Notes

TIME TO RELOAD: THE HARMS OF THE FEDERAL FELON-IN-POSSESSION BAN IN A POST-*HELLER* WORLD

ZACH SHERWOOD†

ABSTRACT

Federal law permanently prohibits anyone who has been convicted of a felony from possessing a firearm. Keeping lethal weapons out of the hands of those who pose a risk to public safety is no doubt a worthy policy goal. But the federal felon-in-possession ban is blunt, punitive, and supremely damaging to the ex-felons who fall within its ambit. The statute's sweeping scope ensures that any ex-felon who possesses any firearm for any length of time for any reason can be swiftly and harshly punished. And it indiscriminately targets conduct that is often neither harmful nor criminal.

The felon-in-possession ban gained constitutional significance following the Supreme Court's landmark decision in District of Columbia v. Heller. *The* Heller *Court recognized for the first time an individual Second Amendment right to possess a firearm for self-defense in the home. Yet by imposing substantial criminal liability on any form of firearm possession by an ex-felon, the felon-in-possession ban categorically strips a sizable portion of Americans of this very same right.*

*This Note argues that it is high time to rethink the federal felon-in-possession ban's role in a post-*Heller *world. It argues that the statute's expansive reach is poorly tailored to addressing gun violence and highlights the weak doctrinal foundation on which the felon-in-possession ban is built. But this Note goes further than most existing scholarship by also examining the tangible, on-the-ground harms that*

† Duke University School of Law, J.D. expected 2021; Harvard University, A.B. 2013. To Professors Sean Andrussier, Neil Siegel, Ben Grunwald, and Sarah Baker, thank you for your wisdom and mentorship. To my classmates in Professor Rebecca Rich's Scholarly Writing Workshop, thank you for your insightful feedback. To the *Duke Law Journal* editors, thank you for your much-needed comments, edits, and improvements. And to my parents and husband, words cannot capture how grateful I am for your abiding love and support.

the felon-in-possession ban inflicts on ex-felons and their communities—from needlessly complicating ex-felons' reintegration into society, to burdening the Second Amendment rights of nonfelon family members, to effectively disarming large swaths of communities of color. Change is needed, and this Note recommends statutory reforms and constitutional challenges that would circumscribe the felon-in-possession ban's scope.

INTRODUCTION

Suppose you have a felony conviction on your record.[1] If committing any sort of heinous crime seems unthinkable, then consider something more pedestrian—perhaps you have a handful of drug possession charges from your younger years,[2] once rashly punched someone during a fight,[3] or cashed a few Social Security checks that continued to arrive in the mail after your elderly mother passed away,[4] all of which qualify as a felony. And for good measure, say you managed to avoid spending a single night in jail.[5] In your case, a fine[6] or brief period of probation[7] was punishment enough.

Now suppose that a police officer, while responding to a domestic disturbance at your residence[8] or patting you down as part of a routine frisk,[9] happens to stumble upon a firearm in your home or on your person. Or perhaps your probation officer, while conducting a

1. *See Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A serious crime usu. punishable by imprisonment for more than one year or by death.").

2. *See* United States v. Rozier, 598 F.3d 768, 769 (11th Cir. 2010) (per curiam) (affirming the felon-in-possession conviction of a defendant with a handful of prior drug convictions).

3. *See* Schrader v. Holder, 704 F.3d 980, 982 (D.C. Cir. 2013) (upholding the application of the federal felon-in-possession ban to a defendant who was convicted of assault and battery after a fistfight forty-five years earlier).

4. *See* 42 U.S.C. § 408(a)(4) (2018) (punishing such Social Security fraud with a prison sentence of up to five years).

5. *See Schrader*, 704 F.3d at 983 (emphasizing that the defendant's conviction of misdemeanor assault and battery did not subject him to any jail time).

6. *See* 18 U.S.C. § 3571(a) (2018) ("A defendant [in federal court] who has been found guilty of an offense may be sentenced to pay a fine.").

7. *See id.* § 3561 (authorizing a "sentence[] to a term of probation" for federal infractions, misdemeanors, and certain felonies).

8. *See* United States v. Bartelho, 71 F.3d 436, 438–39 (1st Cir. 1995) (recounting a police search during a domestic disturbance dispatch that discovered a firearm within an ex-felon's apartment).

9. *See* United States v. Vongxay, 594 F.3d 1111, 1113–14 (9th Cir. 2010) (detailing a personal search of the defendant by a police officer that led to a felon-in-possession charge).

warrantless search of your bedroom,[10] finds the pistol you keep in your nightstand just in case you ever need to ward off an intruder. Or maybe a police detective discovers a few photos of you flaunting a handgun on your Facebook profile.[11] Regardless of whether the gun is yours or someone else's, whether it was a gift or lawfully purchased, whether it is a handgun or a hunting rifle, or whether your felony conviction occurred two years ago or twenty, you could be easily convicted of a serious federal offense.[12]

Since 1968, federal law has prohibited any person convicted of a crime "punishable by imprisonment for a term exceeding one year" from possessing a firearm.[13] The scope of this felon-in-possession ban, which is codified in 18 U.S.C. § 922(g)(1), is expansive. It encompasses ex-felons convicted of violent and nonviolent crimes alike, and the statute's prohibition on firearm possession lasts for life.[14] The ban is also robustly enforced. Firearms offenses, as a class, are the third most common type of conviction in the federal system,[15] and roughly one in ten federal convictions involves a violation of the felon-in-possession ban.[16] Punishment for violating the ban can be harsh. An ex-felon can face a prison sentence of up to a decade,[17] with the average sentence

10. *See* Griffin v. Wisconsin, 483 U.S. 868, 872 (1987) (holding that a warrantless search by a probation officer of a probationer's home, which uncovered a gun and resulted in the probationer being convicted of possessing a firearm as a convicted felon, did not violate the Fourth Amendment).

11. *See* United States v. Farrad, 895 F.3d 859, 864–65 (6th Cir. 2018) (describing a felon-in-possession conviction which relied on evidence generated by a police search of the defendant's Facebook profile).

12. *See infra* Part II.A.

13. 18 U.S.C. § 922(g)(1) (2018).

14. *See infra* Part II.A.

15. U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 45 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf [perma.cc/J4B7-7CDP].

16. U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM 1 (2020) [hereinafter *FY 2019 Quick Facts*], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf [https://perma.cc/RC49-TL6M].

17. 18 U.S.C. § 924(a)(2). While the maximum sentence for a standalone violation of § 922(g)(1) is ten years, *id.*, under the Armed Career Criminal Act ("ACCA"), any defendant convicted under § 922(g)(1) who also has three previous convictions for a "violent felony or a serious drug offense," as defined by the ACCA, is instead subject to a statutory minimum sentence of fifteen years and a maximum sentence of life imprisonment, *id.* § 924(e)(1).

exceeding five years.[18] And a conviction under § 922(g)(1) is generally easy to prove.[19] The government need only establish that a defendant with *any* felony conviction possessed *any* firearm whatsoever for *any* duration of time for *any* reason.[20] The trier of fact is left with an uncomplicated decision: a person with a felony record either did or did not possess a firearm.[21] Case closed.

The federal felon-in-possession ban is blunt and punitive for a reason. In theory, it aims to prevent a "presumptively risky" group of people[22]—namely, individuals who have broken the law and therefore pose an enduring risk to public safety—from wielding lethal weapons.[23] The modern ban and its early twentieth-century precursors were explicitly passed, in fact, to address the violence and criminal activity associated with firearms.[24]

But any law like § 922(g)(1) that facilitates the lengthy reincarceration of ex-felons also comes with attendant harms, and the specific harms imposed by the federal felon-in-possession ban gained constitutional significance following the Supreme Court's landmark decision in *District of Columbia v. Heller*.[25] There, the Court held for

18. *FY 2019 Quick Facts*, *supra* note 16, at 2. The average sentence for defendants convicted under § 922(g)(1) who were also subject to an ACCA enhancement is 188 months, and the average sentence for those who do not face an ACCA enhancement is 58 months. *Id.*

19. *See infra* Part II.A.

20. *See, e.g.*, United States v. Teemer, 394 F.3d 59, 64 (1st Cir. 2005) (noting that § 922(g)(1) "bans possession [of a firearm] outright without regard to how great a danger exists of misuse in the particular case").

21. In fiscal year 2019, 97.7 percent of defendants convicted under § 922(g)(1) were men. *FY 2019 Quick Facts*, *supra* note 16, at 1. Accordingly, this Note defaults to masculine pronouns when referring to ex-felons impacted by the federal felon-in-possession ban. This is done solely for simplicity and clarity.

22. United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010).

23. *See* Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019) (recognizing § 922(g)(1)'s purpose as "preventing gun violence by keeping firearms away from persons, such as those convicted of serious crimes, who might be expected to misuse them").

24. *See* JOSEPH BLOCHER & DARRELL A. H. MILLER, THE POSITIVE SECOND AMENDMENT 42–50 (2018) (describing the history of modern federal firearms regulations); *see also, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (stating that "[t]he Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons" constitutes, among other things, a "threat to the safety of the President of the United States and Vice President of the United States" as well as a "threat to the continued and effective operation of the Government of the United States and of the government of each State"); *id.* § 901, 82 Stat. at 225 (declaring in part that the "ease with which" criminals can obtain firearms "is a significant factor in the prevalence of lawlessness and violent crime in the United States").

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

the first time that the Second Amendment guarantee of "the right of the people to keep and bear Arms"[26] extends to the private use of firearms for self-defense in the home.[27] Yet, by criminalizing firearm possession for ex-felons, § 922(g)(1) effectively prohibits a substantial number of Americans from exercising this very same constitutional right.[28]

The *Heller* majority attempted to square this circle by asserting in passing that nothing in the Court's opinion should "cast doubt on longstanding prohibitions on the possession of firearms by felons"[29] and other "presumptively lawful" gun regulations.[30] The Court then bridged the yawning doctrinal gap between these broad exceptions and the Court's grounding of its newly minted constitutional right in the "inherent right of self-defense" by insisting that the Second Amendment's protections extended only to "law-abiding, responsible citizens."[31] And lower federal courts, relying on this language, have routinely rejected Second Amendment challenges to § 922(g)(1)'s constitutionality post-*Heller*,[32] either by citing the *Heller* majority's "presumptively lawful" language[33] or concluding that the felon-in-possession ban survives the appropriate level of constitutional scrutiny.[34]

Many scholars note the tension between *Heller*'s proclamation of a fundamental right purportedly belonging to "all members of the

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26. U.S. CONST. amend. II.

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

28. *See* Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1806, 1808 (2017) (estimating that roughly 8 percent of the U.S. adult population has a felony conviction, which equates to approximately nineteen million people).

29. *Heller*, 554 U.S. at 626.

30. *Id.* at 627 n.26.

31. *Id.* at 635.

32. *See infra* Part I.B.

33. *E.g.*, United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009). *But see id.* at 1049 (Tymkovich, J., concurring) (expressing concern that the Supreme Court's "summary treatment of felon dispossession in dictum [in *Heller*] forecloses the possibility of a more sophisticated interpretation of § 922(g)(1)'s scope").

34. *See, e.g.*, Schrader v. Holder, 704 F.3d 980, 991 (D.C. Cir. 2013) (upholding § 922(g)(1)'s constitutionality for being "substantially related to the important governmental objective of crime prevention").

political community"[35] and its uncritical approval of laws like § 922(g)(1) that categorically exclude ex-felons from the Second Amendment's reach.[36] But the scholarship has largely focused on whether the federal felon-in-possession ban and similar firearm restrictions are justified by history or the Constitution's text.[37]

This Note takes a more practical approach to evaluating the federal felon-in-possession ban by focusing on the statute's concrete, on-the-ground effects beyond the dignified confines of the academy or an appellate courtroom.[38] It argues that § 922(g)(1)'s sweeping scope ensures that the statute indiscriminately punishes conduct that is often unrelated to criminal activity.[39] It also addresses how the felon-in-possession ban is built on a weak doctrinal foundation.[40] But this Note goes further than most existing scholarship by also examining the tangible harms that § 922(g)(1) exacts on ex-felons, their family members, and their communities. It describes three such harms in detail.[41] First, § 922(g)(1) burdens ex-felons' reintegration into society

35. *Heller*, 554 U.S. at 580.

36. *See, e.g.*, Darrell A. H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1292 (2009) (describing the *Heller* opinion as "one that boldly sallies forth to pronounce the triumph of individual rights under the Second Amendment, but soon breaks into confusion and disarray when pressed on the scope of this new right and finally retreats into a series of muttered exceptions that its earlier reasoning does not support"); Adam Winkler, Heller*'s Catch-22*, 56 UCLA L. REV. 1551, 1561 (2009) (describing *Heller*'s "presumptively lawful" prohibitions as a "laundry list" of Second Amendment exceptions that the *Heller* Court "simply offered up with no discussion whatsoever about how these exceptions comply with the Founders' understanding of the right to keep and bear arms"); *see also* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 413 (2009) (arguing that *Heller*'s categorical exclusion of certain types of people from the Second Amendment's protections "neither reflects nor enables a coherent account of the [] Amendment's core values, whatever they may be"); 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, 1372 (2008) (exploring the implications of the *Heller* exceptions to future regulation of the Second Amendment); Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 DUKE L.J. ONLINE 17, 29 (2018) (questioning the proper interpretation of *Heller* in light of the tension between the fundamental right recognized in the case and the limitation of that right to convicted felons).

37. *See, e.g.*, Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2219–20 (2016) ("[T]he focal point of many gun rights advocates and gun control proponents has become an ostensibly apolitical space of historical and textual interpretation. Rather than examining the *effects* of various extant or proposed gun statutes, scholars and courts have become preoccupied with eighteenth-century views of gun ownership.").

38. *See id.* (describing and critiquing the recent shift in scholarly treatment of gun regulations "from studies of the law in action to careful examinations of the law on the books").

39. *See infra* Part II.B.

40. *See infra* Part II.C.

41. *See infra* Part III.

by effectively precluding them from living in any residence where guns are lawfully kept. Second, the statute's harms are not limited to ex-felons alone—the robust enforcement of the federal felon-in-possession ban also forces nonfelons to choose between exercising their own right to possess a firearm for self-defense and living with loved ones who have a felony record. Third, § 922(g)(1) disproportionately impacts and disarms communities of color.

Importantly, this Note does not mean to suggest that restricting access to deadly firearms by individuals who pose a realistic threat to public safety is an unworthy government interest. Rather, by highlighting the grave harms caused by the federal felon-in-possession ban in its current form, this Note hopes to inspire efforts to challenge this sweeping and punitive statute that all too often re-ensnares members of a disfavored group in the criminal justice system.

Part I reviews the Supreme Court's landmark decision in *Heller*, the case's impact on the federal felon-in-possession ban, and lower courts' subsequent treatment of § 922(g)(1). Part II describes § 922(g)(1) and the elements that must be proved to support a conviction. It then explains how § 922(g)(1)'s sweeping scope causes innocent conduct to fall within its ambit and addresses the post-*Heller* constitutional dimensions of the ban, including the less-than-compelling reasoning the *Heller* Court used to justify the statute's continued punishment of conduct that is otherwise constitutionally protected. Part III discusses three distinct tangible harms that § 922(g)(1) inflicts on ex-felons and their communities. Finally, Part IV proposes solutions that may help to mitigate the damage caused by § 922(g)(1), including recommended statutory changes and potential constitutional challenges.

I. THE CONSTITUTIONAL RIGHT TO BEAR ARMS

Throughout most of American history, laws regulating the possession of firearms were not a matter of constitutional concern. 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."[42] And this text had long been understood to encompass only matters related to "the preservation or

42. U.S. CONST. amend. II.

efficiency of a well regulated militia."[43] Under this interpretation, the Second Amendment thus had nothing to say about the federal felon-in-possession ban and other laws that similarly regulated private gun use.[44] As this Part explains, however, that all changed following the *Heller* decision. But although *Heller* fundamentally transformed Second Amendment jurisprudence, its practical effect on gun control laws like § 922(g)(1) has been far less consequential.[45] Indeed, defining the precise contours of the Second Amendment right has been left almost exclusively to lower courts, who in turn have uniformly upheld the ban against challenges to its constitutionality.[46] The upshot of this doctrinal development is that tens of millions of Americans remain categorically prohibited from exercising the Second Amendment right that *Heller* extolled.[47]

A. District of Columbia v. Heller*: A Turning Point*

In 2002, Dick Heller, a special police officer at the Thurgood Marshall Judiciary Center in Washington, D.C., attempted to register a handgun that he wanted to keep at home for self-defense.[48] But

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43. United States v. Miller, 307 U.S. 174, 178 (1939). Professors Joseph Blocher & Darrell A. H. Miller helpfully summarize the history of the militia-based interpretation of the Second Amendment as follows:

> The militia-based reading of the Amendment holds that the right to keep and bear arms is generally limited to people, arms, and activities having some connection to the militia. As a matter of doctrine, this view prevailed for more than two centuries, meaning that most Second Amendment challenges were dismissed on the basis that the person bringing the challenge had no plausible connection to a militia, let alone a well-regulated one.

BLOCHER & MILLER, *supra* note 24, at 59.

44. *See, e.g.*, Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992) ("The rule emerging from *Miller* is that, absent a showing that the possession of a certain weapon has 'some reasonable relationship to the preservation or efficiency of a well-regulated militia,' the Second Amendment does not guarantee the right to possess the weapon." (quoting *Miller*, 307 U.S. at 178)). *But see* United States v. Emerson, 270 F.3d 203, 220–27 (5th Cir. 2001) (arguing that *Miller*'s holding was not grounded in a militia-based interpretation of the Second Amendment).

45. *See* BLOCHER & MILLER, *supra* note 24, at 99 ("*Heller*'s practical impact on the scope of gun regulation has been, and likely will continue to be, somewhat muted.").

46. 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, 1481 (2018).

47. *See* Shannon et al., *supra* note 28, at 1806, 1808 (estimating that nearly twenty million American adults have a felony conviction that would disqualify them from lawfully possessing firearms).

48. District of Columbia v. Heller, 554 U.S. 570, 575 (2008).

District of Columbia law at the time completely barred the registration of handguns, and his request was summarily rejected.[49] Heller subsequently filed suit to bring a Second Amendment challenge against the District's handgun ban.[50]

In a five–four decision that forever altered the constitutional landscape, the Supreme Court held that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation" wholly separate from militia service.[51] Because the District's handgun ban prevented "law-abiding, responsible citizens" from effectively exercising this "core" Second Amendment right "to use arms in defense of hearth and home," the Court struck it down as unconstitutional.[52]

Two features of this newfound individual right to keep and bear arms stand out. First, the Court identified self-defense as the "*central component*" of the Second Amendment right, one which was itself rooted in a natural right to self-preservation that predated the Founding.[53] Second, keeping firearms for the "core lawful purpose of self-defense" was grounded in the home, where the "need for defense of self, family, and property is most acute."[54]

Crucially, the *Heller* majority stressed that the right to keep and bear arms is not "unlimited."[55] Despite suggesting this right "belongs to all Americans,"[56] the Court qualified the Second Amendment's protections by extending them only to "law-abiding, responsible citizens."[57] The Court also made a point of emphasizing that:

> [N]othing 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

49. *Id*.

50. *Id.* at 575–76. For an overview of *Heller*'s procedural history and the characters involved in the litigation, see BLOCHER & MILLER, *supra* note 24, at 66–71.

51. *Heller*, 554 U.S. at 592.

52. *Id.* at 628–30, 635.

53. *Id.* at 592–93, 599, 630.

54. *Id.* at 628, 630.

55. *Id.* at 626.

56. *Id.* at 581.

57. *See id.* at 635 (characterizing the Second Amendment right as that of "law-abiding, responsible citizens to use arms in defense of hearth and home").

> places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[58]

Its ardent assertion of an individual right to possess firearms notwithstanding, the *Heller* Court implied with a single sentence that practically all gun control measures extant at the time—including the federal felon-in-possession ban—were "presumptively lawful."[59]

Besides determining that the District of Columbia's handgun ban went too far,[60] the *Heller* Court clarified little else about the scope and substance of the Second Amendment right.[61] Relevant here, the majority offered almost no insight into why ex-felons should be excluded from the Second Amendment's protections[62] or how lower courts should review challenges to laws that categorically criminalize gun possession.[63] The Court left such questions for another day.[64]

*B. The Federal Felon-In-Possession Ban Post-*Heller*: A Continuation*

Having broken new constitutional ground, the *Heller* decision prompted a wave of litigation targeting various gun control regulations nationwide.[65] In the first eight years following the decision, federal trial

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58. *Id.* at 626–27.

59. *Id.* at 627 n.26; *see also* Winkler, *supra* note 36, at 1561 ("So while forcefully declaring an individual right to keep and bear arms, the [*Heller*] Court suggest[ed] that nearly all gun control laws currently on the books are constitutionally permissible.").

60. *Heller*, 554 U.S. at 629.

61. *See, e.g.*, BLOCHER & MILLER, *supra* note 24, at 84–90 (describing the "significant challenges, contradictions, and questions" faced by lower courts in defining the "basic building blocks of the Second Amendment" post-*Heller*); Levinson, *supra* note 36, at 20 (claiming that "no serious person could believe that *Heller* clarified very much at all" beyond invalidating the District of Columbia's handgun ban).

62. *See Heller*, 554 U.S. at 644 (Stevens, J., dissenting) (stating that "[t]he Court offer[ed] no way to harmonize its conflicting pronouncements" regarding who the Second Amendment protects); *see also* Winkler, *supra* note 36, at 1564 ("The Court didn't give any substantive explanation for why the types of laws mentioned in the laundry list [of exceptions to the Second Amendment right] were constitutional aside from a description of them as 'longstanding.'").

63. The *Heller* majority explicitly rejected rational basis review and a "balancing test" proposed by Justice Stephen Breyer in his dissent, but it otherwise did not specify the appropriate level of scrutiny to apply to laws burdening the Second Amendment right. *Id.* at 628 n.27, 634–35 (majority opinion); *see also* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010) (noting that "*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment").

64. *See Heller*, 554 U.S. at 635 ("[T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").

65. Winkler, *supra* note 36, at 1565–67.

and appellate courts collectively resolved over seven hundred separate Second Amendment challenges.[66] Yet the Supreme Court, in stark contrast, has remained aloof from the gun rights debate it ignited,[67] having decided only three other cases implicating the Second Amendment since *Heller*.[68] And none of these three cases expanded on *Heller*'s reasoning or even grappled with Second Amendment doctrine directly.[69]

This reticence by the Court means that lower federal courts have had near-exclusive freedom to shape Second Amendment doctrine post-*Heller*.[70] And while the types of challenged regulations have varied widely, the outcomes of these cases have not. Lower federal courts have overwhelmingly rejected Second Amendment challenges in favor of upholding a wide variety of gun control laws,[71] rejecting challenges in more than 90 percent of cases from 2008–2016.[72]

The federal felon-in-possession ban has not fared any differently. Under the two-step inquiry that has emerged as the applicable test for Second Amendment challenges to firearms regulations,[73] federal

66. Ruben & Blocher, *supra* note 46, at 1472–73.

67. *See* Levinson, *supra* note 36, at 26 ("The justices of the Supreme Court have clearly chosen, for their own individual and unexpressed reasons, to withdraw from molding Second Amendment doctrine.").

68. N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (per curiam); Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (per curiam); McDonald v. City of Chicago, 561 U.S. 742 (2012).

69. *See N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 (dismissing as moot a challenge to a New York statute regarding the transportation of firearms to and from a gun owner's home); *Caetano*, 136 S. Ct. at 1027–28 (holding that stun guns, despite not being in common use at the time of the Second Amendment's enactment, were protected under the Second Amendment); *McDonald*, 561 U.S. at 806 (plurality opinion) (incorporating the Second Amendment to the states under the Fourteenth Amendment's Due Process Clause).

70. *See* Ruben & Blocher, *supra* note 46, at 1455 (noting that the Second Amendment's "doctrinal development" has been left "primarily to the lower courts").

71. *See id.* at 1472 ("[T]he vast majority of Second Amendment claims fail."). A notable exception to this general trend is the relative success rate of challenges to public carry restrictions. *Id.* at 1484; *see also, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (striking down a D.C. law requiring a "good reason" for concealed carry licenses as violative of the Second Amendment).

72. Ruben & Blocher, *supra* note 46, at 1472.

73. *See* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 254 (2d Cir. 2015) (describing the two-part inquiry and noting at least nine other circuits that have adopted the same approach). Under this two-step inquiry, the first question is one of coverage: Is the conduct being restricted (e.g., owning an assault rifle) "protected by the Second Amendment in the first place?" Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011). If history or *Heller*'s list of "longstanding," "presumptively lawful" restrictions suggests that such conduct is excluded from the Second

courts of appeals have universally held that the federal felon-in-possession ban does not violate the Second Amendment as defined in *Heller*.[74] In rejecting facial challenges to § 922(g)(1)'s constitutionality, some courts have reflexively cited *Heller*'s list of "presumptively lawful regulatory measures" while saying little else to justify the categorical exclusion of ex-felons from the Second Amendment's protections.[75] Others, like the Ninth Circuit in *United States v. Vongxay*,[76] have held that the felon-in-possession ban passes constitutional muster because it targets a group that falls outside of the Second Amendment's protections entirely.[77] Indeed, courts have regularly defined the "core right identified in *Heller*" as the "right of [] *law-abiding, responsible* citizen[s] to possess and carry a weapon for self-defense"[78]—a definition that, by its terms, wholly excludes ex-felons. And still more courts have indicated that the statute's ends justify its expansive means. In *Schrader v. Holder*,[79] for instance, the D.C. Circuit held that the government had "carried its burden" under the applicable level of intermediate scrutiny by demonstrating a "substantial relationship"

Amendment's scope, the inquiry ends, and the regulation is upheld. *Id.* at 701–03 (quoting District of Columbia v. Heller, 554 U.S. 570, 626, 627 n.26 (2008)). If, however, the challenged regulation does in fact burden conduct protected by the Second Amendment, courts then evaluate whether the regulation "passes muster under the appropriate level of constitutional scrutiny." Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011). In these cases, courts overwhelmingly apply some form of intermediate scrutiny. *See* Ruben & Blocher, *supra* note 46, at 1496 (finding that "[i]ntermediate scrutiny has been the most prevalent form of scrutiny" applied to Second Amendment challenges in federal courts).

74. *See* Kanter v. Barr, 919 F.3d 437, 442 (7th Cir. 2019) (noting that "every federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face" and collecting cases from eleven circuits).

75. *See, e.g.*, United States v. Khami, 362 F. App'x 501, 507–08 (6th Cir. 2010) (agreeing with other circuits that *Heller*'s "longstanding prohibitions" language is "sufficient to dispose of the claim that § 922(g)(1) is unconstitutional"); United States v. McCane, 573 F.3d 1037, 1047 (10th Cir. 2009) (disposing of a constitutional challenge to § 922(g)(1) in a single sentence by citing *Heller*'s "longstanding prohibitions" language); United States v. Anderson, 559 F.3d 348, 352 n.6 (5th Cir. 2009) (same).

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

77. *See id.* at 1115 ("[F]elons are categorically different from the individuals who have a fundamental right to bear arms . . . .").

78. United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010); *see also* Medina v. Whitaker, 913 F.3d 152, 160 (D.C. Cir. 2019) ("At its core, the Amendment protects the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 635)).

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

between the felon-in-possession ban and the "important objective" of crime prevention.[80]

While the circuit courts have uniformly held that the federal felon-in-possession ban is constitutional on its face, they are split on whether an ex-felon can raise an as-applied challenge.[81] Five circuits have foreclosed such challenges entirely, meaning that the felon-in-possession ban is constitutional as applied to violent and nonviolent ex-felons alike, "regardless of their individual circumstances or the nature of their offenses."[82] Six other circuits have left open the possibility of as-applied challenges,[83] with a challenger's success depending largely on whether he has committed an offense "serious" enough to render him an "unvirtuous citizen" who is beyond the Second Amendment's scope.[84] Yet in these six circuits, only once has a court of appeals held the federal felon-in-possession ban unconstitutional as applied to a particular defendant.[85] Thus, even when an as-applied challenge to

80. *Id.* at 990; *see also* Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019) ("[T]he government has shown that prohibiting even nonviolent felons . . . from possessing firearms is substantially related to its interest in preventing gun violence.").

81. For instance, in *Kanter*, the plaintiff claimed that his status as a nonviolent offender with no criminal record beyond a mail fraud conviction meant that § 922(g)(1) was unconstitutional as applied to him. 919 F.3d at 440.

82. *See id.* at 442 (noting that the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have suggested that § 922(g)(1) is "always constitutional" as applied to ex-felons "as a class").

83. *See id.* at 443 (noting that the First, Third, Fourth, Seventh, Eighth, and D.C. Circuits "have left room for as-applied challenges" to § 922(g)(1)).

84. Holloway v. Att'y Gen., 948 F.3d 164, 171 (3d Cir. 2020).

85. *See* Binderup v. Att'y Gen., 836 F.3d 336, 339–40 (3d Cir. 2016) (en banc) (holding in a highly fractured decision that § 922(g)(1) was unconstitutional as applied to a misdemeanant who had pleaded guilty to corrupting a minor eighteen years earlier and to another misdemeanant who had pleaded guilty to unlawfully carrying a handgun without a license twenty-six years earlier). Eight of the fifteen judges on the en banc Third Circuit held that § 922(g)(1) was unconstitutional as applied to the two challengers in the case. *Id.* at 339, 343 (opinion of Ambro, J.); *id.* at 357 (Hardiman, J., concurring in part and concurring in the judgments). The other seven judges would have rejected the as-applied challenge in the case and questioned the validity of such challenges more generally. *Id.* at 407–11 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). A separate majority of eleven judges, however, concluded that the test for whether an individual challenger could prevail with an as-applied challenge depended on the seriousness of the challenger's prior conviction, which determined whether the challenger was an "unvirtuous" citizen beyond the Second Amendment's protections. *Id.* at 348–49 (opinion of Ambro, J.); *id.* at 387 (Fuentes, J., concurring in part, dissenting in part, and dissenting from the judgments). The remaining five judges would have instead based the test on whether a prior conviction was violent. *Id.* at 369 (Hardiman, J., concurring in part and concurring in the judgments).

§ 922(g)(1) is available, the odds of a successful one are vanishingly slim.

II. THE FEDERAL FELON-IN-POSSESSION BAN

While the contours of the Second Amendment right continue to evolve, the federal felon-in-possession ban has been a stable fixture in the federal gun control regime for over half a century. Federal law prohibits any person who has been convicted of a crime punishable by more than a year in prison from purchasing or possessing a firearm.[86] And, as explained above, the *Heller* Court declared that its decision in no way calls this statute's constitutionality into question.

This Part focuses on the federal felon-in-possession ban itself—its elements, its sweeping scope, and its constitutional dimensions in light of *Heller*. This Part starts by explaining that § 922(g)(1), as currently interpreted and enforced, all but ensures that anyone with a felony conviction who possesses a gun can be easily, unconditionally, and harshly punished. It then argues that § 922(g)(1) is poorly designed to address gun violence because the statute's sweeping scope often results in ex-felons being punished for conduct that is neither harmful nor criminal and because the statute indiscriminately treats nonviolent offenders like violent ones. The Part concludes by describing how the felon-in-possession ban acquired constitutional significance after *Heller* while also noting that the reasons courts have offered for upholding the statute's constitutionality post-*Heller* are far from compelling as a doctrinal matter.

A. The Statute and Its Elements

The felon-in-possession ban prohibits "any person . . . who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year" from possessing "any firearm or ammunition" that is "in or affecting commerce."[87] Anyone who

86. 18 U.S.C. § 922(g)(1) (2018). Most states have a state-law equivalent of the federal felon-in-possession ban. *See Who Can Have a Gun: Firearm Prohibitions*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE [hereinafter GIFFORDS L. CTR.], https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people [https://perma.cc/26ZF-FW9C] (listing federal and state laws regulating who can own firearms). This Note, however, focuses exclusively on § 922(g)(1).

87. 18 U.S.C. § 922(g)(1).

"knowingly" violates § 922(g)(1) can be fined, "imprisoned not more than 10 years, or both."[88]

Congress enacted the statute in its current form in 1968,[89] and federal prosecutions for weapons violations increased precipitously in the decades that followed.[90] And the felon-in-possession ban, in particular, continues to be vigorously enforced. More than 7,600 offenders were convicted under § 922(g)(1) in fiscal year 2019, which constituted roughly 10 percent of all federal convictions.[91] Firearms offenses, moreover, are the third most common type of crime for which offenders are convicted in the federal system, behind only immigration and drug offenses.[92] The relatively high number of § 922(g)(1) convictions can be partly attributed to the ease of convicting a defendant.[93] The government must prove only (1) that the defendant has a qualifying prior felony conviction; (2) that he knew of his felony status; (3) that he knowingly possessed a firearm at some point; and (4) that the firearm was in or affecting commerce.[94] And because courts

88. *Id.* § 924(a)(2). This statute is a general scienter provision that applies to § 922(g) as a whole. Rehaif v. United States, 139 S. Ct. 2191, 2195–96 (2019). The government therefore must show that a defendant "knowingly" violated each material element of § 922(g)(1) to convict that defendant under the federal felon-in-possession ban. *See id.* at 2196 ("[W]e think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g).").

89. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236; Gun Control Act of 1968, Pub. L. No. 90-618, § 301, 82 Stat. 1213, 1236. For a more detailed history of federal gun regulations, see BLOCHER & MILLER, *supra* note 24, at 42–50 and C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J. L. & PUB. POL'Y 695, 698–707 (2009).

90. Between 1980 and 1992, for instance, the number of suspects investigated and prosecuted for federal weapons violations increased four-fold and five-fold, respectively. LAWRENCE A. GREENFELD & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., WEAPONS OFFENSES AND OFFENDERS 4 (1995), https://bjs.gov/content/pub/pdf/woofccj.pdf [https://perma.cc/5YE8-ZA4V].

91. *See FY 2019 Quick Facts*, *supra* note 16, at 1.

92. U.S. SENT'G COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL STATISTICS 45 (2018) [hereinafter 2018 U.S. SENT'G COMM'N], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf [https://perma.cc/NPT3-7D4U].

93. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 836 (2001) ("So broad is the reach of possession offenses, and so easy are they to detect and then to prove, that possession has replaced vagrancy as the sweep offense of choice.").

94. *E.g.*, United States v. Parsons, 946 F.3d 1011, 1014 (8th Cir. 2020); United States v. Smith, 939 F.3d 612, 614 (4th Cir. 2019). Circuit courts traditionally required the government to prove only three elements to convict under § 922(g)(1). *See, e.g.*, United States v. Reed, 780 F.3d 260,

have liberally construed each of these elements, they are usually easy to satisfy.[95]

First, the government need only prove that a defendant has a prior conviction for a state or federal "crime punishable by imprisonment for a term exceeding one year."[96] Whether a defendant has a prior felony conviction is undisputed in many cases, either because the defendant stipulates as much or because a defendant's criminal record can be easily obtained and verified.[97] Importantly, whether a prior conviction is a qualifying predicate under § 922(g)(1) depends on whether the crime of conviction was *punishable* by more than a year in prison according to the law of the jurisdiction where the conviction was obtained, not the actual punishment a defendant received.[98] A defendant can therefore be barred from possessing a gun for life without spending a day in jail.[99]

Second, the government must prove that a defendant "knew he belonged to the relevant category of persons barred from possessing a firearm."[100] In other words, the defendant must know that he has previously been convicted of an offense punishable by more than a year in prison. Complex sentencing statutes and a large divergence between

271 (4th Cir. 2015) (listing three elements required to prove a § 922(g)(1) violation). A fourth element, that the defendant also *know* that he has a qualifying felony conviction for purposes of § 922(g)(1), became a requirement following the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). *See id.* at 2200 ("We conclude that in a prosecution under 18 U.S.C. § 922(g) . . . the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.").

95. *See infra* notes 111–13113, 117, 126 and accompanying text; *see also* U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 112 (last updated Jan. 22, 2020), https://www.justice.gov/archives/jm/criminal-resource-manual-112-firearms-charges [https://perma.cc/39DM-AMXM] ("[Federal firearms violations] are generally simple and quick to prove.").

96. 18 U.S.C. § 922(g)(1) (2018). Whether a prior conviction was for a "crime punishable by imprisonment for a term exceeding one year" for purposes of § 922(g)(1) "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." *Id.* § 921(a)(20).

97. *See, e.g.*, United States v. Benamor, 937 F.3d 1182, 1188 (9th Cir. 2019) (noting that, by stipulating to being a convicted felon, the defendant relieved the government of its burden of proving the defendant's felon status).

98. *E.g.*, United States v. Horodner, 993 F.2d 191, 194 (9th Cir. 1993).

99. *See, e.g.*, Schrader v. Holder, 704 F.3d 980, 982 (D.C. Cir. 2013) (affirming the application of § 922(g)(1) to an individual who served no jail time for his misdemeanor assault conviction).

100. Rehaif v. United States, 139 S. Ct. 2191, 2200 (2019). The court noted that a defendant who is unaware that his status disqualifies him from possessing a firearm under § 922(g) "may well lack the intent needed to make his behavior wrongful." *Id.* at 2197.

possible and actual sentences can make it difficult for a person to know whether a prior conviction subjects him to § 922(g)(1)'s prohibitions. Indeed, this knowledge requirement is the most challenging of § 922(g)(1)'s elements to satisfy.[101] Even so, establishing that a defendant knew he was a felon is not a difficult hurdle to overcome in most cases. A lengthy criminal record, for instance, makes it hard for a defendant to claim ignorance of his status as a felon.[102] As one court of appeals put it bluntly, "Most people convicted of a felony know that they are felons."[103] Thus, a defendant's knowledge of his felon status can often be easily inferred from proof that he has previously spent more than a year in prison[104] or has been convicted of a crime that is unequivocally recognized as a felony offense.[105]

Third, the government must prove that a defendant (i) possessed at some point (ii) what he knew to be a firearm. The statutory definition of "firearm" is expansive,[106] encompassing unloaded[107] and even inoperable weapons.[108] And § 922(g)(1) prohibits ex-felons from

101. *See, e.g.*, United States v. Davies, 942 F.3d 871, 874 (8th Cir. 2019) (vacating a § 922(g)(1) conviction after concluding that the government failed to show that a defendant knew that he had been formally "convicted" under Iowa law at the time of his firearm possession). *Rehaif* has also complicated § 922(g)(1) convictions that were secured before the case announced this knowledge requirement. *See, e.g.*, United States v. Balde, 943 F.3d 73, 96 (2d Cir. 2019) (vacating a guilty plea regarding a § 922(g) violation after holding that "the failure of the district court to advise [the defendant] that the government would need to establish beyond a reasonable doubt at trial that he knew that he was illegally present in the United States" amounted to plain error).

102. *See* United States v. Innocent, 977 F.3d 1077, 1082 (11th Cir. 2020) ("[S]omeone who has been convicted of felonies repeatedly is especially likely to know he is a felon.").

103. *Id.*

104. *See, e.g.*, United States v. Dowthard, 948 F.3d 814, 818 (7th Cir. 2020) (observing that a lengthy prison sentence for a prior conviction "severely hamper[s] an assertion" by a defendant that he was "ignorant" of his status as someone who had been convicted of a crime punishable by more than a year of imprisonment).

105. *See, e.g.*, United States v. Burghardt, 939 F.3d 397, 404 (1st Cir. 2019) (inferring that a defendant was well aware of his felon status based on his prior convictions for drug and robbery offenses, which were "punishable by a term of imprisonment well beyond a year").

106. Under federal law, a "firearm" is defined in relevant part as "any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." 18 U.S.C. § 921(a)(3)(A) (2018).

107. *See* United States v. Matthews, 520 F.3d 806, 810 (7th Cir. 2008) ("[T]he cases that we have found strongly suggest that the other courts of appeals also would reject [defendant's] arguments . . . that momentary possession of an unloaded weapon does not violate section 922(g).").

108. *See* United States v. Rivera, 415 F.3d 284, 286 (2d Cir. 2005) (concluding that inoperable weapons fall within the federal definition of "firearm" and collecting cases holding the same).

possessing ammunition as well.[109] In one Sixth Circuit case, for instance, the court upheld a fifteen-year mandatory sentence under the Armed Career Criminal Act ("ACCA") for a § 922(g)(1) conviction that resulted from a consent search of an ex-felon's home in which police uncovered in a drawer seven shotgun shells that a neighbor had given to the defendant.[110]

Regarding the second subpart of the third element, what constitutes "possession" of a firearm under § 922(g)(1) is similarly sweeping—courts have interpreted the statute to prohibit "possession in every form," including both actual and constructive possession.[111] Actual possession cases are straightforward—the government simply must prove that a defendant carried or physically controlled a firearm at some point in time.[112] Even a photo showing a defendant holding a handgun can show actual possession.[113] And a defendant's motive for possessing a firearm is irrelevant, as is the duration of possession.[114] In short, if an ex-felon is found with a gun or there is evidence that he once carried a gun, this possession element is almost certainly satisfied.[115]

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109. *See* 18 U.S.C. § 922(g)(1) (making it unlawful for a convicted felon to possess "any firearm or ammunition"); *see also id.* § 921(a)(17)(A) ("The term 'ammunition' means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.").

110. *See* United States v. Young, 766 F.3d 621, 623, 628 (6th Cir. 2014) (per curiam) (holding that a fifteen-year ACCA mandatory minimum sentence for "innocently acquiring and knowingly continuing to possess ammunition" in violation of § 922(g)(1) was not unconstitutionally disproportionate).

111. Henderson v. United States, 135 S. Ct. 1780, 1784 (2015).

112. *See, e.g.*, United States v. Grubbs, 506 F.3d 434, 439 (6th Cir. 2007) ("Actual possession requires that the defendant have 'immediate possession or control' of the firearm."); *see also* United States v. Caldwell, 760 F.3d 267, 279 (3d Cir. 2014) ("[A]bsent unusual circumstances . . . the knowledge element in a felon-in-possession case will necessarily be satisfied if the jury finds the defendant physically possessed the firearm.").

113. *See* United States v. Farrad, 895 F.3d 859, 864 (6th Cir. 2018) (affirming a § 922(g)(1) conviction where the government relied primarily on Facebook photos portraying the defendant holding what appeared to be guns).

114. *See, e.g.*, United States v. Gilbert, 430 F.3d 215, 218 (4th Cir. 2005) ("The statute in no way invites investigation into why the defendant possessed a firearm or how long that possession lasted.").

115. *See* United States v. Johnson, 459 F.3d 990, 998 (9th Cir. 2006) (describing federal firearms laws, including § 922(g)(1), as "something approaching absolute liability" (citing United States v. Nolan, 700 F.2d 479, 484 (9th Cir. 1983))). In certain narrow circumstances, an ex-felon can assert "a justification defense" for otherwise unlawful possession of a firearm if such possession was needed to avoid an "unlawful and present threat of death or serious bodily injury." *See* United States v. Gomez, 92 F.3d 770, 775, 778 (1996) (excusing the possession of a shotgun

Absent actual possession, a defendant can still be convicted for constructively possessing a firearm.[116] The government need only establish that an ex-felon had the ability to exercise dominion and control over a firearm, irrespective of whether he ever wields the weapon at any point or whether it formally belongs to someone else.[117] For instance, finding a gun in an ex-felon's residence is usually sufficient to permit the inference that, by virtue of his control of the premises, he constructively possessed the gun as well.[118] Similarly, an ex-felon can constructively possess a firearm found in a car that he is driving even if the weapon is concealed and out of reach.[119]

When an ex-felon shares a living space, proximity to a gun or the ex-felon's presence in a residence with a weapon is typically not enough to establish constructive possession. The government must provide additional evidence of a connection between the defendant and the firearm at issue.[120] But the constructive possession inquiry is fact bound and hence largely unpredictable. Consequently, any circumstantial evidence linking an ex-felon to a firearm—being a frequent guest in a home where a firearm is seized,[121] keeping personal belongings in the same room as a firearm,[122] sleeping near a nightstand where a spouse

for self-defense by an ex-felon who received multiple death threats for cooperating with the federal government). Notably, the *Gomez* court suggested that § 922(g)(1) "might not pass constitutional muster" if such a justification defense was deemed unavailable because criminalizing an ex-felon's possession of a firearm when his life is in imminent danger would "collide" with what the court described as a Second Amendment right "to defend oneself and one's home against physical attack." *Id.* at 774 n.7. This articulation of an individual Second Amendment right to self-defense preceded *Heller* by more than a decade.

116. *Henderson*, 135 S. Ct. at 1784.

117. *See, e.g.*, United States v. Morales, 893 F.3d 1360, 1371 (11th Cir. 2018) (stating that a defendant could be convicted under § 922(g)(1) "if he was aware of [a] gun's presence and had the ability and intent to exercise dominion and control over it then or later").

118. *See, e.g.*, United States v. Shorter, 328 F.3d 167, 172 (4th Cir. 2003) ("[T]he fact that the firearms . . . were found in [the defendant's] home permits an inference of constructive possession.").

119. *See, e.g.*, United States v. Norman, 388 F.3d 1337, 1341–42 (10th Cir. 2004) (confirming that a defendant could constructively possess a gun found in a locked glove compartment in his car).

120. *See, e.g.*, United States v. Ramos, 852 F.3d 747, 754 (8th Cir. 2017) (requiring proof of a "link"); United States v. Griffin, 684 F.3d 691, 695 (7th Cir. 2012) (requiring proof of a "nexus . . . connect[ing] the defendant to the contraband").

121. United States v. Johnson, 474 F.3d 1044, 1049 (8th Cir. 2007).

122. United States v. Benford, 875 F.3d 1007, 1015 (10th Cir. 2017); United States v. Kitchen, 57 F.3d 516, 520–21 (7th Cir. 1995).

keeps a handgun,[123] or having easy access to a shared closet where guns are stored[124]—might support a finding of constructive possession. The only guaranteed way for an ex-felon to avoid exposure to considerable criminal liability is to remove firearms from his home entirely.

Finally, the fourth element is jurisdictional: to support federal jurisdiction, the firearm must have some nexus with interstate commerce.[125] Courts have also construed this element liberally, requiring only that a firearm have traveled in interstate commerce at some time in the past.[126] And given that practically all firearms move across states lines at some point between their manufacture and ultimate sale, this element is rarely disputed.[127]

Once the government secures a conviction, the consequences faced by a defendant can be severe. Federal law provides for a maximum sentence of ten years for a § 922(g)(1) violation,[128] with the average sentence for a felon-in-possession offender exceeding five years.[129] The ACCA,[130] moreover, requires a fifteen-year mandatory minimum sentence when an offender convicted under § 922(g)(1) has three previous convictions for a violent felony or serious drug crime.[131] Even defendants with prior convictions for relatively low-level offenses can face a year or two in prison for a single incident of unlawful firearm possession.[132]

In sum, § 922(g)(1) convictions carry harsh sentences, and courts' liberal interpretations of the statute's already-broad language make

123. United States v. Alanis, 265 F.3d 576, 592 (7th Cir. 2001); *see also* United States v. Boykin, 986 F.2d 270, 274 (8th Cir. 1993) (concluding that a defendant constructively possessed firearms found in a bedroom that he shared with his wife).

124. United States v. Denson, 775 F.3d 1214, 1220 (10th Cir. 2014).

125. *See* 18 U.S.C. § 922(g) (2018) (requiring that firearm possession be "in or affecting commerce"); United States v. Singletary, 268 F.3d 196, 199 (3d Cir. 2001) (acknowledging that Congress enacted the felon-in-possession ban pursuant to its Commerce Clause authority).

126. *Singletary*, 268 F.3d at 200.

127. *See, e.g.*, United States v. Harris, 394 F.3d 543, 551 (7th Cir. 2005) (confirming that a gun's manufacture in another state is an adequate "interstate connection" for purposes of § 922(g)(1)).

128. 18 U.S.C. § 924(a)(2).

129. *FY 2019 Quick Facts*, *supra* note 16, at 2.

130. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 1837, 2138.

131. 18 U.S.C. § 924(e).

132. *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL § 2K2.1(a)(6) (2018). The lowest base offense level for an ex-felon who violates § 922(g)(1) is fourteen, *id*., which would still result in a recommended sentence of fifteen to twenty-one months for a defendant in the lowest criminal history category, *id.* at ch. 5, pt. A.

such convictions easy to secure. Given the felon-in-possession ban's worthy purpose of reducing gun violence, its far-reaching scope is no doubt deliberate.[133] But this breadth also comes with severe consequences for ex-felons. By allowing convictions to be based on a largely immutable factor (felony status) in combination with easily verifiable ones (simple possession of a firearm), the statute ensures that enforcement is near effortless,[134] making it that much easier for prosecutors to facilitate the reentry of ex-felons into the carceral state.[135]

B. The Federal Felon-In-Possession Ban's Sweeping Scope

As explained above, the federal felon-in-possession ban punishes firearm possession by ex-felons swiftly and harshly, and its reach is expansive by design. The statute's sweeping scope might be justified if it served an especially important government interest. Indeed, the "broad objective" of § 922(g)(1) is to "keep guns out of the hands of presumptively risky people,"[136] and there is no doubt that such an interest in preventing crime and gun violence is compelling by any metric.[137] Yet whether the felon-in-possession ban actually advances this interest—and whether, by extension, the ban's expansive reach is necessary and therefore defensible—is highly debatable.

Start with the fact that § 922(g)(1) punishes any and all firearm possession by ex-felons, irrespective of whether a crime occurs or is even likely to occur. As explained above, a § 922(g)(1) conviction is predicated on possession without regard to motive, so whether an ex-felon's firearm possession is associated with any sort of harmful behavior worth deterring is irrelevant to § 922(g)(1)'s enforcement.[138] Consequently, because of how § 922(g)(1) is written, courts do not

133. Levin, *supra* note 37, at 2205 ("Possessory offenses do not address harm directly; rather, they target risks that might ultimately grow into harms. They are a proxy for past, future, or ongoing criminality.").

134. *See* Dubber, *supra* note 93, at 859 ("In many cases, possession statutes also save prosecutors the trouble of proving that other major ingredient of criminal liability in American criminal law, mens rea, or a guilty mind.").

135. *See id.* ("Possession has become the paradigmatic offense in the current campaign to stamp out crime by incapacitating as many criminals as we can get our hands on.").

136. United States v. Yancey, 621 F.3d 681, 683–84 (7th Cir. 2010).

137. *Id.* at 684; Schrader v. Holder, 704 F.3d 980, 989–90 (D.C. Cir. 2013).

138. *See, e.g.*, United States v. Teemer, 394 F.3d 59, 64 (1st Cir. 2005) (noting that § 922(g)(1) "bans possession outright without regard to how great a danger exists of misuse in the particular case").

consider whether an ex-felon actually intended to use a firearm for any criminal purpose. Instead, they focus almost exclusively on other considerations that are not obviously related to gun violence, such as whether there is a sufficient "nexus" between the defendant and a gun to establish constructive possession.[139] To be sure, possessing a firearm is an essential first step in any course of action that may ultimately result in a dangerous use of that firearm. And in certain cases, § 922(g)(1) arguably preempts such harm by allowing an ex-felon in possession of a gun to be incapacitated before criminal behavior materializes.[140] Yet the fact that the statute preempts gun violence in certain cases does not mean that it does so in all or even most cases.[141] Nor does it change the inescapable fact that the likelihood of an armed ex-felon putting others in harm's way or of an ex-felon having any intention of harming others is simply not an element of the § 922(g)(1) offense.[142]

The upshot of § 922(g)(1)'s sweeping scope, of course, is that the statute often targets conduct that is nonviolent and unrelated to criminal activity. For instance, nearly all of the federal courts of appeals have rejected an "innocent transitory possession" defense to a § 922(g)(1) charge.[143] Defendants have tried to raise this defense in cases where an ex-felon allegedly stumbled upon a firearm and then briefly possessed it solely for the innocent purpose of safely turning the weapon over to police.[144] But courts have consistently held that an ex-felon's motive for possessing a firearm, even if wholly devoid of illicit intent, is irrelevant under § 922(g)(1).[145] Thus, the result in such cases is that an ex-felon is re-incarcerated, likely for several years, for conduct that in no way jeopardized public safety. In short, under § 922(g)(1), possession of a firearm and possession alone is what

139. *See, e.g.*, United States v. Davis, 896 F.3d 784, 790–91 (7th Cir. 2018) (discussing, among other things, whether a defendant was the head of a household and therefore constructively possessed a revolver found in a shared residence).

140. *See supra* note 133.

141. *See, e.g.*, *Davis*, 896 F.3d at 791(involving a § 922(g)(1) conviction where the firearms at issue were never wielded by the defendant).

142. *See supra* Part II.A.

143. *See* United States v. Vereen, 920 F.3d 1300, 1309 (11th Cir. 2019) (noting that the "overwhelming majority" of circuits have rejected a temporary innocent possession defense to a § 922(g)(1) charge and collecting cases).

144. *E.g.*, United States v. Mason, 233 F.3d 619, 625 (D.C. Cir. 2000).

145. *See Vereen*, 920 F.3d at 1308 ("[T]he defendant's motive or purpose behind his possession [of a firearm] is irrelevant.").

matters, regardless of whether harm is imminent or likely. And without a consideration of harm, § 922(g)(1) convictions seem disconnected with the statute's purpose of preventing gun violence.

The federal felon-in-possession ban is disconnected from its ostensible purpose for a second reason: it punishes firearm possession by violent and nonviolent offenders equally.[146] Some argue that this is necessary to ensure that lethal firearms are wielded only by "*law-abiding, responsible* citizen[s]"[147] rather than "presumptively risky people."[148] And a felony record of any sort, the argument goes, is useful in distinguishing the former from the latter.[149] But, as a predictor of an individual's violent tendencies or his risk to the public, the felon label is patently overinclusive. Indeed, the term "felony" is regularly applied to a wide array of nonviolent conduct. This includes, for example, mail fraud[150] or marijuana possession,[151] offenses that seemingly have little bearing on one's ability to be a responsible gun owner.[152] And as the list of felonies in state and federal criminal codes continues to grow,[153] the range of nonviolent conduct that can potentially disqualify the

146. *See, e.g.*, United States v. Pruess, 703 F.3d 242, 247 (4th Cir. 2012) (affirming the application of § 922(g)(1) to a nonviolent felon).

147. United States v. Moore, 666 F.3d 313, 319 (4th Cir. 2012) (quoting United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010)).

148. United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010).

149. *See, e.g.*, Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019) ("The government identifies its interest [in enforcing § 922(g)(1)] as preventing gun violence by keeping firearms away from persons, such as those convicted of serious crimes, who might be expected to misuse them.").

150. *See* Hatfield v. Barr, 925 F.3d 950, 951, 953 (7th Cir. 2019) (affirming the application of § 922(g)(1)'s lifetime bar on firearm possession to a defendant previously convicted of mail fraud).

151. *See* 21 U.S.C. § 844(a) (2018) (providing that a person with a prior drug possession conviction who knowingly possesses a controlled substance can be sentenced to up to two years in prison).

152. *See* Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339, 1363 (2008) (describing as "absurd" the "claim that income tax evasion, antitrust law violations, or . . . calling George W. Bush a jackass should disqualify anyone from owning a firearm").

153. *See* Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."); *cf.* Gary Fields & John R. Emshwiller, *Many Failed Efforts To Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920 [https://perma.cc/C6TQ-L9H5] (noting the Justice Department's 1982 attempt to count the total number of federal crimes which "produced only an educated estimate" of "about 3,000 criminal offenses").

average citizen from ever possessing a firearm under § 922(g)(1) has expanded in equal measure.

Given the expansive definition of what amounts to a felony, there is little reason then for a statute targeting violent crime to treat all ex-felons unconditionally. To the contrary, there are significant differences between nonviolent offenders and those who have been convicted of violent crimes—or at least enough differences to render the blanket disarmament of *all* ex-felons unwarranted.[154] Compared to violent offenders in the federal system, for instance, nonviolent offenders are considerably less likely to recidivate, and when they do, they are rearrested for less serious offenses.[155] It simply challenges common sense to suggest that the public is equally threatened by an armed ex-felon with a history of violent behavior as it is by someone whose criminal record is limited to falsifying income on a mortgage application.[156]

A final argument that could be made to support § 922(g)(1)'s sweeping scope is that, rather than targeting the dangerous use of firearms, the statute is instead meant to reserve gun ownership exclusively to "law-abiding, responsible citizens"—that is, those citizens who have committed no crimes at all, whether violent or otherwise.[157] If this were true, however, § 922(g)(1) is blatantly underinclusive on this front by its own terms. Although § 922(g)(1) applies to anyone who has been convicted of a crime "punishable by imprisonment for a term exceeding one year,"[158] any previous convictions "pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation

154. *See, e.g.*, United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010) ("[Section] 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.").

155. *See* U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 3, 8 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf [https://perma.cc/P2KL-LWPS] (finding that among the more than 25,000 federal offenders released from prison in 2005, violent offenders recidivated at a rate of 63.8 percent while nonviolent offenders recidivated at a rate of 39.8 percent).

156. Medina v. Whitaker, 913 F.3d 152, 154 (D.C. Cir. 2019) (rejecting a Second Amendment challenge to § 922(g)(1) by a plaintiff who was prohibited from owning a firearm for life based on a prior felony conviction for "falsifying his income on mortgage applications twenty-seven years ago").

157. Indeed, such an interpretation of § 922(g)(1) would align with lower courts' interpretation of *Heller* as restricting the Second Amendment right to such citizens. *E.g.*, United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

158. 18 U.S.C. § 922(g)(1) (2018).

of business practices" are specifically excluded from the statute's ambit.[159] As other scholars acknowledge, there is no principled explanation for this "business practices" exception.[160] Arguing that perpetrators of these serious offenses[161] are somehow more "law-abiding" or "responsible" than other convicted felons borders on the frivolous. And if one instead rationalizes the business practices exception as "reduc[ing] unnecessary restrictions" on gun ownership for certain white-collar felons who do not exhibit "dangerous tendencies,"[162] one must wonder what makes those convicted of nonviolent crimes unrelated to business practices more dangerous.[163]

At bottom, § 922(g)(1)'s expansive reach and punitive nature are often defended as essential to advancing the government's interest in reducing gun violence. But given how the statute regularly punishes conduct unrelated to criminal activity, needlessly treats nonviolent offenders the same as violent ones, and imposes a lifetime ban on firearm possession on some lawbreakers but not others, it is time for this sweeping and "longstanding prohibition"[164] to be reevaluated.

C. The Federal Felon-In-Possession Ban's Constitutional Dimension and Doctrinal Shortcomings

Whatever could have been said about the felon-in-possession ban's sweeping scope before *Heller*, no one at the time could have challenged its constitutionality for the simple reason that courts had routinely held that nobody, felon or otherwise, was constitutionally entitled to possess a firearm in any capacity.[165] But *Heller*'s recognition of an individual Second Amendment right to "keep and bear Arms" gave § 922(g)(1) an added constitutional dimension. In addition to

159. *Id.* § 921(a)(20)(A).

160. *See, e.g.*, Levinson, *supra* note 36, at 28 ("Is lying to the F.B.I. about insider trading [like Martha Stewart] really more of a threat to the republic than the 'business practices' exempted from coverage by § 921(a)(20)(A)?").

161. *See, e.g.*, 15 U.S.C. § 1 (2018) (making "[e]very contract . . . or conspiracy, in restraint of trade" a felony punishable by up to ten years in prison).

162. United States v. Jester, 139 F.3d 1168, 1171 (7th Cir. 1998).

163. *See, e.g.*, United States v. Coleman, 609 F.3d 699, 706 (5th Cir. 2010) (holding that a prior conviction for conspiracy to infringe a copyright does not fall within the business practices exception); United States v. Stanko, 491 F.3d 408, 419 (8th Cir. 2007) (holding that a prior conviction for violating the Federal Meat Inspection Act likewise falls outside the exception).

164. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

165. *See supra* note 43 and accompanying text (describing the militia-based interpretation of the Second Amendment that predated *Heller*).

being expansive, punitive, and robustly enforced,[166] the felon-in-possession ban now, in effect, permanently prohibits a sizable number of Americans from engaging in conduct that is otherwise constitutionally protected.

The irony, of course, is that although the *Heller* Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose of self-defense in the home,[167] this is precisely the sort of conduct that § 922(g)(1) criminalizes. For one, courts have made it clear that an ex-felon's reason for possessing a firearm is irrelevant for purposes of the federal felon-in-possession ban,[168] meaning that a defendant can be convicted under § 922(g)(1) "even if [he] possesses a firearm purely for self-defense."[169] Moreover, under § 922(g)(1), the mere presence of firearms in an ex-felon's residence is effectively verboten.[170] In short then, the statute's prohibition on firearm possession extends directly into an ex-felon's home, where the right to keep and bear arms is most protected.[171]

Despite the felon-in-possession ban's seeming incompatibility with *Heller*'s central holding, however, circuit courts have routinely upheld its constitutionality post-*Heller*.[172] And yet, as several scholars note, the reasons these courts commonly give to justify the continued exclusion of ex-felons from the Second Amendment's protections are far from satisfying as a doctrinal matter.[173] Some courts, for instance, have upheld § 922(g)(1) by simply citing to the *Heller* majority's carve out for "longstanding prohibitions on the possession of firearms by felons."[174] But this language was likely dicta,[175] and the Court did not

166. *See supra* Parts II.A–B.

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

168. *E.g.*, United States v. Vereen, 920 F.3d 1300, 1308 (11th Cir. 2019).

169. United States v. Rozier, 598 F.3d 768, 770 (11th Cir. 2010).

170. *See supra* Part II.A (explaining that seizing a firearm in an ex-felon's residence is usually sufficient to a support a § 922(g)(1) conviction under a theory of constructive possession).

171. *See Heller*, 554 U.S. at 628 (stating that the need for self-defense is "most acute" in the home).

172. *See supra* Part I.B.

173. *See supra* note 36 and accompanying text.

174. *Heller*, 554 U.S. at 626.

175. *See, e.g.*, Winkler, *supra* note 36, at 1567 ("After all, the laundry list [of exceptions] is offered up in the *Heller* opinion without any reasoning or explanation. Moreover, none of the exceptions were formally at issue in *Heller* . . . . The laundry list was, in a first-year law student's favorite word, dicta."). *But see, e.g.*, United States v. Huet, 665 F.3d 588, 600 n.11 (3d Cir. 2012) (asserting that *Heller*'s list of "presumptively lawful" firearm regulations "was not dicta" and instead was a limit on *Heller*'s holding that was binding on lower courts).

cite any laws, cases, or secondary materials to support this proposition.[176] Other courts have concluded that § 922(g)(1) is sufficiently tailored to advance the government's interest in preventing crime and gun violence.[177] Yet, as explained above, such a claim is dubious at best given the statute's sweeping scope.[178]

That leaves courts' reliance on *Heller*'s language about the Second Amendment's protections extending only to "law-abiding, responsible citizens,"[179] which has since become a key limit on the scope of the "core" Second Amendment right.[180] Courts have regularly reasoned, in other words, that the individual right to keep and bear arms is reserved only for upstanding citizens, and because ex-felons are decidedly not part of that group,[181] the felon-in-possession ban raises few if any constitutional concerns. But this "law-abiding, responsible citizens" limit is also doctrinally problematic on at least three fronts.[182]

First, the exclusion of ex-felons from the Second Amendment's ambit cannot be derived from the constitutional text. In fact, the text supports the opposite conclusion, something which the *Heller* majority itself went a long way to illustrate. The Court insisted, for instance, that "the people" referred to in the Second Amendment were identical to

176. Winkler, *supra* note 36, at 1567; *see also* Larson, *supra* note 36, at 1372 ("The Court offered no citations to support this statement, and its ad hoc, patchy quality has been readily apparent to commentators . . . . More cuttingly, Justice Breyer suggested that these exceptions amounted to little more than 'judicial *ipse dixit*.'").

177. Schrader v. Holder, 704 F.3d 980, 990 (D.C. Cir. 2013).

178. *See supra* Part II.B.

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

180. *See, e.g.*, Binderup v. Att'y Gen., 836 F.3d 336, 349 (3d Cir. 2016) (en banc) (opinion of Ambro, J.) (concluding that criminal offenders can be denied the right to bear arms because they are "unvirtuous" for having committed "serious crimes"); United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010) (defining the "core right identified in *Heller*" as the "right of a *law-abiding*, *responsible* citizen to possess and carry a weapon for self-defense").

181. *See, e.g.*, United States v. Moore, 666 F.3d 313, 319 (4th Cir. 2012) ("[The defendant] simply does not fall within the category of citizens to which the *Heller* court ascribed the Second Amendment protection of 'the right of *law-abiding responsible* citizens to use arms in defense of hearth and home.'").

182. Some scholars have suggested that the *Heller* Court adopted this limit on the Second Amendment right not because of any underlying constitutional principles but rather to avoid having to make the controversial move of invalidating the federal felon-in-possession ban and other gun restrictions like it. *See, e.g.*, Larson, *supra* note 36, at 1372 (acknowledging commentators' speculation that *Heller*'s endorsement of various "longstanding" gun regulations was "compromise language" intended to secure a fifth vote); Winkler, *supra* note 36, at 1561 ("In constitutional law, a right is supposed to define the scope of contemporary government regulation. In the *Heller* world . . . contemporary regulation defines the scope of the right.").

"the people" protected by the First, Fourth, and Ninth Amendments.[183] And these "people," according to the Court, "unambiguously" included "*all* members of the political community, not an unspecified subset."[184]

Second, the *Heller* Court's characterization of prohibitions on firearm possession by felons as "longstanding"—and thus presumably constitutional—is likely wrong as a historical matter.[185] The federal felon-in-possession ban is a modern creation.[186] The first major federal restrictions on firearm use by ex-felons, which targeted individuals convicted of a "crime of violence," were enacted only in 1938.[187] And prohibitions on simple possession of firearms were first implemented and imposed on both violent and nonviolent ex-felons in 1968.[188] At the very least, the historical support for limiting the Second Amendment right to virtuous citizens alone is by no means as conclusive as *Heller* suggests.[189]

Third, the "law-abiding, responsible citizens" limit is hard to reconcile with what the *Heller* Court identified as the "central component" of the Second Amendment right—the right to self-defense in case of confrontation.[190] The *Heller* majority claimed that the Second Amendment merely codified a preexisting "natural right"

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183. *Heller*, 554 U.S. at 579–80.

184. *Id.* at 580 (emphasis added).

185. *See* Larson, *supra* note 36, at 1372 ("The *Heller* exceptions lack the historical grounding that would normally justify an exception to a significant constitutional right. Whatever the Court is doing here, it is not rigorously grounded in eighteenth-century sources."); Marshall, *supra* note 89, at 700–08 (2009) (describing the advent of restrictions on firearm possession by convicted felons in the 1920s and asserting that "a lifetime ban on any felon possessing any firearm is not 'longstanding' in America"); Winkler, *supra* note 36, at 1561 ("[*Heller*'s] 'laundry list' of Second Amendment exceptions is simply offered up with no discussion whatsoever about how these exceptions comply with the Founders' understanding of the right to keep and bear arms. *Heller* does not cite a single historical source to support these exceptions. Not one.").

186. Marshall, *supra* note 89, at 698 ("The federal 'felon' disability . . . is less than fifty years old."). Marshall also notes "with a good degree of confidence" that state law bans on ex-felons or convicts possessing firearms were "unknown before World War I." *Id.* at 708.

187. Federal Firearms Act, Pub. L. No. 75-785, § 1(6), 52 Stat. 1250, 1250 (1938); *id.* § 2(f), 52 Stat. at 1251.

188. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236; Gun Control Act of 1968, Pub. L. No. 90-618, § 301, 82 Stat. 1213, 1236.

189. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 650 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (noting that scholars "disagree about the extent to which *felons* . . . were considered excluded from the right to bear arms during the founding era" and that "[t]he historical evidence is inconclusive at best").

190. District of Columbia v. Heller, 554 U.S. 570, 592, 599 (2008).

of self-preservation that was—and surely still is—available to everyone.[191] Yet various commentators point out that it is difficult to fathom why ex-felons "don't . . . have the same right of self-defense as everyone else."[192] In short, a "natural right" of seemingly universal application purportedly undergirds the Second Amendment's protections, but *Heller* affords this "natural right" only to an exclusive subset of citizens. This surely qualifies as another one of the *Heller* majority's "conflicting pronouncements" that Justice John Paul Stevens underscored in his dissent.[193]

In short, *Heller*, in some sense, was doubly damaging to ex-felons who were already subject to a felon-in-possession ban that was harsh and punitive in its own right. Not only did the *Heller* opinion elevate to constitutional status the very conduct—possessing a firearm for self-defense in the home—that the felon-in-possession ban criminalizes, categorically excluding ex-felons from the Second Amendment's protections in the process. It also built this categorical exclusion on a doctrinal foundation that is both unorthodox[194] and unpersuasive. Thus, although § 922(g)(1)'s constitutionality post-*Heller* is well-settled,[195] courts have reached this conclusion only by more or less writing ex-felons out of the Constitution.

III. THE FELON-IN-POSSESSION BAN'S TANGIBLE HARMS

Scholarship post-*Heller* roundly criticizes the decision's reasoning. Yet emerging academic debates largely focus on abstract disputes about the history and text of the Second Amendment rather than facts on the ground, where the felon-in-possession ban continues to be

191. *Id.* at 594; *see also* McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day.").

192. Winkler, *supra* note 36, at 1568; *see also, e.g.*, Blocher, *supra* note 36, at 426 ("Felons, in particular, are likely to move in circles where self-defense is an imperative."); Levinson, *supra* note 36, at 27–29 (noting that if there is a constitutional right "to defend [oneself] against potential sources of physical harm, then Martha Stewart—and millions of other non-violent criminals—have done nothing that should lead us to strip them of their right").

193. *Heller*, 554 U.S. at 644 (Stevens, J., dissenting).

194. *See* Winkler, *supra* note 36, at 1563 ("In modern constitutional law, rights are not selectively doled out by legislatures to those whom elected officials deem to be sufficiently virtuous or worthy.").

195. *See* Kanter v. Barr, 919 F.3d 437, 442 (7th Cir. 2019) (observing that "every federal court of appeals to address the issue has held that § 922(g)(1) does not violate the Second Amendment on its face").

enforced unabated.[196] This Part departs from those debates by taking a more practical approach. Namely, it addresses the tangible impacts of § 922(g)(1)'s criminalization of gun possession by ex-felons. In particular, it describes three distinct harms that the statute inflicts upon ex-felons and their communities: first, the extent to which § 922(g)(1) burdens ex-felons' reintegration into society; second, the chilling effect the statute has on nonfelons' exercise of their own Second Amendment rights; and finally, the disproportionate burden § 922(g)(1) imposes on communities of color.

A Burdening Ex-Felons' Reintegration into Society

Section 922(g)(1)'s harms are not limited to criminal convictions and extended incarceration alone.[197] By effectively barring ex-felons from living in any residence where firearms are lawfully kept, the statute also needlessly complicates their reintegration into society following their release from prison.

Securing stable housing as a formerly incarcerated person is difficult in the first place. Landlords routinely refuse to rent to tenants with criminal records.[198] State and local public housing authorities have broad discretion to deny housing assistance to individuals because of their criminal history or past involvement with drug-related activities.[199] In certain cities, a prior criminal conviction can be grounds for a multiyear ban from federally assisted public housing.[200] Even if landlords were willing to overlook criminal records, a combination of bleak employment prospects[201] and a nationwide shortage of

196. *See supra* note 37 and accompanying text.

197. *See supra* Part I.A.

198. *See, e.g.*, Mireya Navarro, *Federal Housing Officials Warn Against Blanket Bans of Ex-Offenders*, N.Y. TIMES (Apr. 4, 2016), https://nyti.ms/1ZY1CIl [https://perma.cc/U8B6-GY5N].

199. *See, e.g.*, 42 U.S.C. § 13661(c) (2018) (allowing public housing authorities to deny federal housing benefits to applicants based on their criminal history); *see also* Marah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 CITYSCAPE: J. POL'Y DEV. & RSCH. 37, 39–40 (2013).

200. *See* Curtis et al., *supra* note 199, at 43–44.

201. *See, e.g.*, Binyamin Appelbaum, *Out of Trouble, But Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), https://nyti.ms/1C8KVBq [https://perma.cc/E8XK-TGHH] (noting that men with criminal records account for more than one-third of all nonworking men ages twenty-five to fifty-four and describing the various employment barriers faced by ex-felons).

affordable housing[202] puts most of the private rental market out of reach for many ex-felons. Unsurprisingly then, formerly incarcerated people are nearly ten times more likely to experience homelessness than the general public.[203] And homelessness in turn increases the risk of reincarceration, both because it destabilizes ex-felons' return to society[204] and because local authorities criminalize homelessness itself in a variety of ways.[205]

The federal felon-in-possession ban exacerbates an already dire housing problem for a vulnerable group. This is because § 922(g)(1)'s expansive scope, when combined with strict supervised release conditions,[206] can effectively render an ex-felon's preferred residence unsuitable if firearms are kept in the home by a roommate or family member. Under these circumstances, ex-felons face an unenviable choice. They can try to convince their cotenants to part ways with their firearms, risk revocation of their supervised release or conviction for constructive possession of a weapon, or find somewhere else to live.

The scale of this particular housing hurdle is potentially substantial. Roughly 40 percent of American adults live in a gun-owning household,[207] all of which would be effectively off-limits to ex-felons unwilling to risk a constructive possession charge. For anyone subject to the federal felon-in-possession ban, finding housing in a country with nearly four hundred million guns[208] could be an unexpected ordeal. Living in the United States with a felony record is

202. *See* NAT'L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING 1, 4–6 (2018), https://nlihc.org/sites/default/files/oor/OOR_2018.pdf [https://perma.cc/G59W-7YL7].

203. *See* Lucius Couloute, *Nowhere To Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html [https://perma.cc/3NF3-A9NP].

204. *Id.*

205. *See* Human Rights Council, Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America, U.N. Doc. A/HRC/38/33/Add.1, at 12 (2018), http://undocs.org/A/HRC/38/33/ADD.1 [https://perma.cc/96Q3-FZKT] ("In many [American] cities, homeless persons are effectively criminalized for the situation in which they find themselves.").

206. *See, e.g.*, 18 U.S.C. § 3563(b)(8) (2018) (authorizing a sentencing court to require that a defendant "refrain from possessing a firearm" during his term of supervised release).

207. John Gramlich & Katherine Schaeffer, *7 Facts About Guns in the U.S.*, PEW RSCH. CTR. (Oct. 22, 2019), https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states [https://perma.cc/8WTV-YXJ2].

208. GIFFORDS LAW CTR., *supra* note 86 (estimating that there are roughly 393 million firearms in the United States).

challenging enough. And § 922(g)(1), among its many harms, makes ex-felons' return to society needlessly harder.

B. Chilling Nonfelons' Exercise of Their Second Amendment Right

One aspect of § 922(g)(1) that often goes unaddressed is the collateral damage it inflicts on people outside of the criminal justice system.[209] The robust enforcement of the federal felon-in-possession ban effectively chills the Second Amendment rights of nonfelons who choose to live with loved ones with a felony record. There are several reasons why lawful gun purchasers may choose to own a firearm, from hunting and recreation to self-defense. Two-thirds of gun owners claim that protection is the primary reason for owning a firearm, and nearly 30 percent of female gun owners say protection is the sole reason they own one.[210] In short, Americans often choose to own firearms for the "core lawful purpose of self-defense."[211]

But the federal felon-in-possession ban makes exercising this Second Amendment right a risky proposition for those who live with loved ones with felony records. Simply having the ability to "exercise dominion and control" over a firearm is often enough for an ex-felon to constructively, and thus unlawfully, possess a firearm under § 922(g)(1).[212] Consequently, because a nonfelon keeping a gun in the home does not necessarily exclude an ex-felon from jointly "possessing" it,[213] an ex-felon can face a criminal conviction for merely living somewhere where he knows firearms are kept, even if those firearms are stored in a locked compartment[214] or are formally

209. *But see* United States v. Huet, 665 F.3d 588, 601 (3d Cir. 2012) ("We are mindful of the risk that felon dispossession statutes, when combined with laws regarding accomplice liability, may be misused to subject law-abiding cohabitants to liability simply for possessing a weapon in the home."); Marshall, *supra* note 89, at 734 (describing the federal felon-in-possession ban as "go[ing] beyond even stripping the convict of the entire core of the [Second Amendment] right, by pressuring those who share his household to disarm themselves as well, to avoid the risk of the convict's being prosecuted for unlawful possession based on theories of joint or constructive possession").

210. Gramlich & Schaeffer, *supra* note 207.

211. District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

212. *See supra* Part II.A.

213. *See, e.g.*, United States v. Gallimore, 247 F.3d 134, 136–37 (4th Cir. 2001) ("[Section] 922(g)(1) does not require proof of actual or exclusive possession; constructive or joint possession is sufficient.").

214. *See* United States v. Rivers, 355 F. App'x 163, 165–66 (10th Cir. 2009) (upholding a defendant's § 922(g)(1) conviction although police recovered the weapons from a locked compartment to which the defendant did not have a key).

"owned" by a spouse or family member.[215] Courts of appeals have emphasized, of course, that an ex-felon's "mere proximity" to a gun or his mere presence in a residence where a gun is kept is not sufficient to prove constructive possession under § 922(g)(1).[216] But deciding whether certain factors establish the requisite "nexus"[217] between an ex-felon and a specific firearm involves a fact-intensive and unpredictable inquiry that offers nonfelons little guidance.[218]

United States v. Griffin[219] illustrates the dilemma faced by gun owners who live with ex-felons. After moving in with his parents following his release from federal prison, the defendant in *Griffin*, an ex-felon, was later convicted under § 922(g)(1) after police found ammunition and ten firearms in his parents' home.[220] Because the firearms belonged to the defendant's father, who was an avid hunter, the Seventh Circuit concluded that the government had failed to sufficiently demonstrate that the defendant "intended to exercise control" over his father's guns, and the court reversed the defendant's conviction.[221] But this reversal came *more than four years* after the defendant was initially arrested.[222] For most nonfelons, exercising their Second Amendment rights simply will not be worth the risk of having their ex-felon loved ones endure years of trials and appeals in federal court.

Indeed, nonfelons who take the risk of both living with an ex-felon and keeping firearms in the home may ultimately face criminal liability themselves. Consider *United States v. Huet*.[223] The defendant in that case shared a home with her boyfriend, who had a prior federal

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215. *See, e.g.*, United States v. Alanis, 265 F.3d 576, 592 (7th Cir. 2001) (finding it immaterial that the defendant's wife owned the firearm because constructive possession can be joint).

216. *See, e.g.*, United States v. Griffin, 684 F.3d 691, 696 (7th Cir. 2012) ("We have explained repeatedly that mere proximity to contraband is not enough to establish a sufficient nexus to prove constructive possession.").

217. *Id.* at 695 (quoting United States v. Morris, 576 F.3d 661, 666 (7th Cir. 2009)).

218. *Compare* United States v. Kitchen, 57 F.3d 516, 520 (7th Cir. 1995) (finding constructive possession where guns were seized in a bedroom in the defendant's girlfriend's residence that also contained the defendant's jewelry and clothes), *with Griffin*, 684 F.3d at 698–99 (finding no constructive possession where the defendant moved into his parent's house where several firearms were later found).

219. United States v. Griffin, 684 F.3d 691 (7th Cir. 2012).

220. *Id.* at 693–94.

221. *Id.* at 693, 699.

222. The defendant in *Griffin* was arrested in April 2008, *id.* at 693, and the case was decided by the Seventh Circuit in July 2012, *id.* at 691.

223. United States v. Huet, 665 F.3d 588 (3d Cir. 2012).

conviction for possessing an unregistered firearm and thus was subject to the federal felon-in-possession ban.[224] After police seized a rifle in the couple's upstairs bedroom while executing a search warrant, the government indicted the boyfriend with illegal possession of the weapon under § 922(g)(1).[225] Yet despite being able to lawfully possess a firearm herself, the defendant was indicted as well for aiding and abetting her boyfriend's unlawful firearm possession.[226] In holding that this aiding and abetting charge did not violate the defendant's Second Amendment rights, the Third Circuit acknowledged the risk that a felon-in-possession ban, when combined with laws regarding accomplice liability, might be "misused to subject law-abiding cohabitants to [criminal] liability simply for possessing a weapon in the home."[227] But the court then insisted that the defendant's right to keep a firearm in the home "did not give her the right to facilitate" her boyfriend's unlawful possession of one.[228] And because the government had sufficiently alleged both that the defendant knew her boyfriend was barred from possessing a firearm and that she had knowingly aided and abetted his possession of a firearm anyway, the government's case against the defendant could proceed.[229]

The federal felon-in-possession ban thus presents millions of nonfelons who have family members involved in the criminal justice system[230] with an unappealing choice as well: keep firearms in the home or live with their loved ones. They cannot do both.

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224. *Id.* at 592–93.

225. *Id.*

226. *Id.* at 593. The government charged the defendant under a general federal aiding and abetting statute, which provides that, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (2018).

227. *Huet*, 665 F.3d at 601.

228. *Id.* at 602.

229. *Id.* at 596, 603.

230. In 2016 alone, roughly 626,000 people were released from state and federal correctional authorities, meaning that hundreds of thousands of households have family members who were formerly incarcerated. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2016: SUMMARY 1 (2018), https://www.bjs.gov/content/pub/pdf/p16_sum.pdf [https://perma.cc/4EZU-9YZ7].

C. Targeting Communities of Color

Finally, every aspect of the American criminal justice system is intimately connected with race,[231] and the federal felon-in-possession ban is no different. Criminalizing the use and possession of firearms disproportionately impacts the Black community. Of the 7,647 convictions under § 922(g)(1) in fiscal year 2019, more than 55 percent of the offenders were Black, which was more than twice the percentage of white offenders (24.8 percent)[232] and more than four times the percentage of Black Americans in the general population.[233] Racial disparities are especially stark in the context of firearms offenses. Nearly 53 percent of defendants convicted of any federal gun crime were Black, which exceeded the percentage of Black offenders in every other category of federal crime save robbery (58.1 percent).[234]

Among the myriad explanations for such racially disparate outcomes, at least two are salient. First, Black Americans are overrepresented in the criminal justice system to begin with.[235] For instance, given that an estimated 33 percent of adult Black males have a felony conviction compared to 13 percent of all adult males,[236] simple math dictates that Black men are more likely to have a predicate felony necessary for a § 922(g)(1) charge compared to other demographic groups. Second, as with many other aspects of the criminal justice system, people of color have plainly "b[orne] the brunt of enforcement" of the nation's gun crimes for decades.[237] New York

231. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (detailing how the War on Drugs and other law enforcement policies have disproportionately harmed communities of color and facilitated the mass incarceration of Black men).

232. *FY 2019 Quick Facts*, *supra* note 16, at 1.

233. *QuickFacts*, U.S. CENSUS BUREAU (2019), https://www.census.gov/quickfacts/fact/table/US/PST045218 [https://perma.cc/Y3VA-WF66] (indicating that African Americans comprise approximately 13.4 percent of the total U.S. population).

234. 2018 U.S. SENT'G COMM'N, *supra* note 92, at 48.

235. *See* THE SENT'G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2018), https://www.sentencingproject.org/publications/trends-in-u-s-corrections [https://perma.cc/K935-CNPT] (noting that Black men are six times as likely to be incarcerated as white men and that one in three Black men born in 2001 are likely to be incarcerated at some point in their lifetime).

236. Shannon et al., *supra* note 28, at 1807.

237. *See* Levin, *supra* note 37, at 2194–99 (detailing racial disparities in the criminal regulation of gun possession); *see also* Maya Schenwar, Opinion, *Reduce Gun Penalties*, N.Y. TIMES (Mar. 14, 2014), https://nyti.ms/1iLDByg [https://perma.cc/E39Y-5GS3] ("In fact, a black person is

City's infamous stop-and-frisk policy—which a federal district court found unconstitutionally targeted young of men of color[238]—aimed to tackle gun violence and illegal gun possession.[239]

Yet statistics about § 922(g)(1) convictions alone fail to fully capture the potential scale of this inequality. Because of their felony records, nearly a quarter of Black adults have been permanently stripped of the right to lawfully possess firearms.[240] And given the de facto racial and socioeconomic segregation that persists in many American cities,[241] the federal felon-in-possession ban effectively disarms large swaths of communities of color. The dynamics of this phenomenon are not complicated. Ex-felons returning to society are disproportionately of color because convicted felons are.[242] These same ex-felons return to predominantly Black or Latino neighborhoods in urban areas where affordable housing or family networks (or both) exist. Taking advantage of these networks, they move in with spouses, family members, or roommates. And because the risk of a § 922(g)(1) conviction makes it unwise for these ex-felons to be anywhere near a firearm, the spouses and family members with whom these ex-felons choose to live are themselves effectively barred from possessing firearms—a dilemma discussed above and one which is particularly prevalent in communities of color given the overrepresentation of nonwhite offenders in the criminal justice system.[243] Consequently, in certain nonwhite neighborhoods with large concentrations of ex-felons living with their friends and loved ones, any possession of a gun might give rise to criminal liability of some sort.

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nearly twice as likely to face a mandatory minimum carrying charge than a white person who is prosecuted for the same conduct.").

238. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (finding that New York City's stop-and-frisk policy used indirect racial profiling).

239. *See* Levin, *supra* note 37, at 2202 (mentioning, in reference to New York City's stop-and-frisk policy, that "it was guns as much, if not more so, than drugs that justified the aggressive and intrusive practice").

240. *See* Shannon et al., *supra* note 28, at 1807.

241. *See, e.g.*, John Eligon & Robert Gebeloff, *Affluent and Black, and Still Trapped By Segregation*, N.Y. TIMES (Aug. 20, 2016), https://nyti.ms/2bvF9m5 [https://perma.cc/N8F8-66ZY] (describing various census figures indicating that "[n]ationally, black and white families of similar incomes still live in separate worlds").

242. *See* THE SENT'G PROJECT, *supra* note 235, at 5.

243. *See supra* Part III.B.

Sadly, the residents of these communities have perhaps the strongest claim to needing a firearm for self-defense.[244] To say that gun violence unduly affects Black Americans is an understatement.[245] Close to 60 percent of Black adults say they personally know someone who has been shot with a firearm either accidentally or intentionally.[246] Roughly half of all homicide victims in the United States are Black,[247] despite Black Americans comprising only 13 percent of the general population.[248] And Black males between the ages of twenty and thirty-five are seventeen times more likely to be killed by a firearm than their white counterparts.[249] The disproportionate victimization of Black Americans has motivated several communities to pass stricter gun control laws in the hopes of making those communities safer. The District of Columbia handgun ban struck down in *Heller* was passed by a majority-Black city council with overwhelming support from the city's majority-Black population.[250] But the fact that Black Americans are, statistically speaking, far more likely to be victims of gun violence than those from other demographic groups also gives them especially compelling reasons for exercising their Second Amendment right to armed self-defense. In some sense then, the felon-in-possession ban disproportionately disarms the very people who are most likely to find themselves needing to defend their hearth and home.

Yet an armed Black man in an urban community simply does not comport with the popular image of the "law-abiding, responsible" gun owner, whether that be a gun-wielding rural white male or a white woman defending herself from an assailant.[251] Consequently, as

244. *See, e.g.*, Winkler, *supra* note 36, at 1568.

245. *See* Michael B. de Leeuw, Dale E. Ho, Jennifer K. Kim & Daniel S. Kotler, *Ready, Aim, Fire?* District of Columbia v. Heller *and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 148–52 (2009) (citing several nationwide statistics to support the claim that "the brunt of [handgun] violence is borne by people of color").

246. Gramlich & Schaeffer, *supra* note 207.

247. *See* VIOLENCE POL'Y CTR., BLACK HOMICIDE VICTIMIZATION IN THE UNITED STATES: AN ANALYSIS OF 2017 HOMICIDE DATA 1 (2020), https://vpc.org/studies/blackhomicide20.pdf [https://perma.cc/A569-ARA6] (noting that there were 7,809 Black homicide victims in the United States in 2017).

248. *Quickfacts*, *supra* note 233.

249. THE EDUC. FUND TO STOP GUN VIOLENCE, GUN VIOLENCE IN AMERICA: AN ANALYSIS OF 2018 CDC DATA 10 (2020), https://efsgv.org/wp-content/uploads/Gun-Violence-in-America_An-Analysis-of-2018-CDC-Data_February-2020.pdf [https://perma.cc/FSR9-2X72].

250. *See* de Leeuw et al., *supra* note 245, at 167 ("[T]he *Heller* decision effectively silenced the democratic will of a majority African-American electorate.").

251. *See, e.g.*, Levin, *supra* note 37, at 2193 ("One consequence of the political Right's support for gun rights is the popularization of the image of the gun owner as rural white male.").

§ 922(g)(1)'s disparate impact on communities of color make clear, the "people" of the Second Amendment may be equal in theory, but they are hardly so in practice.

IV. A WAY FORWARD

Given the federal felon-in-possession ban's harms, one might ask: Where should lawmakers, ex-felons, and their family members go from here? Of course, lethal firearms should not come into the hands of dangerous people. And federal and state governments have a compelling interest in using criminal sanctions to deter and punish gun crimes. But, for § 922(g)(1), the ends of protecting the public do not justify the statute's blunt means. This Note, therefore, proposes a few solutions that could potentially mitigate § 922(g)(1)'s myriad harms. First, Congress should rewrite the statute so as to circumscribe its scope on a number of fronts. Second, even if the political will to assist ex-felons is lacking, ex-felons should continue to bring as-applied challenges to § 922(g)(1) in federal court. Finally, nonfelons living with family members who are ex-felons should bring constitutional challenges against § 922(g)(1), claiming that the statute unduly burdens their Second Amendment right to keep firearms in the home for self-defense.

A. Rewriting the Statute

Rewriting § 922(g)(1) would be the easiest path to achieving widespread and immediate change. Section 922(g)(1) could be refined in multiple ways. Congress should start by imposing a felon-in-possession ban on a more limited subset of ex-felons—namely, those who have been convicted of *violent* crimes.[252] The Federal Firearms Act that was enacted in 1938, for instance, limited its restrictions on firearm possession to "any person who has been convicted of a crime of violence,"[253] which the statute defined with an enumerated list of

252. *See* Marshall, *supra* note 89, at 728–30 (recommending that firearm disabilities be limited to "convictions indicating that one actually poses some danger of physically harming others rather than simply being dishonest or otherwise unsavory").

253. Federal Firearms Act, Pub. L. No. 75-785, § 2(f), 52 Stat. 1250, 1251 (1938). In 1968, Congress expanded the federal felon-in-possession ban to cover all felons, including nonviolent offenders, in response to a spate of high-profile assassinations in the 1960s and the civil unrest that characterized the decade. *See* BLOCHER & MILLER, *supra* note 24, at 49–50.

obviously violent offenses.[254] Congress could do something similar with the current felon-in-possession ban, either by enumerating a new set of disqualifying violent offenses or simply incorporating into § 922(g)(1) the definition of "violent felony" that already exists in other federal criminal statutes such as the ACCA.[255] Reducing the number of felonies that trigger the felon-in-possession ban would ensure that a substantial number of ex-felons would no longer be permanently disarmed for nonviolent offenses that arguably have little bearing on their ability to be responsible gun owners.[256]

Congress could likewise limit *where* the felon-in-possession ban applies. For example, ex-felons could be prohibited from carrying firearms in public, where the risk of harming or intimidating others is most acute.[257] But their ability to safely "keep" firearms in the home for self-defense could otherwise remain unfettered.[258] Such a home-based restriction would go a long way toward resolving the tension between § 922(g)(1)'s broad reach and *Heller*'s emphasis on a constitutional right to use "arms in defense of hearth and home."[259] A more narrowly tailored law would also ensure that § 922(g)(1) convictions punish dangerous conduct that involves more than just the mere possession of firearms in an ex-felon's residence.

Finally, § 922(g)(1) could be revised so that the current lifetime prohibition on firearm possession imposed on ex-felons is replaced by a ban with a shorter and more reasonable duration. One option for Congress would be to follow the lead of other states and criminalize firearm possession by an ex-felon only for a limited period of time after

254. Federal Firearms Act § (6), 52 Stat. at 1250 (defining "crime of violence" as including murder, manslaughter, rape, kidnapping, burglary, assault with intent to kill, and similar violent offenses).

255. The ACCA defines a "violent felony" in relevant part as a "crime punishable by imprisonment for a term exceeding one year" that either "has as an element the use, attempted use, or threatened use of physical force against the person of another" or is "burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B) (2018).

256. *See supra* notes 146–53 and accompanying text.

257. *See* Marshall, *supra* note 89, at 731 (suggesting that the history of gun regulations supports stripping those convicted of a crime of any right "to carry [firearms] openly off his premises").

258. *See* Miller, *supra* note 36, at 1280 (arguing that individuals should have a "robust right" to possess firearms in the home that is subject to substantial government restrictions elsewhere).

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

that person's release from incarceration, which would then be followed by an automatic restoration of the ex-felon's gun rights.[260]

Alternatively, Congress could make it easier for ex-felons to individually petition for the restoration of their gun rights after a certain time period following their disqualifying conviction, a process that would better allow for a case-by-case assessment of the risk posed by a prospective gun owner.[261] In fact, such restoration procedures at the state level currently allow thousands of ex-felons every year to not only have their state gun rights restored[262] but also to escape the shadow of potential criminal liability under § 922(g)(1).[263] Congress could do well to replicate the state systems that most effectively balance rights restoration with the general interest in public safety. Or it could simply revive the restoration process that already exists under federal law. Section 925(c) authorizes the attorney general to restore gun rights to any individual barred from possessing a firearm under federal law if certain conditions are met,[264] but this procedure has been defunct for nearly thirty years due to a lack of appropriated funds from Congress.[265] Whichever option Congress may ultimately pursue, a more circumscribed statute would no doubt be more sensible than

260. *See, e.g.*, TEX. PENAL CODE ANN. § 46.04(a) (West 2021) (barring ex-felons from possessing firearms for up to five years after their release from prison or mandatory supervision, whichever is later); *see also* Michael Luo, *Felons Finding It Easy To Regain Gun Rights*, N.Y. TIMES (Nov. 13, 2011), https://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html [https://perma.cc/F9S4-PFN2] ("Today, in at least 11 states . . . restoration of firearms rights is automatic, without any review at all, for many nonviolent felons, usually once they finish their sentences, or after a certain amount of time crime-free.").

261. Several states have similar restoration procedures that, for better or worse, allow those with state felony convictions to have their gun rights restored with little to no discretionary review. Luo, *supra* note 260.

262. *See, e.g.*, *id.* (observing that 3,300 ex-felons and people convicted of domestic violence misdemeanors have regained their gun rights in Washington State since 1995 under the state's gun rights restoration statute).

263. *See* 18 U.S.C. § 921(a)(20) (2018) (providing that "[a]ny conviction which has been expunged[] or set aside or for which a person has been pardoned or has had civil rights restored" does not qualify as a disqualifying felony conviction under § 922(g)(1)).

264. *See id.* § 925(c) (authorizing the attorney general to restore an individual's gun rights if it is established 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").

265. *See* United States v. Bean, 537 U.S. 71, 74–75 (2002) (acknowledging this appropriations bar on the federal restoration process); *see also* H.R. REP. NO. 102-618, at 13–14 (1992) (justifying the appropriations bar by noting that the restoration process is costly, time-consuming, and ultimately involves "guess[ing] whether a convicted felon . . . can be entrusted with a firearm").

indiscriminately stripping violent and nonviolent offenders alike of their right to possess a firearm for life.

Given that ex-felons have long been a disfavored constituency, federal legislators may have little interest in expending political capital on revising a statute to make it *more difficult* to convict ex-felons of possessing firearms. But the potential benefits of such reforms are substantial, ranging from preventing the needless reincarceration of ex-felons hoping to return to society and mitigating racial disparities in the criminal justice system to reducing burdens on the judicial system and facilitating the use of nonpunitive means to address crime and gun violence. For lawmakers committed to criminal justice reform, tackling § 922(g)(1)'s harms directly would be time well spent.

B. Bringing As-Applied Challenges to § 922(g)(1) Convictions

Moving from Congress to the courts, ex-felons previously convicted of nonviolent offenses should continue to bring as-applied challenges against § 922(g)(1)'s lifetime ban on possessing firearms.[266] The chance of success is miniscule. Only one circuit court has ever upheld an as-applied challenge to § 922(g)(1).[267] Moreover, courts have determined that nonviolent offenses such as driving under the influence[268] and making a false statement to a lending institution are sufficiently serious to "remove[] one from the scope of the Second Amendment" entirely.[269] And various factors for determining whether a nonviolent ex-felon can be entrusted with a firearm—including the passage of time since the ex-felon's conviction, evidence of his rehabilitation, his likelihood of recidivism, and his contributions to his community since his offense—have been dismissed by some courts as irrelevant to the as-applied inquiry.[270]

Despite these unfavorable odds, doctrinal development only happens through litigation. Thus, as courts continue to hear as-applied challenges to §922(g)(1), they will be compelled to explain time and again why certain ex-felons who are fully rehabilitated and unthreatening still deserve to be permanently stripped of their right to defend themselves with a firearm. Regardless of whether these

266. *See supra* Part I.B.

267. Binderup v. Att'y Gen., 836 F.3d 336, 339 (3d Cir. 2016) (en banc).

268. Holloway v. Att'y Gen., 948 F.3d 164, 168 (3d Cir. 2020).

269. Medina v. Whitaker, 913 F.3d 152, 154, 160 (D.C. Cir. 2019).

270. *See id.* at 160 (stating that such factors cannot "un-ring the bell of [an ex-felon's] conviction" and deeming them irrelevant in as-applied challenges brought by convicted felons).

challenges spark major doctrinal change or merely entrench the status quo, they will at least ensure that § 922(g)(1)'s sweeping scope remains top of mind for federal judges.

C. Bringing Constitutional Challenges to § 922(g)(1)

Perhaps the most successful challenges to § 922(g)(1) will come not from the ex-felons who are directly targeted by the statute but instead from family members who choose to live with them. Nonfelons living with an ex-felon could assert that § 922(g)(1) indirectly yet impermissibly burdens their core Second Amendment right to keep firearms in the home for self-defense.[271] The burden would be indirect, of course, because the nonfelon could never be prosecuted personally for violating § 922(g)(1). But a nonfelon must still ensure a loved one is not held criminally liable for his or her own gun possession—by consistently storing a firearm in such a way that places it beyond the loved one's "domain and control" or keeping the firearm outside of the home at all times. These precautions burden the nonfelon's ability to fully use the weapon for self-defense. Owning a firearm, while theoretically possible, is essentially impracticable.

Ezell v. City of Chicago[272] suggests that even attenuated burdens on the right to armed self-defense can amount to a Second Amendment violation. There, the Seventh Circuit concluded that a Chicago ordinance mandating that gun owners participate in one hour of training at a firing range while prohibiting any firing ranges within city limits impermissibly burdened the owners' Second Amendment rights.[273] The ordinance did not ban firearm possession outright, nor was such possession impossible. Indeed, as a practical matter, most gunowners could have satisfied the mandatory one-hour training requirement by driving to a shooting range in the suburbs.[274] According to the *Ezell* court, however, this possibility of compliance did not save the ordinance. That gun owners could not satisfy the requirement in

271. *See* Ezell v. City of Chicago, 651 F.3d 684, 698 (7th Cir. 2011) (describing the "core Second Amendment right" as the right "to possess firearms at home for protection").

272. Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011).

273. *Id.* at 710. The Seventh Circuit heard the case at the preliminary injunction stage and thus only concluded that the challengers had a "strong likelihood of success on the merits." *Id.* But the court still suggested that it was very unlikely that Chicago city officials could "muster sufficient evidence to justify [under intermediate scrutiny] banning firing ranges everywhere in the city." *Id.*

274. *Id.* at 697.

Chicago was enough of a burden on their "right to maintain proficiency in firearm use" to render the ordinance in violation of the Second Amendment.[275] And if the inconvenience of driving to a distant shooting range for a one-hour training session burdens an individual's Second Amendment right, then a statute that puts a gun owner's loved ones at risk of criminal sanctions is surely just as burdensome.

Of course, challenging the burdens imposed by § 922(g)(1) on nonfelons under such a theory would be novel, which would in turn require navigating at least a few major procedural hurdles. It is unclear, for instance, whether the potential or actual prosecution of a family member with a felony record under § 922(g)(1) would constitute a "concrete and particularized" injury sufficient to confer Article III standing to that ex-felon's nonfelon loved ones.[276] When precisely a nonfelon plaintiff suffers a constitutional injury caused by § 922(g)(1)'s enforcement could also be a pivotal question.[277] A gun purchase by a nonfelon that ultimately leads to a loved one with a felony record being charged under § 922(g)(1) for constructive possession of a firearm could amount to an emotional injury sufficient to confer standing. And a purchase that results in a loved one actually being convicted and incarcerated almost certainly would.[278] But fine distinctions could prove fatal to such a case's justiciability. For example, whether a nonfelon plaintiff actually purchases a firearm or merely intends to do so, and whether such a purchase actually causes a loved one with a felony record to be charged under § 922(g)(1) or merely enhances the likelihood of such a charge, could be dispositive.[279]

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275. *Id.* at 698.

276. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (describing the elements of Article III standing and requiring that an injury for such purposes be "concrete and particularized" as well as "actual or imminent, not 'conjectural' or 'hypothetical'" (citation omitted)).

277. The ripeness doctrine requires that federal courts only hear cases where the facts "have developed sufficiently to permit an intelligent and useful decision to be made." *Ripeness*, BLACK'S LAW DICTIONARY (11th ed. 2019). A case involving a plaintiff who has not yet been "immediately harmed, or immediately threatened with harm" in a legal sense is unripe and thus nonjusticiable. Poe v. Ullman, 367 U.S. 497, 504 (1961) (plurality opinion).

278. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2416 (2018) ("[A] person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.").

279. *See, e.g.*, Parker v. District of Columbia, 478 F.3d 370, 374–78 (D.C. Cir. 2007), *aff'd sub nom.* District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that residents who merely expressed an intention to violate the District of Columbia's handgun ban lacked standing to sue

At bottom, a litigation strategy involving nonfelons bringing constitutional challenges to § 922(g)(1) remains wholly untested, and the likelihood of prevailing in such a case is uncertain. But then again, the idea that the Second Amendment protects an individual right to possess a firearm was considered fanciful not so long ago.[280] Nonfelons hoping to challenge § 922(g)(1)'s harms will never know their odds of success until they try.

CONCLUSION

Designing sensible and effective firearms regulations to counteract gun violence is undoubtedly a worthy goal.[281] But the federal felon-in-possession ban is a blunt and punitive remedy that is unacceptably damaging in its own right. Its sweeping scope ensures that anyone with a felony conviction who comes into possession of a gun can be easily, unconditionally, and harshly punished. It indiscriminately targets nonviolent offenders as well as conduct wholly unrelated to criminal activity. And, as this Note addresses, it exacts tangible harms on ex-felons and their communities—from complicating their reentry into society, to burdening the Second Amendment rights of their nonfelon family members, to effectively disarming entire neighborhoods.

That the felon-in-possession ban is also incompatible with the spirit of *Heller* makes the current status quo all the more indefensible. Those who advocate for a robust constitutional right to "keep and bear Arms" should be troubled by a statute that permanently strips a sizable portion of the populace of that same right. And those pushing for criminal justice reform should be equally troubled by a statute that funnels ex-felons back into prison for conduct that is often noncriminal and otherwise constitutionally protected. When needed change will come or what form it will take remains to be seen. But it is high time to rethink the role of this sweeping and damaging statute in a post-*Heller* world.

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but Dick Heller, who had applied for and been denied a registration certificate to own a handgun, had suffered an injury sufficient to support standing).

280. *See* Michael Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO (May 19, 2014), https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856 [https://perma.cc/V22L-KWWR].

281. *See* John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Aug. 16, 2019), https://www.pewresearch.org/fact-tank/2019/08/16/what-the-data-says-about-gun-deaths-in-the-u-s [https://perma.cc/AM2N-REHG] (noting that over 39,000 people died from gun-related injuries in the United States in 2017).