch*, 636 F. App'x 695, 697 (7th Cir. 2016); *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010).

85 *Williams*, 616 F.3d at 692–93.

86 *Id.* at 693.

87 *Id.*

88 *Id.*

89 *Hatfield v. Sessions*, No. 16-cv-00383, 2018 WL 1963876 (S.D. Ill. Apr. 26, 2018).

90 *Id.* at *1.

91 *Id.* at *3–5.

92 *Id.* at *5–7.

Seventh Circuit, it will give the court a “chance to squarely opine on the issue,”⁹³ since the court has not taken on a case with a past conviction like this before.

3. Success in the Third Circuit: *Binderup v. Attorney General*

*Binderup v. Attorney General*⁹⁴ is a recent appellate decision on an as-applied challenge of § 922(g)(1)—and is, perhaps, the most significant case thus far because of its outcome. *Binderup* involved two individuals who challenged § 922(g)(1) on an as-applied basis.⁹⁵ The first challenger, Daniel Binderup, pled guilty in 1998 in a Pennsylvania state court to the offense of corrupting a minor after having a consensual sexual relationship with a seventeen-year-old.⁹⁶ Corrupting a minor was a misdemeanor offense in Pennsylvania that carried the possibility of five-years imprisonment.⁹⁷ Binderup, however, received no jail time—he was sentenced to three years of probation and was issued a \$300 fine.⁹⁸ Since that run-in with the law, Binderup had no other criminal offenses on his record.⁹⁹

The second individual in the *Binderup* decision was Julio Suarez, who pleaded guilty in 1990 for the unlawful carrying of a handgun without a license—a misdemeanor subject to up to three years imprisonment.¹⁰⁰ (Recall that because the misdemeanor carries a potential sentence of more than two years, the felon-in-possession ban applies.) The only other blemish on Suarez’s record was a state-law misdemeanor offense for driving while under the influence of alcohol.¹⁰¹

Both men sought relief from the firearm disability in federal district court on two grounds: (1) as a matter of statutory construction § 922(g)(1) did not apply to them, and (2) the statute, as applied to them, violated the Second Amendment.¹⁰² The district court concluded that § 922(g)(1)

93 Eugene Volokh, *Second Amendment Claim of Felon with 25-Year-Old False Statements Conviction May Go Forward*, WASH. POST.: THE VOLOKH CONSPIRACY (Dec. 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/21/second-amendment-claim-of-felon-with-25-year-old-false-statements-conviction-may-go-forward/?utm_term=.a95545f56072 (noting that the Seventh Circuit “hasn’t directly resolved the question, or further defined which felons can indeed rebut the presumption.”).

94 836 F.3d 336 (3d Cir. 2016), *cert. denied sub nom.* Sessions v. Binderup, 137 S. Ct. 2323 (2017) (mem.).

95 *See id.* at 340.

96 *Id.*

97 *Id.* (citing 18 PA. CONS. STAT. §§ 6301(a)(1)(i), 1104). Although the crime was only a misdemeanor, the potential for a five-year sentence activated § 922(g)(1) through the exception in § 921(a)(20)(B).

98 *Binderup*, 836 F.3d at 340.

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

applied as a matter of statutory construction, but that it nevertheless was unconstitutional as applied to both *Binderup* and *Suarez*.¹⁰³

Consistent with the district court, the Third Circuit en banc decision rejected the statutory interpretation argument¹⁰⁴ and focused on the as-applied constitutional challenge. Drawing from its own precedent, the *Binderup* Court presented a two-step framework for as-applied challenges to presumptively lawful firearms regulations.¹⁰⁵ First, the challenger must prove that the firearm regulation burdened his Second Amendment right. To do this, the challenger must (a) “identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member”¹⁰⁶ and (b) present facts that distinguish the challenger from the class of barred individuals—i.e., prove the crime was not “serious.”¹⁰⁷ If the challenger overcomes the first part of the test, the court moves to consider whether the felon-in-possession ban survives heightened scrutiny on an as-applied basis.¹⁰⁸

Part one of the test was satisfied, the court held, because of the *Heller* pronouncement that “longstanding prohibitions on the possession of firearms by felons” are “presumptively lawful.”¹⁰⁹ The traditional concept of a “felon” is codified in § 922(g)(1) through its ban on anyone committing an offense, either state or federal, that is subject to greater than two years of imprisonment. Such was the case for both *Binderup* and *Suarez*—thus both men were subject to a presumptively lawful firearm ban.¹¹⁰ The court pointed to historical arguments made that individuals committing felonies—deemed a “serious crime” by the state—lack virtue, and virtue is a quality that has been (even before the founding of the republic) tied to the right to bear arms.¹¹¹

Having established that § 922(g)(1) is a presumptively lawful firearm regulation, the majority next questioned whether the challengers’ crimes were “*serious enough*” to strip away their Second Amendment rights.¹¹² Answer: no.¹¹³ The crimes were deemed not “serious enough” for four reasons: (1) the offenses were classified as misdemeanors rather than felonies, (2) the crimes lacked violence, (3) the judge imposed a minor sentence, and

103 *Id.* at 340–41.

104 *Id.* at 341–42.

105 *Id.* at 345–47.

106 *Id.* at 347.

107 *Id.*

108 *Id.* at 353.

109 *Id.* at 347 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008)).

110 *Id.* at 348.

111 *Id.* at 348–49. The stripping of the right to bear arms is not unlike other civil rights taken from individuals convicted of crimes. For example, voting rights are often stripped from individuals who have committed felonies. See James A. Stout, Note, *Civil Consequences of Conviction for a Felony*, 12 *DRAKE L. REV.* 141 (1963) (surveying various civil rights the state strips upon conviction of a felony both by state and federal law).

112 *Binderup*, 836 F.3d at 351 (emphasis added).

113 *Id.*

(4) there was no cross-jurisdictional consensus about the seriousness of the offense.¹¹⁴

In conclusion, the *Binderup* court, in applying intermediate scrutiny, determined that the government failed to provide any “meaningful evidence” to justify its prediction that Binderup and Suarez were likely to misuse firearms or be irresponsible citizens.¹¹⁵ Because the government failed to meet its burden, the court’s holding restored Binderup’s and Suarez’s Second Amendment rights.

The decision in *Binderup* is significant. Most remarkably, this is the first outcome known to restore a petitioner’s Second Amendment rights based on a §922(g)(1) challenge.

C. Solicitor General Appeals the *Binderup* Decision

The Obama administration initially sought a writ of certiorari in the *Binderup* decision, but the Trump administration continued the appeal once President Trump took office.¹¹⁶ This course of action seemed to contradict the rhetoric of the administration and its support for gun rights. For example, at a speech to the National Rifle Association, President Trump declared that “[t]he eight-year assault on your Second Amendment freedoms has come to a crashing end,” and that he would “never, ever infringe on the right of the people to keep and bear arms.”¹¹⁷ Such was not the tone in the Solicitor General’s petition to the Supreme Court. The Solicitor General’s petition for a writ of certiorari cited two main factors warranting review and reversal by the Supreme Court: (1) the threat to public safety and (2) the challenge the judicial branch faces with ad hoc assessments of whether or not to restore firearm privileges.¹¹⁸

114 *Id.* at 351–53.

115 *Id.* at 354. The Court determined that the government’s proffered evidence—i.e., statistical studies—were not on point for Binderup’s and Suarez’s circumstances; this conclusion was furthered by the fact that the offenses were twenty and twenty-six years old, suggesting that the recidivism studies may be irrelevant to the facts at hand. *Id.*

116 See Petition for Writ of Certiorari, *Sessions v. Binderup*, 137 S. Ct. 2323 (2017) (No. 16-847), 2017 WL 83637; Reply Brief for the Petitioners, *Binderup*, 137 S. Ct. 2323 (No. 16-847), 2017 WL 1353289; see also David G. Savage, *Trump Administration Asks Supreme Court to Reject 2nd Amendment Claim by Men Who Lost Gun Rights Over Nonviolent Crimes*, L.A. TIMES (May 25, 2017), <http://beta.latimes.com/politics/la-na-pol-court-guns-trump-20170525-story.html>.

117 Ali Vitali, *Trump to NRA: ‘Eight-Year Assault’ on Gun Rights Is Over*, NBC NEWS (Apr. 28, 2017), <https://www.nbcnews.com/politics/white-house/trump-nra-eight-year-assault-gun-rights-over-n752446>. Following the horrific and deadly school shooting that took place in Parkland, Florida, in February 2018, commentators suggested that President Trump is maintaining his allegiance with the NRA. See Michael D. Shear & Sheryl Gay Stolberg, *Conceding to N.R.A., Trump Abandons Brief Gun Control Promise*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/politics/trump-gun-control-nation-al-rifle-association.html> (“President Trump . . . abandoned his promise to work for gun control measures opposed by the National Rifle Association.”).

118 See Petition for Writ of Certiorari, *supra* note 114.

The Supreme Court, however, denied the petition in a 7–2 decision.¹¹⁹ Why the Court decided not to hear the case is beyond knowing; no judicial reasoning was attached to the denial of certiorari.¹²⁰ As the Court has time and again noted, however, “the denial of certiorari ‘imports no expression of opinion upon the merits of a case.’”¹²¹ To that end, the Court’s denial to review the *Binderup* decision reflects only that a sufficient number of Justices were unwilling to hear the case, for whatever reason, but does not advance an implicit acceptance or rejection by the Court of *Binderup*’s holding. This issue, then, will continue to be ventilated among the circuit courts, but the Supreme Court should grant certiorari in a future case to bring uniformity to this issue of such national importance.

One possible reason *Binderup* did not generate enough interest in the highest court relates to the criminal offense at issue in *Binderup*. Unlike most of the cases previously discussed involving violent crimes, *Binderup* involved misdemeanor offenses—not felonies. As such, the Court might have interpreted *Binderup* as not striking at the heart of the circuit split. But no doubt remains that uncertainty of application permeates the lower courts.

IV. THE CASE FOR PERMITTING AS-APPLIED CHALLENGES TO § 922(G)(1)

Part IV of this Note will examine the rationale for permitting petitioners to advance as-applied challenges through the federal court system. For reasons discussed below, this Note advocates for the continued consideration of as-applied challenges to § 922(g)(1) for convicted felons. First, Second Amendment jurisprudence, in both *Heller* and *McDonald*, suggests that the validity of firearm regulations rests only on a presumption of its lawfulness. Second, in the absence of any administrative remedy, the foreclosure of as-applied challenges leaves plaintiffs with no realistic form of redress to challenge the felon-in-possession ban.

A. *Textual Justification: Heller’s Presumption Invites a Rebuttal*

Starting with the text of *Heller* and *McDonald*, the Court’s plain language fails to assert as impenetrable any challenge to the felon-in-possession ban. The text of *Heller* states that “*presumptively* lawful regulatory measures,” including bans on firearm ownership by convicted felons and the mentally ill, should not be doubted.¹²² Presumptions, however, are not wholly insurmountable.¹²³

119 *Binderup*, 137 S. Ct. 2323. Justices Ginsburg and Sotomayor would have granted the petition for certiorari. *Id.*

120 *Id.*

121 *Brown v. Allen*, 344 U.S. 443, 456 (1953) (citing *House v. Mayo*, 324 U.S. 42, 48 (1945)).

122 *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008) (emphasis added).

123 A presumption is “[s]omething that is thought to be true because it is highly probable.” *Presumption*, BLACK’S LAW DICTIONARY (10th ed. 2014). Nevertheless, presumptions “shift[] the burden . . . to the opposing party, who can then attempt to overcome the

Taking the text on its face, albeit dicta, Justice Scalia's use of the term "presumptively" ought not to go unnoticed. Scalia—a Justice famous for his consultations with the dictionary¹²⁴—unlikely inserted the term "presumptively" without due care. By using such a term, gun regulations against classes of people like felons and the mentally ill may be constitutional on their face, but this need not assume that every scenario will pass constitutional muster. The *Hatfield* court put it well, stating that *Heller's* reference to "felon disarmament bans only as 'presumptively lawful' . . . means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge."¹²⁵

Just how strong is the presumption described by Justice Scalia? To overcome a challenge to a Second Amendment restriction, must the law pass rational basis, intermediate scrutiny, strict scrutiny, or some varying level of heightened scrutiny? *Heller* forecloses the use of rational basis review for firearms regulations.¹²⁶ Recent scholarship has debated whether intermediate or strict scrutiny applies; though no absolute consensus has emerged, courts tend to evaluate Second Amendment claims under intermediate scrutiny.¹²⁷

The "presumptively lawful" language provides a safe harbor that precludes facial invalidation of the felon-in-possession prohibition, but it leaves

presumption." *Id.*; see also *Presumptively*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/presumptively> (last visited Oct. 30, 2017) (defining presumptive as "giving grounds for reasonable opinion or belief").

124 See, e.g., William Safire, *On Language; Scalia v. Merriam-Webster*, N.Y. TIMES (Nov. 20, 1994), <http://www.nytimes.com/1994/11/20/magazine/on-language-scalia-v-merriam-webster.html> (discussing Justice Scalia's use of the dictionary in *MCI v. AT&T* to discern the meaning of "modify").

125 *Hatfield v. Lynch*, No. 16-cv-00383, 2016 WL 7373768, at *6 (S.D. Ill. Dec. 20, 2016) (citing *Heller*, 554 U.S. at 627 n.26).

126 *Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."); see also Benjamin A. Ellis, Note, "*Time Enough*" for Scrutiny: *The Second Amendment, Mental Health, and the Case for Intermediate Scrutiny*, 25 WM. & MARY BILL RTS. J. 1325, 1336 (2017) ("The [*Heller*] Court did rule out rational basis, however, which leaves intermediate scrutiny and the more demanding standard of strict scrutiny.").

127 See *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissenting from denial of certiorari); see also David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435 (2014) (arguing for the application of varying levels of scrutiny depending on the context); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013) (advocating for the adoption of the Seventh Amendment's "historical test" to be applied in Second Amendment claims); Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 824–25 (2015) (noting that in the absence of *Heller* declaring a level of scrutiny to apply, courts tend to choose between intermediate and strict scrutiny). Other scholars, however, would do away with the scrutiny approach and adopt an entirely different analytical framework. For example, Professor Sobel advocates for the use of the undue burden test as the test for courts to analyze Second Amendment claims. Stacey L. Sobel, *The Tsunami of Legal Uncertainty: What's a Court to Do Post-McDonald?*, 21 CORNELL J.L. & PUB. POL'Y 489 (2012).

open the door for particularized challenges to the law.¹²⁸ Thus, while the language of *Heller* poses no challenge to § 922(g)(1) on its face, the government will still have to justify the law's application on an individual basis.

B. *The Judiciary as the Avenue for Relief*

A second reason for courts to entertain as-applied challenges is that the federal government offers no other adequate form of relief. Since 1992, no congressional appropriations have been permitted to fund 18 U.S.C. § 925(c)—the provision of the U.S. Code that created an administrative process for those seeking to restore their Second Amendment rights.¹²⁹ Without this administrative remedy and without courts considering as-applied challenges, litigants would lack a realistic avenue for relief.¹³⁰

Even though courts might not be best equipped to handle a potential flood of cases seeking to restore firearm privileges, providing a judicial forum for relief is preferred, as opposed to blockading all options of vindicating one's constitutional right. The ATF, compared to Article III courts, is in a much better position to execute a gun-possession restoration program than the judiciary for multiple reasons. First, like other administrative agencies, ATF specializes in firearms.¹³¹ Whereas federal courts must be generalists and hear different types of cases within their Article III jurisdiction, a division of the ATF could focus exclusively on firearm restoration applications. Second, an application process with the ATF would be centralized. Not only would all applications be reviewed by the same department (as opposed to hundreds of district court judges), but the ATF would develop expertise in reviewing petitions with similar (or different) facts under an identical framework. Third and finally, Congress would have the opportunity to exert more control over the petition process if it remained with the ATF, rather than abdicating all authority to the judiciary to create an ad hoc patchwork of legal frameworks that vary among the circuits.

Nevertheless, because the appropriations ban precludes the ATF from executing the § 925(c) relief provision, the judiciary ought to hear cases involving as-applied challenges to § 922(g)(1). This is not a novel job for the

128 See Barrett, *supra* note 57, at 192–94.

129 See *supra* notes 30–35 and accompanying text.

130 To be sure, the ATF does direct individuals seeking relief to seek a presidential pardon as an alternative remedy. See *supra* note 27. However, statistics confirm the likelihood of restoring one's civil rights through a pardon is unlikely. See *Clemency Statistics*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/pardon/clemency-statistics> (last updated Mar. 2, 2018). For example, during President Obama's tenure, only 212 of 3395, or approximately six percent, of pardon petitions were granted. *Id.*

131 Noting its specialized focus, the ATF describes itself as a “law enforcement agency . . . that protects our communities from . . . the illegal use and trafficking of firearms.” *About the Bureau of Alcohol, Tobacco, Firearms and Explosives*, ATF, <https://www.atf.gov/> (last visited Nov. 29, 2017).

courts. In fact, when the ATF processed relief petitions, the judiciary maintained a role in hearing petitions for review of denied applications.¹³²

Courts are understandably concerned about the judicial economy implications that could arise with an influx of as-applied challenges brought by felons, both violent and nonviolent alike. As one district court judge aptly noted, individualized assessments have the potential to create a “logistical and administrative nightmare for the courts.”¹³³ This is a reasonable concern, considering that committee reports in both the House and Senate expressed concern about the amount of time the ATF devoted to assessing individual applications—forty man-years-per-year, to be exact.¹³⁴ If the relief program was resource intensive for an administrative agency, it follows that that burden would be shifted to the judicial branch.

It is understandable for the judiciary to want to manage an ever-increasing docket, but judicial economy concerns ought not outweigh a plaintiff’s access to the courts for vindication of her rights. That such burdensome tasks may arise, from time to time, is a recognized concern, but not one that supersedes judicial duties. The ATF’s program could streamline the process and help minimize the litigation load for the federal court system—perhaps Congress should resort to providing resources to this program once again.

Handling as-applied challenges is not unfamiliar terrain for the courts, and courts ought not shirk this duty. As Justice Scalia put it: “When a litigant claims that [the] legislation has denied him individual rights secured by the Constitution, the court ordinarily asks first whether the legislation is constitutional *as applied to him*.”¹³⁵ This is a task for the courts.

This Note, of course, does not advocate that every individual petition should succeed. In reality, the opposite outcome—to deny the challenge—will most often be the proper result under the proposed framework discussed below.¹³⁶ Indeed, whether reviewed under strict scrutiny or intermediate scrutiny,¹³⁷ the result often will be (and perhaps should be) that the litigant will fail—and fail without expending substantial judicial resources. For example, it is entirely plausible to predict that a plaintiff seeking restoration of firearm privileges, but who has a violent felony conviction, will (and should) be precluded from any relief. These as-applied challenges are only

132 18 U.S.C. § 925(c) (2012). “Any person whose application for relief . . . is denied . . . may file a petition with the United States district court.” *Id.*

133 *Medina v. Sessions*, 279 F. Supp. 3d 281, 292 (D.D.C. 2017) (citing *Binderup v. Att’y Gen.*, 836 F.3d 336, 409 (3d Cir. 2016) (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgment)).

134 See *supra* note 32 and accompanying text.

135 *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 743 (2003) (Scalia, J., dissenting) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

136 See *infra* Part V.

137 There is a robust literature addressing the level of scrutiny to apply for Second Amendment challenges—a question yet to be addressed in the highest court. See, e.g., Calvin Massey, Essay, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1432 (2009) (commenting on the lack of a scrutiny standard announced in *Heller*); see also *supra* note 128 and accompanying text.

likely lead to uncertain results where cases involve nonviolent felons. Does a person convicted of tax evasion¹³⁸ or the unlawful solicitation of money in connection with an election¹³⁹ have the potential to succeed on a claim where heightened scrutiny is applied? Possibly, yes.

V. *BINDERUP* AS A GUIDEPOST?

Resting on the position that the felon-in-possession ban is indeed rebuttable,¹⁴⁰ Part V of this Note examines *Binderup* as a framework for future courts to follow. In large part, *Binderup* concludes that individuals who have committed “serious” offenses are excluded from Second Amendment protections¹⁴¹ based on the historical assessment that only virtuous citizens had the right to bear arms.¹⁴² Thus, the question of virtue was not whether the litigant committed a violent or nonviolent felony, but whether that offense was “serious.”¹⁴³

I will argue that courts should consider the following factors—a framework with some variance from *Binderup*—when determining whether to grant or deny challenges to the felon-in-possession ban: (1) nature of the offense, (2) recidivism concerns, and (3) cross-jurisdictional consistency.

In determining the seriousness of the offense, the *Binderup* Court considered the following factors: (1) felony versus misdemeanor, (2) violent or nonviolent offense, (3) sentencing, and (4) federalism considerations.¹⁴⁴

Beginning by tackling the first factor, *Binderup*’s distinction between felony and misdemeanor offenses is instructive, but ought not to be dispositive. It tends to be the case that legislatures create felonies as “more serious” crimes and misdemeanors as “less serious crimes,”¹⁴⁵ but whether this is nec-

138 26 U.S.C. § 7201 (2012).

139 18 U.S.C. § 607 (2012) (“It shall be unlawful for any person to solicit or receive a donation of money . . . in connection with a[n] . . . election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States.”).

140 See *supra* notes 119–24 and accompanying text.

141 *Binderup v. Att’y Gen.*, 836 F.3d 336, 351 (3d Cir. 2016).

142 *Id.* at 348 (citing law review articles supporting the proposition that historical evidence points to the conclusion that the “government could disarm ‘unvirtuous citizens’”). *Binderup* recognized unvirtuous citizens to be those who had committed serious crimes—i.e., a category inclusive of both violent and nonviolent felonious offenses. *Id.* at 348–49.

143 *Id.* at 351.

144 *Id.* at 351–52.

145 For example, the FBI Uniform Crime Report categorizes crimes as Part I and Part II crimes. The Part I crimes are deemed “most serious” and include felonious offenses: homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson. *Offense Definitions: Crime in the United States, 2010*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/offense-definitions> (last visited Nov. 30, 2017). Part II offenses, presumably “less serious” include, inter alia, fraud, forgery, vandalism, prostitution, drug abuse violations, and gambling. *Id.* How states classify these crimes, though, can vary state by state. For example, in Illinois, committing an offense deemed a “hate crime” carries with it the possibility of a felony conviction, 720 ILL. COMP. STAT. 5/12-7.1 (2012), whereas in Indiana, hate crime legislation isn’t on the books.

essarily a bright-line classification between virtue and lack of virtue leaves the analysis wanting. Indeed, the collapse of this analysis as being a dispositive factor is illuminated in Justice Alito's dissent in *Johnson v. United States* where he noted: "At common law . . . many very serious crimes, such as kidnaping and assault with the intent to murder or rape, were categorized as misdemeanors."¹⁴⁶ In the twenty-first century, it would be unthinkable to consider these crimes as anything less than serious, or even heinous. If the felony-misdemeanor dichotomy is accepted as a factor in this framework, the crime would at least need to be considered in its contemporaneous context—i.e., whether the conduct is a felony on the books now as opposed to at the founding. Unfortunately, the divide between felony and misdemeanor is not so simple, since crimes today are products of legislative creation, and may vary from state to state.¹⁴⁷ For this reason, I incorporate this factor into my final consideration: cross-jurisdictional consistency.

Second, *Binderup* instructs courts to consider whether the offense involved either actual or attempted violence¹⁴⁸—with violence being a per se disqualifying factor.¹⁴⁹ The bright-line violence test likely would pass muster of heightened constitutional scrutiny in any scenario brought before a court. Firearm regulations advance the important governmental interest of protecting the public safety from violent behavior, and restricting gun possession for those with histories of violent crime undoubtedly is substantially related to furthering the goal of public safety.¹⁵⁰ Because the violence bright-line rule is not susceptible to challenge, I adopt this factor in my § 922(g)(1) as-applied challenge analysis.

Third, *Binderup* uses the defendant's sentence as persuasive evidence of the seriousness of the crime. Significant issues arise when using sentencing as a guide for seriousness. First, to some extent, sentencing is already linked to the classification of a felony versus a misdemeanor offense,¹⁵¹ so this factor appears not to rest on independent ground. Felonies are typically consid-

Abdul-Hakim Shabazz, *Abdul: How a Hate Crimes Law Could Work in Indiana*, INDY STAR (Aug. 17, 2017), <https://www.indystar.com/story/opinion/2017/08/17/abdul-how-hate-crimes-law-could-work-indiana/576807001/> ("Indiana is one of only five states without a hate or bias crime law.").

146 *Johnson v. United States*, 559 U.S. 133, 149–50 (2010) (Alito, J., dissenting).

147 See *supra* note 143.

148 The U.S Code defines a crime of violence as one that has as an element the actual, attempted, or threatened use of "physical force against the person or property of another" or any other felony that involves a "substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (2012).

149 *Binderup*, 836 F.3d at 352.

150 See *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010) (accepting under intermediate scrutiny that the government objective to keep firearms out of violent felons' possession satisfies the burden of an important objective advanced by substantially related means).

151 Indeed, the definitions of felony and misdemeanor are linked to the sentence imposed. Felonies tend to be crimes punishable for more than one year, or by death. See *Felony*, BLACK'S LAW DICTIONARY (10th ed. 2014). Whereas misdemeanors are limited to

ered more serious than misdemeanors, and a felony offense would typically yield a higher sentence. Thus, sentencing in many aspects seems to be a proxy variable for the type of crime committed.

Another shortcoming of the actual sentence as a factor is that sentencing is a reflection beyond just the seriousness of the offense. For example, in addition to representing the seriousness of the offense, federal courts may consider the history and characteristics of the defendant,¹⁵² and a judge's sentence may reflect a compromise resulting from a plea bargain between the government and the defendant.¹⁵³ As a result, the replication of the felony-misdemeanor dichotomy and the malleable nature of sentencing lends itself to being precluded from the analysis in determining the "seriousness" of the offense for purposes of this as-applied challenge.

Fourth and lastly, *Binderup* considers whether there is "cross-jurisdictional consensus" related to the seriousness of the crime.¹⁵⁴ This consideration is of significant value, especially for a Second Amendment standard that will be applied nationwide. If the overwhelming majority of the states classify an act as a felony, this would point in favor of the crime being serious. If, however, there is a lack of consensus—with some states finding an act to be a felony and other states classifying it as a misdemeanor—that would raise doubts about society's perception of the seriousness of the offense. Finally, if some states don't criminalize the act at all, the lack of criminalization in a state might suggest that the conduct could even be law abiding and virtuous, or at least not law obstructing.¹⁵⁵ This federalism consideration is particularly important because the individual right of the Second Amendment in a *federal* constitution should not afford disparate protections based on whether one lives in Louisiana or Indiana.

Considering these four factors from *Binderup*, the felony/misdemeanor divide and sentencing consideration seem to cover, largely, the same considerations—namely, the severity of punishment a crime deserves. The felony and misdemeanor distinction looks at the crime as a class, whereas actual sentencing provides an individualized approach—or what a judge finds to be the appropriate sentence based on the specific offense. *Binderup* correctly posits that violent offenses would provide an automatic bar to Second Amendment relief.¹⁵⁶ Lastly, federalism consensus remains an important factor to ensure a consistent approach by the states and federal government when considering what crimes are "serious."

punishment for a brief term, such as less than one year. See *Misdemeanor*, BLACK'S LAW DICTIONARY (10th ed. 2014).

152 See 18 U.S.C. § 3553(a).

153 See generally Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901 (2017).

154 *Binderup*, 836 F.3d at 352.

155 This is not to suggest that just because there is an absence of criminal activity that the person is virtuous. Indeed, many lawful activities, even constitutionally protected activities, arguably represent the antithesis of virtue—e.g., flag burning and falsifying military awards, to name a few.

156 See *Binderup*, 836 F.3d at 348.

In addition to the first two factors I posit for the framework—the violent nature of the offense and cross-jurisdictional, or federalism, consideration—I advocate for a new factor: recidivism. In other words, a plaintiff whose criminal record demonstrates that she is a repeat offender points in favor of not granting relief from the federal firearms ban. On the flip side, a one-time offender who has since demonstrated a rehabilitated life, such as one with a clean record and reformed citizenship, would have a strong case for firearm rehabilitation. Although the *Binderup* decision rejected considering recidivism since it is tangential to the offense and relates more to the offender, the D.C. Circuit in *Schrader* noted in dicta that the plaintiff's renewed law-abiding life could be relevant.¹⁵⁷ The individual with a clean postconviction record, so the argument goes, demonstrates a renewed virtuous life.¹⁵⁸ Tara McGuire advocates for a five-year span of lawful conduct to serve as the predicate timespan necessary for consideration of firearm restoration.¹⁵⁹ A bright-line five-year rule would be easy to apply in practice, but whether or not this number is arbitrary will likely require additional judicial development.

Taken together, the three factors: (1) nature of the crime (violent versus nonviolent), (2) cross-jurisdictional consensus, and (3) recidivism considerations, together seek to resolve whether an individual has demonstrated life as a law-abiding citizen, such that they no longer pose a threat to the public safety. If a court determines these criteria are met, then the plaintiff would have a strong case to argue that the felon-in-possession ban, as applied to them, does not meet constitutional muster.

CONCLUSION

Over this past decade, Second Amendment jurisprudence post-*Heller* has led to more questions than answers. Ill-defined doctrine has a tangible impact both on individuals' legal rights and the interests of public safety. At this juncture, it seems unlikely that Congress will extend appropriations to the ATF to resume an administrative process for firearm-disability review, leaving this challenge within the judiciary's domain. The circuit courts' lack of uniformity in how to approach as-applied challenges to § 922(g)(1) implicates concerns that Second Amendment protections may vary depending on the jurisdiction.

In light of this judicial discord, it is time again for the Supreme Court to speak and explicate a standard of review for challenges to firearm regula-

157 *Schrader v. Holder*, 704 F.3d 980, 991 (D.C. Cir. 2013).

158 Tara Adkins McGuire, Note, *Disarmed, Disenfranchised, and Disadvantaged: The Individualized Assessment Approach as an Alternative to Kentucky's Felon Firearm Disability and Other Arbitrary Collateral Sanctions Against the Non-Violent Felon Class*, 53 U. LOUISVILLE L. REV. 89, 111 (2014).

159 *Id.*

tions.¹⁶⁰ It is time to dispel the myth that the Second Amendment is the “[Supreme] Court’s constitutional orphan.”¹⁶¹

160 In Justice Thomas’s view, the Supreme Court’s reluctance to take Second Amendment cases has left the Second Amendment as a “constitutional orphan,” thereby enabling “defiance” by the lower courts. *Silvester v. Becerra*, 138 S. Ct. 945, 951–52 (2018) (Thomas, J., dissenting from denial of certiorari).

161 *Id.*