

# UPHOLDING THE DOMESTIC VIOLENCE FIREARM PROHIBITORS UNDER *BRUEN*'S SECOND AMENDMENT

SAMANTHA L. FAWCETT\*

## INTRODUCTION<sup>1</sup>

After Zackey Rahimi allegedly assaulted his ex-girlfriend, he agreed to have a Texas state court serve him with a domestic violence protective order.<sup>2</sup> A little under a year later, between December 2020 and January 2021, Rahimi was involved in five shootings.<sup>3</sup> He shot into a residence, shot at three different cars, and shot into the air after being inconvenienced at a fast-food restaurant.<sup>4</sup> Police found two firearms in Rahimi's home while investigating these shootings, and Rahimi admitted the firearms were his.<sup>5</sup> Rahimi was indicted for violating 18 U.S.C. § 922(g)(8), which criminalizes the possession of a firearm by individuals currently subject to certain domestic violence protective orders.<sup>6</sup>

Rahimi challenged the constitutionality of § 922(g)(8) under the Second Amendment at the district court and was rejected.<sup>7</sup> After

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1. This note was published during a period of rapid legal change. It is current as of March 2, 2023.

2. *United States v. Rahimi*, No. 21-11001, 2023 LEXIS 5114, at \*3 (5th Cir. Mar. 2, 2023) (dating the order in February of 2020).

3. *Id.* at \*2-3.

4. *Id.* at \*3.

5. *Id.*

6. *Id.*

7. *Id.* at \*4.

pleading guilty, Rahimi appealed his conviction to the Fifth Circuit, renewing his objection to the statute’s constitutionality.<sup>8</sup> A Fifth Circuit panel opinion foreclosed the issue, finding that binding Fifth Circuit precedent had found the statute constitutional.<sup>9</sup> After the June 2022 Supreme Court decision in *New York State Rifle and Pistol Association v. Bruen*,<sup>10</sup> however, the Fifth Circuit panel withdrew its opinion, and a new panel was scheduled to hear the case.<sup>11</sup> On February 2, 2023, the new panel found that § 922(g)(8) violated the Second Amendment and was unconstitutional under *Bruen*.<sup>12</sup> On March 2, 2023, the Fifth Circuit panel withdrew its February opinion,<sup>13</sup> but it released a new opinion holding the same, for much of the same rationale.

In *Bruen*, the Supreme Court held that when a regulation burdens a Second Amendment right, the regulation must be “consistent with this Nation’s historical tradition,” meaning that the regulation must be analogous to a pattern of historical firearm regulation.<sup>14</sup> The Court indicated that regulations from the Founding era and the passage of the Fourteenth Amendment are most relevant to the historical analysis.<sup>15</sup> Despite Rahimi’s protective order and habit of lawlessness, the Fifth Circuit determined that Rahimi was part of the political community protected by the Second Amendment,<sup>16</sup> and his possession of firearms was protected by the Second Amendment.<sup>17</sup> Thus, the Fifth Circuit found that under *Bruen*, this right could only be constitutionally restricted by § 922(g)(8) if disarming individuals subject to a domestic violence protective order was consistent with American historical tradition.<sup>18</sup>

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8. *Id.*

9. *Id.*

10. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

11. *Rahimi*, 2023 LEXIS 5114 at \*5.

12. *United States v. Rahimi*, No. 21-11001, 2023 LEXIS 2693, at \*28 (5th Cir. Feb. 2, 2023), *withdrawn and superseded*, 2023 LEXIS 5114 (5th Cir. Mar. 2, 2023).

13. *Rahimi*, 2023 LEXIS 5114 at \*1 (“Our prior panel opinion, *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023), is WITHDRAWN and the following opinion is SUBSTITUTED therefor”).

14. *Id.*

15. *Id.* at 2163 (Barrett, J., concurring) (“[T]he Court avoids another ‘ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868’ or when the Bill of Rights was ratified in 1791”).

16. *Rahimi*, 2023 LEXIS 5114 at \*11.

17. *Id.* at \*15–16.

18. *Id.* at \*18–19.

The Fifth Circuit found that it was not.<sup>19</sup> According to the court, although “18 U.S.C. § 922(g)(8) embodies salutary policy goals meant to protect vulnerable people in our society,” *Bruen* forecloses consideration of any such policy.<sup>20</sup> Instead, the relevant inquiry is historical and analogical. Through this lens, the Fifth Circuit “conclude[d] that § 922(g)(8)’s ban on possession of firearms is an ‘outlier[ ] that our ancestors would never have accepted.’”<sup>21</sup> Thus, the Fifth Circuit found the statute unconstitutional and vacated Rahimi’s conviction.<sup>22</sup> The Fifth Circuit is the first federal appeals court to examine one of the domestic violence firearm prohibitors after *Bruen*,<sup>23</sup> and the government swiftly announced its intent to appeal the decision.<sup>24</sup> It is unclear at this juncture whether the administration plans to seek an en banc hearing by the Fifth Circuit or if it plans to petition the Supreme Court for certiorari.<sup>25</sup>

Federal law prohibits individuals subject to a domestic violence protective order (§ 922(g)(8)) or convicted of domestic violence misdemeanors (§ 922(g)(9)) from possessing firearms. After *Bruen*, the domestic violence firearm prohibitors have been challenged in district courts around the country.<sup>26</sup> Thus far, all challenges to § 922(g)(9) have been rejected.<sup>27</sup> Unfortunately, § 922(g)(8) has a more problematic

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19. *Id.* at \*19.

20. *Id.* at \*31.

21. *Id.*

22. *Id.*

23. Andrew Willinger, *Fifth Circuit Strikes Down Domestic-Violence Prohibitor in United States v. Rahimi*, DUKE CENTER FOR FIREARMS LAW, SECOND THOUGHTS BLOG (Feb. 6, 2023), <https://firearmslaw.duke.edu/2023/02/fifth-circuit-strikes-down-domestic-violence-prohibitor-in-united-states-v-rahimi/>.

24. *Statement from Attorney General Merrick B. Garland Regarding United States v. Rahimi*, THE UNITED STATES DEPARTMENT OF JUSTICE (Feb. 2, 2023), <https://www.justice.gov/opa/pr/statement-attorney-general-merrick-b-garland-regarding-united-states-v-rahimi> (“Nearly 30 years ago, Congress determined that a person who is subject to a court order that restrains him or her from threatening an intimate partner or child cannot lawfully possess a firearm. Whether analyzed through the lens of Supreme Court precedent, or of the text, history, and tradition of the Second Amendment, that statute is constitutional. Accordingly, the Department will seek further review of the Fifth Circuit’s contrary decision.”).

25. *Id.*

26. *See* *United States v. Jackson*, No. CR-22-59-D, 2022 U.S. Dist. WL 3582504 (W.D. Okla. Aug. 19, 2022); *United States v. Nutter*, No. 21-CR-00142, 2022 U.S. Dist. WL 3718518 (S.D.W. Va. Aug. 29, 2022); *United States v. Anderson*, No. 2:21CR00013, 2022 U.S. Dist. WL 10208253 (W.D. Va. Oct. 17, 2022); *United States v. Jae Michael Bernard*, No. 22-CR-03 CJW-MAR, 2022 U.S. Dist. WL 17416681 (N.D. Iowa Dec. 5, 2022); *United States v. Kays*, No. CR-22-40-D, 2022 U.S. Dist. WL 3718519, at \*4 (W.D. Okla. Aug. 29, 2022); *United States v. Combs*, No. CR 5:22-136-DCR, 2023 WL 1466614 (E.D. Ky. Feb. 2, 2023) (appeal filed); *United States v. Perez-Gallan*, No. 22-CR-00427-DC, 2022 U.S. Dist. WL 16858516, at \*6 (W.D. Tex. Nov. 10, 2022) (appeal filed).

27. *See* *United States v. Jackson*, No. CR-22-59-D, 2022 U.S. Dist. WL 3582504 (W.D. Okla.

record. The Western District of Oklahoma in *United States v. Kays* upheld the statute, holding that the “prohibition is consistent with the longstanding and historical prohibition on the possession of firearms by felons.”<sup>28</sup> In addition to the Fifth Circuit panel’s decision on § 922(g)(8), however, two district courts have found the protective order firearm prohibitor unconstitutional. The Pecos Division of the Western District of Texas in *United States v. Perez-Gallan* determined that because intimate partner violence existed during the Founding era, and the Founders chose not to remove firearms from those domestic abusers, it would violate the Second Amendment to do so today.<sup>29</sup> The Eastern District of Kentucky in *United States v. Combs* held that § 922(g)(8) was not sufficiently similar to historical statutes to justify its intrusion on the Second Amendment.<sup>30</sup> Notably, however, a Tenth Circuit panel considered § 922(g)(8) while dismissing an appeal in October of 2022.<sup>31</sup> The order is not binding precedent and can only be cited for its persuasive value,<sup>32</sup> but the panel cited to *Kays* approvingly, highlighting that the district court opinion rejected the constitutional challenge to the prohibitor.<sup>33</sup>

Before *Bruen*, these commonsense gun laws had generally been considered uncontroversial, both in terms of their broad popular

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Aug. 19, 2022) (upholding § 922(g)(9)); *United States v. Nutter*, No. 21-CR-00142, 2022 U.S. Dist. WL 3718518 (S.D. W.Va. Aug. 29, 2022) (upholding § 922(g)(9)); *United States v. Anderson*, No. 2:21CR00013, 2022 U.S. Dist. WL 10208253 (W.D. Va. Oct. 17, 2022) (upholding § 922(g)(9)); *United States v. Jae Michael Bernard*, No. 22-CR-03 CJW-MAR, 2022 U.S. Dist. WL 17416681 (N.D. Iowa Dec. 5, 2022) (upholding § 922(g)(9)); *United States v. Farley*, No. 22-CR-30022, 2023 WL 1825066 (C.D. Ill. Feb. 8, 2023) (upholding § 922(g)(9)); *United States v. Hammond*, No. 422CR00177SHLHCA, 2023 WL 2319321 (S.D. Iowa Feb. 15, 2023) (upholding § 922(g)(9)).

28. *United States v. Kays*, No. CR-22-40-D, 2022 U.S. Dist. WL 3718519 at \*4 (W.D. Okla. Aug. 29, 2022).

29. See *United States v. Perez-Gallan*, No. 22-CR-00427-DC, 2022 U.S. Dist. WL 16858516 at \*8 (W.D. Tex. Nov. 10, 2022) (appeal filed) (“Even the Government conceded in oral argument that the historical support for § 922(g)(8) is ‘thin.’ So the Court notes that a strict reading of *Bruen*—which instructs that ‘the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment’—would seemingly bar this Court from analyzing further. The Court’s inquiry could stop here and arguably comply with *Bruen*’s demands”).

30. *United States v. Combs*, No. CR 5:22-136-DCR, 2023 WL 1466614 at \*5 (E.D. Ky. Feb. 2, 2023) (appeal filed).

31. *United States v. Haas*, No. 22-5054, 2022 WL 15048667 (10th Cir. Oct. 27, 2022) (order and judgment).

32. *Id.* at 1 (“This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.”).

33. *Id.* at 4.

support<sup>34</sup> and their constitutionality under the Second Amendment.<sup>35</sup> Congress only began regulating domestic violence in the twentieth century, however, which is a time period explicitly carved out of the *Bruen* historical analysis.<sup>36</sup> This means courts must perform a complicated analysis to reach what should be an inevitable result of constitutionality. Although these complications under the *Bruen* standard may spark discussion of the majority's decision's logic, this Note meets the law where it is and aims to argue for the constitutionality of these prohibitors within the *Bruen* framework.<sup>37</sup> Indeed, for *Bruen* to remain internally consistent and instruct a workable doctrine,<sup>38</sup> domestic violence restrictions on firearm ownership must survive Second Amendment constitutional scrutiny, as they have since their inception.<sup>39</sup>

## I. THE DOMESTIC VIOLENCE FIREARM PROHIBITORS

When a domestic abuser has access to a firearm, the situation can become deadly. Weapons can be used to exert control, which can create an atmosphere of fear and result in coercion.<sup>40</sup> And a victim of

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34. See discussion *infra* Section I.

35. See discussion *infra* Section II.

36. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2154, n.28 (2022) (“We will not address any of the 20th-century historical evidence brought to bear by respondents or their amici. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.”).

37. This Note is intended as a discussion of the constitutionality of the domestic violence firearm prohibitors rather than a discussion of their policy. Many articles discussing the policy of these statutes exist. See, e.g., Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1 (2005); Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257 (2017); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004); Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. REV. 365 (1999). People of all genders can be victims of violence in the home. This Note primarily focuses on female victims of male violence because of the gendered nature of the legal discussion of the constitutionality of the statutes at issue. Additionally, this Note uses the phrase “domestic violence” rather than “intimate partner violence” not out of a noted preference, but because the phrase “domestic violence” is used throughout the legislative history of the statutes at issue and the court precedent discussing their constitutionality.

38. See discussion *infra* Section V.A.

39. See discussion *infra* Section II.

40. See, e.g., Brief for the National Coalition Against Domestic Violence et al. as Amici Curiae Supporting Respondents at 10, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (“Perpetrators of domestic violence can and do use guns as a means of control over their victims. As one study has reported, of the population of women living in a household with a gun, approximately 5% had been shot at by their partners. The same study found that, of the population of women living in a household with a gun, 64.5% had experienced a partner using the gun ‘to scare, threaten, or harm her.’ Nearly 1 million women alive today have been shot or

domestic violence is most likely to die when the abuser has access to a firearm. Of all women who are murdered in the United States, nearly half are killed by an intimate partner.<sup>41</sup> Of these killings, over half are done with a firearm.<sup>42</sup> Not only are firearms the weapon of choice for men who kill women,<sup>43</sup> statistics suggest that a gun in the hands of an abuser can increase death rates: “[w]omen are *five times more likely to be murdered* by an abusive partner when the abuser has access to a gun.”<sup>44</sup> And when a domestic assault involves a firearm, the assault is twelve times more likely to result in death than when the assault does not involve a firearm.<sup>45</sup> Murders of women with firearms are significantly more common in the United States than in other developed countries. Even though domestic violence occurs worldwide, American women make up 92% of all women killed by guns in high-income countries, making American women *twenty-one times more likely* to be killed by a gun than women in other high-income countries.<sup>46</sup> Domestic assault has additionally been shown to be

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shot at by an intimate partner. But approximately 25 million American women alive today—13.6% of all American women—have been threatened with a gun by an intimate partner.”) (internal citations omitted) [Hereinafter DV Amici Brief]; Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. REV. 365, 375 (1999) (“As many politicians and commentators have noted, guns and domestic violence go hand in hand. Guns represent the essence of the intimidation used in domestic violence: ‘While firearms can be used to physically harm a battered woman, they also can be used to instill fear and terror.’”).

41. *Domestic Violence and Firearms*, THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/> (last visited Dec. 9, 2022).

42. *Id.*

43. Violence Policy Center, *WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2018 HOMICIDE DATA* at 3, <https://vpc.org/studies/wmmw2020.pdf> (describing that in 2018, “[n]ationwide, for homicides in which the weapon could be determined (1,698), more female homicides were committed with firearms (56 percent) than with all other weapons combined. Knives and other cutting instruments accounted for 19 percent of all female murders, bodily force 10 percent, and murder by blunt object six percent. Of the homicides committed with firearms, 69 percent were committed with handguns.”).

44. *Domestic Violence and Firearms*, THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/> (last visited Dec. 9, 2022) (emphasis added).

45. Lisa D. May, *supra* note 37 at 12 (citing *Guns and Domestic Violence Change to Ownership Ban: Hearing on H.R. 26 and H.R. 445 Before the House Subcomm. on Crime, Comm. on the Judiciary*, 104th Cong. (1997) (statement of Donna F. Edwards, Executive Director, National Network to End Domestic Violence)).

46. *Domestic Violence and Firearms*, THE EDUCATIONAL FUND TO STOP GUN VIOLENCE, <https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/> (last visited Dec. 9, 2022).

a predictor for further gun violence, and there is evidence connecting domestic violence and mass shootings.<sup>47</sup>

The domestic violence firearm prohibitors (“DV prohibitors”) are situated within a federal scheme that prohibits certain individuals from possessing a firearm. The most well-known is the felon prohibitor, 18 U.S.C. § 922(g)(1), which bans anyone “who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year” from possessing a firearm. Although the felon prohibitor reaches individuals convicted of felony domestic violence, the felon-in-possession law fails to reach all domestic violence convictions, as many perpetrators of domestic violence avoid felony charges.<sup>48</sup> As Senator Lautenberg explained in advocacy for the statutes,

Under current Federal law it is illegal for persons convicted of felonies to possess firearms. Yet many people who engage in serious spousal or child abuse ultimately are not charged with or convicted with felonies. At the end of the day, due to outdated thinking, or perhaps after a plea bargain, they are—at most—convicted of a misdemeanor. In fact . . . most of those who commit family violence are never even prosecuted. When they are, one third of the cases that would be considered felonies if committed by strangers are, instead, filed as misdemeanors. The fact is, in many places today, domestic violence is not taken as seriously as other forms of criminal behavior. Often, acts of serious spouse abuse are not even considered felonies.<sup>49</sup>

Various complications occur in the prosecution of domestic violence, including prosecutorial undercharging based on a lack of cooperation from key witnesses, often because these witnesses are either unwilling to prosecute family members or are justifiably fearful.<sup>50</sup> For these reasons, felon-in-possession laws do not cover all

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47. See Lisa B. Geller, et al, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014–2019*, 8 INJURY EPIDEMIOLOGY 1, 4 (“59.1% of mass shootings between 2014 and 2019 were DV-related and in 68.2% of mass shootings, the perpetrator either killed at least one partner or family member or had a history of DV.”); Mike Stankiewicz, *Brady Responds To Fifth Circuit Ruling On Domestic Violence Gun Ban*, BRADY UNITED (Feb. 3, 2023), <https://www.bradyunited.org/press-releases/fifth-circuit-decision-domestic-violence-guns> (“60% of mass shooting events in the U.S. between 2014 and 2019 were either domestic violence attacks or perpetrated by those with a history of domestic violence.”).

48. See *United States v. Staten*, 666 F.3d 154, 161 (4th Cir. 2011) (“legislative history of § 922(g)(9) indicates that it was passed in response to Congress’ concern that existing felon-in-possession laws were not keeping firearms out of the hands of domestic abusers because many people who engage in serious spousal or child abuse ultimately were not charged with or convicted of felonies and that the statute was designed to close this dangerous loophole.”).

49. 142 CONG. REC. S10377–78 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

50. See *United States v. Skoien*, 614 F.3d 638, 643 (7th Cir. 2010) (“Start with prosecuting

perpetrators of domestic violence. As demonstrated by statistics like those cited above, the victim's situation can be dire. Indeed, congressional discussion framed the necessity rather succinctly: "all too often, the only difference between a battered woman and a dead woman is the presence of a gun."<sup>51</sup> The DV prohibitors ban individuals who are subject to certain DV protective orders (§ 922(g)(8))<sup>52</sup> and those who have been convicted of misdemeanor DV (§ 922(g)(9))<sup>53</sup> from transporting, possessing, or receiving firearms within interstate commerce.

These statutes are fundamentally different from other criminal laws in that they attempt to predict and stop violence before it happens, rather than attempting to punish after the violence has occurred.<sup>54</sup> Taken together, the DV prohibitors are politically popular: "[t]here is little debate that guns and domestic violence abusers should not mix."<sup>55</sup>

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domestic violence as a misdemeanor when similar acts against a stranger would be a felony (a practice often called 'undercharging'). Prosecutors face two major obstacles to obtaining felony convictions: some family members are willing to forgive the aggressors in order to restore harmonious relations, while others are so terrified that they doubt the ability of the police to protect their safety. Either way, victims of domestic violence are less willing to cooperate with prosecutors, who may need to reduce charges to obtain even limited cooperation and thus some convictions. Indeed, either forgiveness or fear induces many victims not to report the attack to begin with. The result is that many aggressors end up with no conviction, or a misdemeanor conviction, when similar violence against a stranger would produce a felony conviction.").

51. 142 CONG. REC. S10378 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

52. "It shall be unlawful for any person—who is subject to a court order that—was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

53. "It shall be unlawful for any person—who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

54. Jodi L. Nelson, *The Lautenberg Amendment: An Essential Tool for Combatting Domestic Violence*, 75 N.D. L. REV. 365, 380–81 (1999) ("The Lautenberg Amendment seeks to remedy these exact situations by removing guns from abusers with a history of violent behavior before they have a chance to use them. It seeks to keep guns from the very individuals who have proven their instability by threatening and beating their own loved ones. Most importantly, it aims to decrease substantially the number of domestic violence homicides and allow victims an opportunity to get out of their situation alive.").

55. DV Amici Brief at 13, *supra* note 40.

These prohibitors enjoy wide bipartisan popular support.<sup>56</sup> In 2017, 81% of Americans supported laws that prohibited “a person subject to a domestic violence restraining order from having a gun for the duration of the order.”<sup>57</sup> And in 2022, 83% of Americans favored a “federal law that bans those convicted of domestic violence from purchasing a gun.”<sup>58</sup> Further, surveys focused on gun owners echo these convincing numbers.<sup>59</sup> A 2022 survey found that 78% of gun owners favored “[p]rohibiting gun possession by people convicted of a domestic violence crime.”<sup>60</sup> And 76.9% of gun owners favored “[p]rohibiting gun possession by people subject to a domestic violence restraining order.”<sup>61</sup> This support may be due to the nature of a DV prohibitor. Although the felon-in-possession law implicates all felons, regardless of whether they committed a violent crime, the DV prohibitors, by nature, are more narrowly tailored to those who have indicated a proclivity toward violent behavior.<sup>62</sup>

Additionally, before the Supreme Court’s decision in *Bruen*, courts had almost universally upheld the constitutionality of the DV prohibitors under the Second Amendment.<sup>63</sup> The Second Amendment reads: “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.”<sup>64</sup> In 2008, after the Supreme Court interpreted the Second Amendment to guarantee an individual right to bear arms for the

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56. See discussion *infra* note 57 and 58.

57. *Domestic Violence & Firearms*, GIFFORDS LAW CENTER, <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> (last visited Dec. 9, 2022) (“A 2017 survey found that 81% of Americans support laws prohibiting a person subject to a domestic violence restraining order from having a gun for the duration of the order.”).

58. *Americans’ Experiences, Concerns, and Views Related to Gun Violence*, THE ASSOCIATED PRESS-NORC CENTER FOR PUBLIC AFFAIRS RESEARCH (Aug. 2022) at 4.

59. See, e.g., *Finding the Common Ground in Gun Safety*, TUFTS UNIVERSITY SCHOOL OF MEDICINE & 97PERCENT (Oct. 2022) at 7 (“There is broad support among gun owners, including Republican gun owners, for laws aiming to keep people at high risk of violence from gaining access to guns. Nearly 8 in 10 of Republican gun owners, for instance, support prohibiting gun possession by people convicted of domestic violence.”).

60. *Id.* at 11.

61. *Id.*

62. See *United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010) (emphasis added) (“By way of example, the federal ban on felons-in-possession in § 922(g)(1)—a statute characterized in the *Heller* dictum as a presumptively lawful longstanding prohibition—does not distinguish between the violent and non-violent offender. Thus, both an armed robber and tax evader lose their right to bear arms on conviction under § 922(g)(1). In contrast, a person convicted under § 922(g)(9) must have first acted violently toward a family member or domestic partner, a predicate demonstrated by his conviction for a misdemeanor crime of violence.”).

63. See discussion *infra* Section II.

64. U.S. CONST. amend. II.

purpose of self-defense in *District of Columbia v. Heller*,<sup>65</sup> these DV prohibitors faced Second Amendment challenges. Although different circuits utilized different means, the circuit courts universally held these laws to be constitutional under the Second Amendment.<sup>66</sup>

## II. LEGAL HISTORY

The first revolution in Second Amendment jurisprudence occurred in 2008, with the Supreme Court's decision in *Heller*.<sup>67</sup> Prior to *Heller*, state and federal courts almost universally upheld gun regulations,<sup>68</sup> due to the understanding that the Second Amendment only applied to activities related to the work of an organized militia.<sup>69</sup> Thus, if the regulation did not burden the militia, the regulation withstood the scrutiny required by the Second Amendment.<sup>70</sup> In *Heller*, however, the Supreme Court held that the Second Amendment provided a constitutional "guarantee [of] the individual right to possess and carry weapons in case of confrontation."<sup>71</sup> The "core" of the Second Amendment is in an "inherent right of self-defense," most pronounced in "the home, where the need for defense of self, family, and property is most acute."<sup>72</sup> Because imagery of the home as the

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

66. Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. OF GENDER L. & POL'Y 45, 58 (2020) (stating that after *Heller*, "there [was] broad agreement that the law can, consistent with the Second Amendment, deny guns to abusers. Courts have generally reached that conclusion either by carving DV perpetrators out of Second Amendment coverage entirely or by finding that government efforts to disarm them survive the requisite constitutional scrutiny.").

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

68. Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller And McDonald*, 70 MD. L. REV. 1131, 1134 (2011) ("State and federal courts followed the Supreme Court's lead in taking a collectivist approach to the Second Amendment right to keep and bear arms, upholding gun regulations in nearly all instances").

69. *Id.* ("Throughout the nineteenth and twentieth centuries, state and federal courts largely took a collective rights view of the Second Amendment, holding that it guaranteed the rights of states to organize militias and of individuals to keep weapons connected to militia service."). *See also* *United States v. Miller*, 307 U.S. 174, 177 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

70. Stephen Kiehl, *In Search of a Standard: Gun Regulations After Heller And McDonald*, 70 MD. L. REV. 1131, 1134 (2011) ("Throughout the nineteenth and twentieth centuries, state and federal courts largely took a collective rights view of the Second Amendment, holding that it guaranteed the rights of states to organize militias and of individuals to keep weapons connected to militia service.").

71. *Heller*, 554 U.S. 570 at 592.

72. *Id.* at 628.

ideal—an area where the government must not interfere—has enabled harms against women throughout history,<sup>73</sup> the consecration of the home was a warning for the DV prohibitors.<sup>74</sup> The DV prohibitors fundamentally reach into the home because they disallow the individual from possessing a gun anywhere, including a private residence.

The *Heller* Court, however, stressed that like all constitutional rights, the Second Amendment is not unlimited, and the individual right to possess a firearm can be restricted, noting in what has come to be termed the “exceptions paragraph,”

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on *longstanding prohibitions on the possession of firearms by felons and the mentally ill*, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>75</sup>

After *Heller*, federal courts considered challenges to many gun control regulations, including the federal DV prohibitors. In considering these challenges, almost all circuits used the same two-step test:<sup>76</sup> (1) is the restricted activity protected by the Second Amendment’s plain text, as

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73. Imagery of the home as the idyllic center of family, one where government must not interfere, has supported harms against women throughout history. In discussing the harms of advancing a dichotomy between the public and private spheres, Catharine MacKinnon notes the “right to privacy is a right of men ‘to be let alone’ to oppress women one at a time,” shielding “the place of battery, marital rape, and women’s exploited domestic labor.” DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW*, 73 (Rachel E. Barkow et al. eds., 7th ed. 2021) (Citing CATHERINE A. MACKINNON, *Toward a Feminist Theory of the State* (1989)). See also Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2118 (1996) (“In the late 1970s, the feminist movement began to challenge the concept of family privacy that shielded wife abuse, and since then, it has secured many reforms designed to protect women from marital violence.”).

74. See, e.g., Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 *DUKE J. OF GENDER L. & POL’Y* 45, 45–46 (2020) (“The degree to which the right to keep and bear arms is home-bound—or at least home-centric, in the sense that it is strongest within the home—is perhaps the most important and most contested debate in Second Amendment law and scholarship. But that debate has not always grappled with the possibility that limiting the right to the home (a goal of many gun regulation supporters) would fail to address, and could even exacerbate, the threat of armed domestic violence.”).

75. *Heller*, 554 U.S. 570 at 626–27 (emphasis added). Noting further, “[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26.

76. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2174 (2022) (Breyer, J., dissenting) (“[E]very Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment.”).

informed by history, and if yes, (2) does the regulation pass the appropriate level of scrutiny.<sup>77</sup> In short, under *Heller*, there are three major arguments for a DV prohibitor to “win.” First, the government could show that DV misdemeanants, or an analogous comparison, were historically not afforded Second Amendment protection. Second, the government could argue the provision passed scrutiny because the governmental goal to protect from violence is compelling, and the DV prohibitor is a legitimate and reasonable means to accomplish that goal. And third, because “DV misdemeanants are relevantly similar to felons,” and *Heller* deemed the felon-in-possession statute to be presumptively lawful, courts analogized between the two and reasoned that DV misdemeanants and those under DV protective orders “can be denied weapons for the same reasons.”<sup>78</sup> Courts could reasonably consider this analogy at either step one or two of the *Heller* analysis.<sup>79</sup> At step one, a court could conclude that the individuals who fall under the DV prohibitors are not protected by the Second Amendment at base, and at step two, a court could determine that the DV prohibitor appropriately aids an important government end. Indeed, when DV prohibitors came under facial challenges, regardless of rationale, federal appeals courts were unanimous in outcome: the DV prohibitors were squarely constitutional under *Heller*.

Circuits upheld § 922(g)(9) (DV misdemeanor) through a variety of strategies: either by analogy to *Heller*’s presumptively lawful felon prohibitor,<sup>80</sup> by assuming away *Heller*’s step one question because the regulations easily pass scrutiny under *Heller* step two,<sup>81</sup> or by holding that although the regulation burdens the Second

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77. See, e.g., *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (“As we read *Heller*, it suggests a two-pronged approach to Second Amendment challenges. First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.”) (internal citations omitted).

78. Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. OF GENDER L. & POL’Y 45, 56 (2020).

79. See, e.g., *NRA v. BATFE*, 700 F.3d 185, 196 (5th Cir. 2012) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008)) (citations omitted) (“We admit that it is difficult to map *Heller*’s ‘longstanding,’ ‘presumptively lawful regulatory measures,’ onto this two-step framework. It is difficult to discern whether ‘longstanding prohibitions on the possession of firearms by felons and the mentally ill, ... or laws imposing conditions and qualifications on the commercial sale of arms,’ by virtue of their presumptive validity, either (i) presumptively fail to burden conduct protected by the Second Amendment, or (ii) presumptively trigger and pass constitutional muster under a lenient level of scrutiny.”).

80. See discussion *infra* Section II.A.

81. See discussion *infra* Section II.B.

Amendment under *Heller* step one, it nonetheless passes scrutiny under *Heller* step two.<sup>82</sup> And circuits with the opportunity to consider § 922(g)(8) (active DV protective order) upheld the statute using similar means.<sup>83</sup>

*A. Section 922(g)(9) Upheld at Heller Step One as a “presumptively lawful ‘longstanding prohibition’” in the Eleventh Circuit*

The Eleventh Circuit focused on finding § 922(g)(9) sufficiently similar to *Heller’s* *presumptively lawful* felon ban.<sup>84</sup> In reaching this conclusion, the Eleventh Circuit noted the DV prohibitor evolved from the “longstanding” felon prohibitor because of the concern that DV aggressors were evading felony convictions.<sup>85</sup> Additionally, the Eleventh Circuit explained that the felon prohibitor could be construed as more overbroad than the DV prohibitor, because “a person convicted under § 922(g)(9) must have first acted *violently* toward a family member or domestic partner,” while “§ 922(g)(1)—a statute characterized in the *Heller* dictum as a *presumptively lawful longstanding prohibition*—does not distinguish between the violent and non-violent offender.”<sup>86</sup> Thus, the Eleventh Circuit held that *Heller* did not impact the constitutionality of § 922(g)(9) because “§ 922(g)(9) is a *presumptively lawful ‘longstanding prohibition[]* on the possession of firearms.”<sup>87</sup>

*B. Section 922(g)(9) Upheld Under Heller at Step Two (and Dodging the Step One Question): First, Fourth, and Seventh Circuits*

Unlike the Eleventh Circuit, the First and Seventh Circuits found the “*presumptively lawful*” list in *Heller* to be informative but not decisive. The First Circuit acknowledged that “§ 922(g)(9) fits comfortably among the categories of regulations that *Heller* suggested

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82. See discussion *infra* Section II.C.

83. See discussion *infra* Section II.D.

84. United States v. White, 593 F.3d 1199, 1205 (11th Cir. 2010).

85. *Id.*

86. *Id.* at 1205–06 (emphasis added) (noting further “[b]y way of example, the federal ban on felons-in-possession in § 922(g)(1)—a statute characterized in the *Heller* dictum as a *presumptively lawful longstanding prohibition*—does not distinguish between the violent and non-violent offender. Thus, both an armed robber and tax evader lose their right to bear arms on conviction under § 922(g)(1). In contrast, a person convicted under § 922(g)(9) must have first acted violently toward a family member or domestic partner, a predicate demonstrated by his conviction for a misdemeanor crime of violence.”).

87. *Id.* at 1206.

would be ‘presumptively lawful.’”<sup>88</sup> But both circuits found that analogizing § 922(g)(9) to the felon prohibitor was futile, stressing that the exceptions paragraph’s significance was uncertain.<sup>89</sup> Nonetheless, these circuits acknowledged that the exceptions paragraph provides two key insights into the analysis: (1) “that statutory prohibitions on the possession of weapons by some persons are proper”<sup>90</sup> and (2) because the felon prohibitor noted by *Heller* is squarely twentieth century law,<sup>91</sup> “that the legislative role did not end in 1791.”<sup>92</sup> Both circuits did not discuss a *Heller* step one analysis, and instead moved to step two,<sup>93</sup> but neither circuit had a difficult time upholding the prohibitor. The Seventh Circuit emphasized that “no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective.”<sup>94</sup>

The Fourth Circuit upheld § 922(g)(9) based purely on *Heller* step two.<sup>95</sup> It first rejected the argument that the DV prohibitor was

88. *United States v. Booker*, 644 F.3d 12, 24–25 (1st Cir. 2011) (explaining further, “Section 922(g)(9) is, historically and practically, a corollary outgrowth of the federal felon disqualification statute. Moreover, in covering only those with a record of violent crime, § 922(g)(9) is arguably more consistent with the historical regulation of firearm than § 922(g)(1), which extends to violent and nonviolent offenders alike.”) (internal citation omitted).

89. *Id.* at 23 (citing *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (“We thus find ourselves in agreement with the Seventh Circuit’s observation, in [*Skoien*], of the relative futility of ‘pars[ing] these passages of *Heller* as if they contain an answer to the question whether § 922(g)(9) is valid.”)).

90. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010); *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) (“Nonetheless, as the *Skoien* court noted, at least a couple of important points can be gleaned from this passage. First, it ‘tell[s] us that statutory prohibitions on the possession of weapons by some persons are proper.’ That is, the Second Amendment permits categorical regulation of gun possession by classes of persons—e.g., felons and the mentally ill []—rather than requiring that restrictions on the right be imposed only on an individualized, case-by-case basis.”) (internal citations omitted).

91. *Skoien*, 614 F.3d at 640 (“The first federal statute disqualifying felons from possessing firearms was not enacted until 1938[.]”). And further noting that “[i]t would be weird to say that § 922(g)(9) is unconstitutional in 2010 but will become constitutional by 2043, when it will be as ‘longstanding’ as § 922(g)(1) was when the Court decided *Heller*.” *Id.* at 641.

92. *Id.* at 640; *Booker*, 644 F.3d at 24 (1st Cir. 2011) (“Nor can it be that the relative age of a regulation is the key to its constitutionality”).

93. *Skoien*, 614 F.3d at 641 (“The United States concedes that some form of strong showing (‘intermediate scrutiny,’ many opinions say) is essential, and that § 922(g)(9) is valid only if substantially related to an important governmental objective.”); *Booker*, 644 F.3d at 25 (“We think it sufficient to conclude, as did the Seventh Circuit, that a categorical ban on gun ownership by a class of individuals must be supported by some form of ‘strong showing,’ necessitating a substantial relationship between the restriction and an important governmental objective.”).

94. *Skoien*, 614 F.3d at 642. In reaching this conclusion, both circuits cited statistics illustrating the likelihood of DV recidivism, and the tendency for guns to be deadly in a DV scenario. *Skoien*, 614 F.3d at 643–44. *Booker*, 644 F.3d at 25.

95. *United States v. Staten*, 666 F.3d 154, 160 (4th Cir. 2011).

“valid by analogy based on *Heller*’s ‘presumptively lawful’ language.”<sup>96</sup> Next, the circuit assumed for the sake of argument that DV misdemeanants retained Second Amendment rights but found that § 922(g)(9) passed intermediate scrutiny.<sup>97</sup> The Fourth Circuit determined that “reducing domestic gun violence is a substantial government objective,”<sup>98</sup> and “established facts along with logic and common sense compel” the conclusion that the statute is constitutional.<sup>99</sup>

*C. Section 922(g)(9) Upheld Under Heller—Although Burdening Second Amendment Right at Step One, Passing at Step Two: Ninth Circuit*

Under *Heller* step one, the Ninth Circuit explicitly held that “§ 922(g)(9) burdens conduct falling within the scope of the Second Amendment’s guarantee.”<sup>100</sup> In doing so, the Ninth Circuit highlighted that “the government has not proved that domestic violence misdemeanants *in particular* have historically been restricted from bearing arms.”<sup>101</sup> In applying intermediate scrutiny, however, the Ninth Circuit characterized the government interest of preventing domestic gun violence as “self-evident.”<sup>102</sup> And § 922(g)(9) is substantially related to this government interest because (1) the statute was enacted because it reached violent offenders who were uncovered by the felon prohibitors, (2) there is a high rate of DV recidivism, (3) DV abusers use guns, and (4) use of guns by DV abusers is especially likely to result in death.<sup>103</sup> Therefore, the statute passed intermediate scrutiny analysis.<sup>104</sup>

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96. *Id.* at 158 (citing *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010)).

97. *Id.* at 160–61.

98. *Id.* at 161.

99. *Id.* at 167. Characteristic of other cases, the court emphasized “the government has established that: (1) domestic violence is a serious problem in the United States; (2) the rate of recidivism among domestic violence misdemeanants is substantial; (3) the use of firearms in connection with domestic violence is all too common; (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident; and (5) the use of firearms in connection with domestic violence often leads to injury or homicide.” *Id.*

100. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

101. *Id.* at 1137 (emphasis added).

102. *Id.* at 1139.

103. *Id.* at 1140.

104. *Id.* at 1141.

#### D. Section 922(g)(8) Upheld Under *Heller*

Challenges to § 922(g)(8) were similarly dismissed under *Heller*. In rejecting a facial challenge to § 922(g)(8), the Eighth Circuit declined to use a balancing approach. The Eighth Circuit stated that “[i]t seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right.”<sup>105</sup> Section 922(g)(8) specifically applies to a group of presumptively dangerous individuals, much like other prohibitions on the possession of firearms by the mentally ill or violent felons.<sup>106</sup> Thus, the circuit concluded that because § 922(g)(8) prohibits those who represent a physical threat to others, it is consistent with a common law tradition limiting the right to bear arms “to peaceable or virtuous citizens.”<sup>107</sup> This type of regulatory measure is not barred by the Second Amendment.<sup>108</sup> The Fifth Circuit, in 2020, also considered a facial challenge.<sup>109</sup> Taking a different approach, the Fifth Circuit declined to reach the issue at step one of the *Heller* analysis<sup>110</sup> but held that the challenge failed at step two due to the established link between domestic abuse and gun violence.<sup>111</sup> Other circuits similarly dismissed as-applied challenges to § 922(g)(8).<sup>112</sup>

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105. *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011).

106. *Id.* at 1184 (“Although persons restricted by § 922(g)(8) need not have been convicted of an offense involving domestic violence, this statute—like prohibitions on the possession of firearms by violent felons and the mentally ill—is focused on a threat presented by a specific category of presumptively dangerous individuals.”).

107. *Id.* (“Insofar as § 922(g)(8) prohibits possession of firearms by those who are found to represent ‘a credible threat to the physical safety of [an] intimate partner or child,’ 18 U.S.C. § 922(g)(8)(C)(i), it is consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens”).

108. *Id.* (“The Second Amendment does not preclude this type of regulatory measure”).

109. *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1397 (2021).

110. *Id.* at 756. In determining what level of scrutiny to apply, however, the court noted “§ 922(g)(8) is comprised of individuals who, after an actual hearing with prior notice and an opportunity to participate, have been found by a state court to pose a ‘real threat or danger of injury to the protected party,’—”individuals subject to such judicial findings are not the ‘responsible citizens’ protected by the core of the Second Amendment.” *Id.* at 757.

111. *Id.* at 758 (These features assure us that § 922(g)(8) is ‘reasonably adapted’ to the goal of reducing domestic gun abuse, whether or not it is the least restrictive means for doing so”).

112. *See, e.g., States v. Reese*, 627 F.3d 792, 804, n. 4 (10th Cir. 2010) (considering § 922(g)(8) to burden the Second Amendment, but easily upholding the regulation as applied under intermediate scrutiny, and noting it could survive even under a strict scrutiny analysis); *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012) (declining to hold whether 922(g)(8) burdened the Second Amendment, because it found the statute to survive under an intermediate scrutiny analysis); *United States v. Boyd*, 999 F.3d 171, 188 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 511 (2021) (noting on an as applied challenge, “we conclude that Boyd cannot distinguish himself from the

### III. ANALYSIS: UPHOLDING THE DV PROHIBITORS UNDER *BRUEN*

Under *Heller*, courts consistently endorsed the DV prohibitors as constitutional in the face of Second Amendment challenges.<sup>113</sup> But in the summer of 2022, the Supreme Court rejected the test that almost all the circuits had embraced under *Heller*<sup>114</sup> and announced an entirely new framework based in history. The Court described the new “test” as follows:<sup>115</sup>

[W]e hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’<sup>116</sup>

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class of presumptively dangerous persons who historically lack Second Amendment protections,” but even if he did, that the statute passed heightened scrutiny).

113. As an additional note, the Fifth Circuit had a chance to consider § 922(g)(8) before *Heller*. The Fifth Circuit announced an individual rights view of the Second Amendment, but upheld the statute, finding that as the defendant was subject to a court order with the finding that he represented a credible threat to the physical safety of his wife, the defendant can, consistent with the Second Amendment, be precluded from possessing a firearm. *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (“Although, as we have held, the Second Amendment does protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country. . . . In essence, Emerson, and the district court, concede that had the order contained an express finding, on the basis of adequate evidence, that Emerson actually posed a credible threat to the physical safety of his wife, and had that been a genuinely contested matter at the hearing, with the parties and the court aware of section 922(g)(8), then Emerson could, consistent with the Second Amendment, be precluded from possessing a firearm while he remained subject to the order.”).

114. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2174 (2022) (Breyer, J., dissenting) (“[E]very Court of Appeals to have addressed the question has agreed on a two-step framework for evaluating whether a firearm regulation is consistent with the Second Amendment.”).

115. The *Bruen* court does not use the word “test” or the phrases “step one” and “two” in describing this framework, but this note will do so because scholars have interpreted *Bruen* to assume a two-step inquiry. *See, e.g.,* Jake Charles, *Bruen, Analogies, and the Quest for Goldilocks History*, DUKE CENTER FOR FIREARMS LAW, SECOND THOUGHTS BLOG (June 28, 2022), <https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/> (“[*Bruen*] seems to assume a first inquiry into whether the ‘plain text’ covers some conduct. If the answer is yes, it appears to envision a second step to see whether the government has met its burden to introduce sufficient historical evidence to justify the law. . . . Justice Thomas, however, said the existing two-part framework ‘is one step too many.’ Only history is relevant.”).

116. *Bruen*, 142 S. Ct. at 2126 (2022).

The new *Bruen* two-step framework asks (1) whether the Second Amendment’s “plain text” covers the individual’s conduct, and if yes, (2) is the regulation “consistent with this Nation’s historical tradition.”<sup>117</sup> The majority clearly explained that this new test is not a departure from *Heller* but rather a correction: the proper step two inquiry should be based in history, not the circuits’ use of means-end scrutiny.<sup>118</sup> The majority justified the historical reliance as “more legitimate, and more administrable” than means-end scrutiny.<sup>119</sup>

The DV prohibitors present a particularly complicated case for the *Bruen* analysis because although violence against intimate partners has existed throughout history, the Founding Fathers failed to acknowledge domestic violence as a problem. Prior to the twentieth century, domestic violence was not criminalized and was considered a private concern within the homestead.<sup>120</sup> Courts’ consistency in upholding the statutes under *Heller* should, at a minimum, favor caution in consideration of the DV prohibitors,<sup>121</sup> but the government’s defense of the DV prohibitors must also express a clear *Bruen*-based argument. Although *Bruen*’s analysis may be more complicated than *Heller*’s, *Bruen*’s framework allows for courts to find these restrictions constitutional at both steps of the framework. Further, *Bruen*’s workability depends on whether it can account for cases, like the DV prohibitors, which went un contemplated by the Founding government,

117. *Id.*

118. *Id.* at 2129 (“In sum, the Courts of Appeals’ second step is inconsistent with *Heller*’s historical approach and its rejection of means-end scrutiny”).

119. *Id.* at 2130. This assertion, as a note, is questionable at best; means-end scrutiny of some kind is used throughout constitutional law in a variety of contexts. See Russell W. Falloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 449–50 (1988) (“Means end scrutiny is not the only test used for enforcing constitutional limits, but it is the most common and important form of constitutional analysis.”). And when the right at issue is a right to have a firearm, which by nature implicates the rights of others, means-end scrutiny allowed courts to bring in some understanding of the policy concern, and at a minimum, a chance to establish that the government has an important objective in decreasing violence. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 891–92 (2010) (Stevens, J. dissenting) (“Your interest in keeping and bearing a certain firearm may diminish my interest in being and feeling safe from armed violence. And while granting you the right to own a handgun might make you safer on any given day—assuming the handgun’s marginal contribution to self-defense outweighs its marginal contribution to the risk of accident, suicide, and criminal mischief—it may make you and the community you live in less safe overall, owing to the increased number of handguns in circulation.”).

120. See discussion *infra* Section V.A.

121. See discussion *infra* Section V.A. See also text accompanying note 113 (discussing the *Emerson* case). For an argument that the *Emerson* case, and presumably certain § 922(g)(8) cases under *Heller* should have come out a different way, see Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. LAW & POL. 157 (1999).

yet nevertheless embody critical policy goals today. Because the DV firearm prohibitors are similar, both in their method and goal, the prohibitors will be discussed below in tandem, and an argument supporting one can most typically be made for the other.

#### IV. *BRUEN* STEP ONE: THE SECOND AMENDMENT’S PLAIN TEXT DOES NOT PROTECT THE DOMESTIC ABUSER

At *Bruen* step one, a court must ask whether the statute at issue implicates the text of the Second Amendment. When courts consider whether the DV prohibitors burden “the Second Amendment’s plain text,”<sup>122</sup> they must decide whether to place focus on the activity (the conduct) or the status of the individual. Because the prohibitors are person-based—meaning they apply to the person regardless of location and conduct—the proper consideration at step one is whether the Second Amendment protects an *individual* with a DV conviction or active protective order.

##### A. *The Conduct of the Defendant is Not Relevant to Whether the DV Prohibitor Burdens the Second Amendment*

The *Bruen* Court emphasized the word “conduct” in considering whether the Second Amendment’s plain text applied to public carry.<sup>123</sup> This focus may have confused the problem for courts reviewing Second Amendment challenges at step one. Some have argued that “*Bruen* frames the inquiry at step one in terms of ‘conduct’ only because the case concerned conduct—public carry—not a question about what weapons are protected (‘Arms’) or what people are covered (‘the People’).”<sup>124</sup> Certain courts, however, have been reluctant to frame *Bruen*’s step one outside of the inquiry of conduct. These courts have been persuaded by arguments that the Second Amendment’s text focuses on the conduct of the individual person, regardless of their status as a domestic violence misdemeanant.<sup>125</sup>

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122. *Bruen*, 142 S. Ct. 2111 at 2126.

123. *See, e.g., id.* (“In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s *conduct*, the Constitution presumptively protects that *conduct*.”) (emphasis added).

124. Jake Charles, *Worrying Trends in the Lower Courts After Bruen*, DUKE CENTER FOR FIREARMS LAW, SECOND THOUGHTS BLOG (Sept. 30, 2022), <https://firearmslaw.duke.edu/2022/09/worrying-trends-in-the-lower-courts-after-bruen/>.

125. *See, e.g.,* United States v. Jackson, No. CR-22-59-D, 2022 U.S. Dist. WL 3582504 at \*2 (W.D. Okla. Aug. 19, 2022) (finding the government’s argument that the Second Amendment rights recognized in *Heller* and *Bruen* do not apply to individuals with prior criminal convictions to “ignore[] the Supreme Court’s emphasis on an individual’s conduct, rather than status, to

This characterization illustrates an alarming tendency to frame the Second Amendment inquiry in the broadest sense. If the inquiry under *Bruen* step one is whether a person has a right to have a firearm for self-defense, *Heller* would always dictate that the answer is yes. It becomes very difficult to imagine a scenario where the Second Amendment does not apply. This is not an exaggeration; the Western District of Texas declared, citing *Heller*, that “*Bruen*’s first step asks a strictly textual question with only one answer: the Second Amendment’s plain text covers possession of a firearm.”<sup>126</sup> This, however, is a clear misunderstanding; the court was assessing a “who” ban, § 922(g)(8), and thus it should have been discussing whether the Second Amendment protects the class of individuals—here, individuals subject to DV protective orders—rather than whether the Second Amendment protects the conduct of having a firearm.

### *B. Properly Placing the Inquiry at “Who” Enjoys the Second Amendment Right*

Because the DV prohibitors are person-based bans, they should be considered under the Second Amendment’s referral to “the people”<sup>127</sup> rather than by reference to how the defendant was using the firearm.<sup>128</sup> Even when courts are willing to place the inquiry at whether the defendant is part of “the people” whom the Second Amendment protects, step one has presented a difficult question. *Bruen* and *Heller* repeat the phrase “law-abiding,”<sup>129</sup> suggesting (but not holding) that if

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decide if Second Amendment protection exists. This Court declines to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not violated any laws.”); *United States v. Kays*, No. CR-22-40-D, 2022 U.S. Dist. WL 3718519 at \*2 (W.D. Okla. Aug. 29, 2022) (“Based on [*Bruen*’s] reference to law-abiding citizens, the government argues that the Second Amendment rights recognized in *Heller* and *Bruen* do not apply to individuals under indictment. This argument ignores the Supreme Court’s emphasis on an individual’s conduct, rather than status, to decide if Second Amendment protection exists. This Court declines to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not been accused of violating any laws”).

126. *United States v. Perez-Gallan*, No. 22-CR-00427-DC, 2022 U.S. Dist. WL 16858516 at \*3 (W.D. Tex. Nov. 10, 2022) (appeal filed).

127. U.S. CONST. amend. II.

128. If a court, however, prefers to place the analysis at conduct, a similar result would occur by a more narrow framing of the question; rather than asking whether an individual has a Second Amendment right to possess a firearm, the question should be “whether possessing a firearm while under a DV protective order implicates the Second Amendment’s plain text” or “whether a DV misdemeanant’s possession of a firearm implicates the Second Amendment’s plain text.”

129. *See Range v. Att’y Gen. United States*, 53 F.4th 262, 271 (3d Cir. 2022), *reh’g en banc granted, opinion vacated* (“the [*Bruen*] majority characterized the holders of Second Amendment rights as ‘law-abiding’ citizens no fewer than fourteen times. *Bruen*, 142 S. Ct. at 2122, 2125, 2131, 2133–34, 2135 n.8, 2138 & n.9, 2150, 2156; *accord Heller*, 554 U.S. at 625, 635, 128 S. Ct. 2783.”).

a person has committed a crime, they may lose Second Amendment protection. Thus, government briefs defending the DV prohibitors argue:

“a person convicted of a misdemeanor crime of violence is exactly the kind of non-law-abiding, dangerous person that the Second Amendment does not protect. In other words, for § 922(g)(9)’s prohibition to apply, the person was specifically found, after Due Process, to not be a law-abiding citizen.”<sup>130</sup>

Defendants, correctly, argue that neither *Heller* nor *Bruen* explicitly holds that those with misdemeanor convictions or protective orders are outside of the scope of “the people” protected by the Second Amendment’s text.<sup>131</sup> Similarly, challengers urge that any reference to the phrase “law-abiding citizen” in *Bruen* and *Heller* is dicta, referring to the case at issue, rather than to the scope of the Second Amendment.<sup>132</sup> These arguments have led some courts, regardless of whether the law passes scrutiny at step two, to decline at step one “to read into *Bruen* a qualification that Second Amendment rights belong only to individuals who have not violated any laws.”<sup>133</sup>

A Third Circuit panel in November of 2022, however, held that “individuals . . . who commit felonies and felony-equivalent offenses, are not part of ‘the people’ whom the Second Amendment protects”<sup>134</sup> because “[t]hose whose criminal records evince disrespect for the law are outside the community of law-abiding citizens entitled to keep and bear arms.”<sup>135</sup> In reaching this determination, the panel cited the continual use of the phrase “law-abiding” in *Bruen* and *Heller*, the *Bruen* majority’s insistent approval of shall-issue regimes, which routinely require criminal background checks, and *Heller*’s expression

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130. United States’ Supplemental Brief in Support of its Response to Defendant’s Motion to Declare 18 U.S.C. § 922(g)(9) Unconstitutional under the Second Amendment and Dismiss the Indictment and Memorandum at 4, *Jackson*, No. CR-22-59-D, 2022 U.S. Dist. WL 3582504 (No. 38) (emphasis removed).

131. Reply to Government’s Response to Defendant’s Supplemental Brief in Support of his Motion to Dismiss the Indictment Because 18 U.S.C. § 922(G)(9) is Unconstitutional under the Second Amendment at 3, *Jackson*, No. CR-22-59-D, 2022 U.S. Dist. WL 3582504 (No. 42) (“Defendant is without question one of ‘the people’ referred to in the text of the Second Amendment. Its plain text does not exclude those with prior domestic violence misdemeanors from ‘the people.’”).

132. *Id.* at 2 (“Use of the phrase ‘law abiding citizen’ in *Bruen*, and also [*Heller*] is dicta.”).

133. *Jackson*, 2022 U.S. Dist. WL 3582504 at \*2.

134. *Range*, 53 F.4th 262 at 271 (3d Cir. 2022), *reh’g en banc granted, opinion vacated*.

135. *Id.* at 273. The Third Circuit held the felon prohibitor to be constitutional under *Bruen* step one and also found the prohibitor constitutional under a *Bruen* step two analysis. *Id.* at 273–74.

of the felon prohibitor's legitimacy.<sup>136</sup> This panel decision has since been vacated for a rehearing en banc,<sup>137</sup> and it is unclear whether the entire Third Circuit will adopt this "law-abiding citizen" approach.

Surviving *Heller* step one precedent bolsters a "law-abiding citizen" holding. Although *Bruen* rejected the circuits' *Heller* step two balancing, the *Bruen* Court continually stressed its reliance and basis upon *Heller*.<sup>138</sup> Indeed, if *Bruen* did not overturn *Heller*, circuit holdings which resolved the case at step one may survive *Bruen* because the reasoning does not involve the now-banned scrutiny analysis.<sup>139</sup> Both the Eleventh and the Eighth Circuits<sup>140</sup> found that the DV prohibitor at issue did not violate the Second Amendment because the prohibitor *did not burden* the Second Amendment. As the Eleventh Circuit explained, "*Heller* does not cast doubt on the constitutionality of § 922(g)(9)" because "§ 922(g)(9) is a presumptively lawful 'longstanding prohibition[] on the possession of firearms.'"<sup>141</sup> And the Eighth Circuit dismissed a *Heller*-era challenge to § 922(g)(8), holding the Second Amendment does not preclude a regulatory measure which prohibits the right to bear arms for those who fall within a "specific category of presumptively dangerous individuals."<sup>142</sup> This denial is consistent with "common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens."<sup>143</sup> While other circuits may have declined to resolve such inquiries under step one of *Heller*, choosing instead to focus on a step two analysis, both the First and Fifth Circuits acknowledged that there are persuasive arguments under step one.<sup>144</sup> Of particular interest in

136. *Id.* at 271–73.

137. *Range*, 56 F.4th at 992 ("A majority of the active judges having voted for rehearing en banc in the above captioned case, it is ordered that the petition for rehearing is GRANTED.").

138. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022) ("We too agree, and now hold, consistent with *Heller* . . ."); *id.* at 2126 ("In keeping with *Heller*, we hold that when . . ."); *id.* at 2131 ("The test that we set forth in *Heller* and apply today . . .").

139. *Id.* at 2127 ("Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history.").

140. Neither circuit expressly named their analysis as a step one analysis, but they made their decisions without invoking now-banned *Heller* step two balancing.

141. *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010).

142. *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011).

143. *Id.* ("Insofar as § 922(g)(8) prohibits possession of firearms by those who are found to represent 'a credible threat to the physical safety of [an] intimate partner or child,' 18 U.S.C. § 922(g)(8)(C)(i), it is consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens.").

144. *See, e.g.*, *United States v. McGinnis*, 956 F.3d 747, 757 (5th Cir. 2020), cert. denied, 141 S. Ct. 1397 (2021) (holding statute constitutional under step two, but in determining what level of scrutiny to apply, noting "§ 922(g)(8) is comprised of individuals who, after an actual hearing with prior notice and an opportunity to participate, have been found by a state court to pose a 'real

light of *Rahimi*, in 2020, the Fifth Circuit upheld § 922(g)(8) and stated in dictum: “§ 922(g)(8) is comprised of individuals who, after an actual hearing with prior notice and an opportunity to participate, have been found by a state court to pose a ‘real threat or danger of injury to the protected party.’”<sup>145</sup> The “individuals subject to such judicial findings are not the ‘responsible citizens’ protected by the core of the Second Amendment.”<sup>146</sup>

The Third Circuit panel and surviving step one precedent from the *Heller* era can provide a model for courts to follow.<sup>147</sup> By placing the inquiry at step one of *Bruen*, a court can determine that the Second Amendment does not protect the right to bear arms for individuals found by courts, after notice and a hearing, to be a danger to others. It would be entirely possible to interpret the Second Amendment not to affirmatively empower dangerous individuals to carry or own firearms, based on an understanding that the Second Amendment allows for categorical bans for either dangerous or non-law-abiding individuals. Because of courts’ historical hesitance to place the inquiry at step one,<sup>148</sup> however, forming a coherent and clear argument under step two of the *Bruen* test is likely key to winning on Second Amendment challenges.

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threat or danger of injury to the protected party,”—“individuals subject to such judicial findings are not the ‘responsible citizens’ protected by the core of the Second Amendment.”); *United States v. Booker*, 644 F.3d 12, 23–25 (1st Cir. 2011) (placing inquiry at step two, but noting “the Second Amendment permits categorical regulation of gun possession by classes of persons—e.g., felons and the mentally ill []—rather than requiring that restrictions on the right be imposed only on an individualized, case-by-case basis,” and further noting “§ 922(g)(9) fits comfortably among the categories of regulations that *Heller* suggested would be ‘presumptively lawful’”).

145. *McGinnis*, 956 F.3d 747, 757 (5th Cir. 2020).

146. *Id.* (emphasis added).

147. At least two district court opinions have gone this route in upholding § 922(g)(9). *See United States v. Farley*, No. 22-CR-30022, 2023 WL 1825066 at \*3 (C.D. Ill. Feb. 8, 2023) (“In the end, Circuit precedent forecloses Mr. Farley’s request. In *United States v. Skoien*, decided nearly two years after *Heller*, an en banc Seventh Circuit considered an indistinguishable facial challenge to § 922(g)(9). A near-unanimous majority of that court held § 922(g)(9) constitutional. This Court cannot hold otherwise.”) (internal citations omitted); *United States v. Hammond*, No. 22CR00177SHLHCA, 2023 WL 2319321 at \*7 (S.D. Iowa Feb. 15, 2023) (“The Eighth Circuit concluded in *Bena* that there is sufficient historical precedent from the Founding era to justify the constitutionality of firearm restrictions on those who have committed, or are found through a judicial process to be at risk of committing, acts of domestic violence. Nothing in *Bruen* undermines the core holding of this precedent, and thus the Court rejects Hammond’s facial and as-applied constitutional challenges to 18 U.S.C. § 922(g)(9).”).

148. *See supra* text accompanying note 144, highlighting that although circuit courts acknowledged good arguments under *Heller* step one, they chose to place the inquiry at step two. *See also* discussion *supra* Section II.C. (Ninth Circuit holding at step one of *Heller* that § 922(g)(9) burdened the Second Amendment, but nonetheless upholding the DV prohibitor at step two).

V. *BRUEN* STEP TWO: THE DV PROHIBITORS ARE CONSISTENT  
WITH THE NATION'S HISTORICAL TRADITION  
OF FIREARM REGULATION

*Bruen* created two categories for how history should be addressed at step two of the analysis: regulations where the historical analysis is “straightforward” and regulations where the historical analysis demands more nuance. The *Bruen* majority announced that “[i]n some cases, [the historical] inquiry will be fairly straightforward.”<sup>149</sup> The majority listed three examples:

[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.<sup>150</sup>

The majority also acknowledged that things could become more complicated: “[a]lthough its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.”<sup>151</sup> In such circumstances, the “historical inquiry that courts must conduct will often involve reasoning by analogy.”<sup>152</sup>

Because acts of DV certainly pre-date the twentieth century (and regulation of DV began in the twentieth century), courts must first establish that the existence of this unregulated violence does not, by itself, constrain analysis to the “straightforward” category. Ultimately, upholding the DV prohibitors requires (1) a showing that the DV prohibitors require a nuanced approach by analogy and (2) a determination that DV prohibitors are sufficiently analogous to historical firearm restrictions. Although *Bruen* made the step two

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149. New York State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

150. *Id.*

151. *Id.* at 2132.

152. *Id.*

analysis more complicated, the test does allow for courts to uphold the DV prohibitors at step two.

### A. *The DV Prohibitors Are Not a “Straightforward” Bruen Analysis*

The legal history of domestic violence regulation is uncontestably grim.<sup>153</sup> Until the late nineteenth century, the common law recognized a right of chastisement, allowing “husbands to inflict corporal punishment on their wives.”<sup>154</sup> A husband’s right “to beat [his wife] with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities” was an “ancient” privilege.<sup>155</sup> Blackstone’s commentaries described, “[f]or, as he is to answer for her misbehavior,<sup>156</sup> the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children.”<sup>157</sup> A wife could ask a court to require her husband to provide a bond to promise he would not severely harm her, other than the harm resulting from reasonable chastisement.<sup>158</sup> The jurisprudence of certain American states reflected this understanding. For example, Mississippi’s Supreme Court in 1824 upheld the right for a husband to

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153. See, e.g., *United States v. Jackson*, No. CR-22-59-D, 2022 WL 3582504, at \*3 (W.D. Okla. Aug. 19, 2022) (“Legal scholars have commented on the paucity of evidence that American traditions reached within the home to interfere with domestic relationships, particularly the marital relationship.”) (citing Joseph Blocher, *Domestic Violence and the Home-Centric Second Amendment*, 27 DUKE J. OF GENDER L. & POL’Y 45, 55–56 (2020) (“In the context of domestic violence prohibitions, the historical record is problematic to say the least.”); Carolyn B. Ramsey, *Firearms in the Family*, 78 OHIO ST. L.J. 1257, 1301 (2017) (“Historical support for the exclusion of domestic violence offenders from Second Amendment protection appears rather thin.”).

154. *Id.*

155. *Fulgham v. State*, 46 Ala. 143, 145–47 (1871) (holding that the state of Alabama no longer condones chastisement as a right).

156. A husband was liable for his wife’s conduct in certain circumstances during this time period, in part because a husband “owned” their wife’s legal identity. Siegel, *supra* note 73 at 2122–23 (“By law, a husband acquired rights to his wife’s person, the value of her paid and unpaid labor, and most property she brought into the marriage. A wife was obliged to obey and serve her husband, and the husband was subject to a reciprocal duty to support his wife and represent her within the legal system. According to the doctrine of marital unity, a wife’s legal identity ‘merged’ into her husband’s, so that she was unable to file suit without his participation, whether to enforce contracts or to seek damages in tort. The husband was in turn responsible for his wife’s conduct—liable, under certain circumstances, for her contracts, torts, and even some crimes.”).

157. *Id.* at 2123 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*444). Blackstone additionally described the right of chastisement as dependent on class; while an upper class woman may have some “security of the peace against her husband; [] the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour.” *Id.* at 2124 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*445).

158. *Id.* at 2123. This process was called a writ of *supplicavit*. *Id.*

claim chastisement as a defense in a prosecution for assaulting his wife.<sup>159</sup> While not an “unlimited” right,<sup>160</sup> “let the husband be permitted to exercise the right of moderate chastisement, in cases of great emergency, and use salutary restraints in every case of misbehaviour.”<sup>161</sup> The court continued: “*every principle of public policy and expediency*, in reference to the domestic relations, would seem to require [upholding the right of chastisement] in order to prevent the *deplorable spectacle* of the exhibition of similar cases in our courts of justice.”<sup>162</sup> Husbands should be able to chastise “without being subjected to vexatious prosecutions, resulting in the mutual discredit and shame of all parties concerned.”<sup>163</sup> Mississippi was not an outlier on this issue, and certain courts across America recognized a legal right to chastisement throughout the nineteenth century.<sup>164</sup>

Legally-sanctioned violence against women in the home continued through the Reconstruction era with a new rationale: the home was a place of privacy, where courts should not intervene.<sup>165</sup> For example, the North Carolina Supreme Court in 1868 held that while a husband does not have a right to hit his wife, nor a wife a right to hit her husband, the state would not interfere with them doing so, as it would be a greater evil to raise the curtain on domestic privacy: “[f]or, however great are the evils of ill temper, quarrels, and even personal conflicts inflicting *only temporary pain*, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber.”<sup>166</sup>

159. *Bradley v. State*, 1 Miss. 156, 158 (1824).

160. *Id.* at 157.

161. *Id.* at 158.

162. *Id.* (emphasis added).

163. *Id.* The Mississippi Supreme Court continued to hear appeals on the issue until 1924, when it held that a husband could not claim a defense based in chastisement for the assault and battery of his wife. *Gross v. State*, 100 So. 177, 179 (Miss. 1924) (“[T]here is no exception in favor of the husband as against the wife in the common-law offense of assault and battery.”) (citing *Harris v. State*, 14 So. 266, 266 (Miss. 1894) (originating this proposition)).

164. Siegel, *supra* note 73 at 2125 n. 25 (citing American cases ranging from 1823 through 1864 recognizing a right to chastisement in Mississippi, North Carolina, Alabama, Delaware, and New York).

165. *Id.* at 2120 (“[D]uring the Reconstruction Era, chastisement law was supplanted by a new body of marital violence policies that were premised on a variety of gender-, race-, and class-based assumptions. This new body of common law differed from chastisement doctrine, both in rule structure and rhetoric. Judges no longer insisted that a husband had the legal prerogative to beat his wife; instead, they often asserted that the legal system should not interfere in cases of wife beating, in order to protect the privacy of the marriage relationship and to promote domestic harmony.”).

166. *State v. Rhodes*, 61 N.C. 453, 457 (1868) (emphasis added).

The Western District of Texas in *Perez-Gallan* found § 922(g)(8) unconstitutional and noted that “examples of the government removing firearms from someone accused (or even convicted) of domestic violence” are “glaringly absent from the historical record.”<sup>167</sup> This is deeply unsurprising, considering that domestic violence itself was not a crime, and in many circumstances, was actually considered a *right*. After determining that no laws disarmed domestic abusers during the Founding or Reconstruction era, the Western District of Texas asserted that “a strict reading of *Bruen*” would bar a court from further inquiry, meaning a court could not continue through *Bruen* step two and consider analogies to other statutes.<sup>168</sup> The court based this conclusion on the “straightforward” categories of *Bruen*: because DV has existed since the Founding, the fact that the Founding generation chose not to disarm domestic abusers indicates § 922(g)(8)’s inconsistency with the Second Amendment.<sup>169</sup>

The Western District of Texas’s sole reliance on the failure to regulate, which is defined extremely narrowly, is both unjust and incorrect. The clearest explanation for why the Founding and Reconstruction eras failed to disarm (or convict) domestic abusers is that Americans in the eighteenth and nineteenth centuries did not consider domestic violence a “societal problem.” Courts at the time expressly ruled that the “[s]tate government ... will not interfere” with a husband hitting his wife.<sup>170</sup> The court, however, found § 922(g)(8) unconstitutional based on the failure of Founding era legislatures to remove firearms from husbands who were *permitted* to hit their wives.

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167. *United States v. Perez-Gallan*, No. 22-CR-00427-DC, 2022 WL 16858516, at \*6 (W.D. Tex. Nov. 10, 2022) (appeal filed).

168. *See id.* at \*8 (citing *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (“So the Court notes that a strict reading of *Bruen*—which instructs that ‘the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment’—would seemingly bar this Court from analyzing further.”); *id.* at 15 (“How strictly or flexibly a court reads *Bruen* impacts its conclusion. *Bruen*’s mandate is that a gun regulation’s constitutionality hinge solely on the historical inquiry. According to *Bruen*, that can be this Court’s only consideration. The Court concedes, therefore, that a court reading *Bruen* strictly could have arguably stopped after Section IV of this Opinion.”).

169. *Id.* at \*8 (“This Court, and other courts in the time between *Heller* and *Bruen*, uncovered little (if any) ‘straightforward’ historical support for § 922(g)(8)’s proscriptions. Even the Government conceded in oral argument that the historical support for § 922(g)(8) is ‘thin.’ So the Court notes that a strict reading of *Bruen*—which instructs that ‘the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment’—would seemingly bar this Court from analyzing further. The Court’s inquiry could stop here and arguably comply with *Bruen*’s demands.”).

170. *State v. Rhodes*, 61 N.C. 453, 456 (1868).

Acts of violence against women existed in the eighteenth and nineteenth centuries, but the government clearly did not consider this violence a societal concern. Instead, it was a fact of life.

A modern court cannot recognize that there was a right to chastise one's wife in the nineteenth century while simultaneously asserting that the Founders considered domestic violence a "general societal problem." Doing so would violate *Bruen* itself: *Bruen* commands that courts determine "whether modern firearms regulations are consistent with the Second Amendment's text and *historical understanding*."<sup>171</sup> In order to remain internally consistent, determining the scope of a "general societal problem" under *Bruen* must be done in reference to the view of the individuals who were permitted to contour the scope of law at the Founding. History can only be understood by accounting for the pervasive gender discrimination. Otherwise, the failure of exclusively male legislatures in the eighteenth century to stop violence against women precludes a twenty-first century legislature from attempting to make good law. It would be absurd for *Bruen* to command such an outcome. In succinctly dismissing a similar argument, the Southern District of West Virginia noted:

If it is Defense Counsel's intent, in this foray into the history of women's rights, to suggest that the Founders would have rejected a regulation designed to disarm domestic batterers in order to prevent them from escalating violence against their family members with firearms on the basis that *the predominately female victims were not worthy of such protection because the Founders failed to recognize women as full citizens*, the Court declines the opportunity to follow him down that path.<sup>172</sup>

Thus, DV does not qualify as a "general societal problem that has persisted since the [eighteenth] century" under *Bruen*'s analysis, and a court needs to continue to *Bruen*'s step two analysis and consider whether analogous statutes exist to support the regulation's constitutionality.

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171. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (emphasis added).

172. *United States v. Nutter*, No. 21-CR-00142, 2022 WL 3718518, at \*3, n.4 (S.D.W. Va. Aug. 29, 2022) (emphasis added). The Court further noted that the "absence of stronger [DV] laws [at the Founding] may reflect the fact that the group most impacted by domestic violence lacked access to political institutions." *Id.* at \*5.

*B. The DV Prohibitors Are Constitutional Because They Are Relevantly Similar to Historical Statutes Disarming Dangerous Individuals*

When a regulation's historical constitutionality is not "straightforward,"<sup>173</sup> "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'"<sup>174</sup> The Court identified "two metrics" that would render regulations relevantly similar under the Second Amendment: "[(1)] how and [(2)] why the regulations burden a law-abiding citizen's right to armed self-defense."<sup>175</sup> When searching for a regulation to gather historical support, the majority found the Founding or Reconstruction eras most relevant,<sup>176</sup> but it made abundantly clear that courts should not consider the twentieth century.<sup>177</sup> *Bruen* cast out any analysis of contemporary regulations, which, if permitted, would have borne fruitful analysis because an increase in gun violence during the twentieth century prompted an increase in firearm regulation.<sup>178</sup> For example, the New York licensing law the *Bruen* Court invalidated was passed in 1913.<sup>179</sup> Relevant here, women gained the federal right to vote<sup>180</sup> and the DV prohibitors were first passed<sup>181</sup> in the twentieth century.

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173. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

174. *Id.* at 2132.

175. *Id.* at 2133.

176. *Id.* at 2163 (Barrett, J. concurring) ("[T]he Court avoids another 'ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868' or when the Bill of Rights was ratified in 1791.>").

177. *Id.* at 2154, n.28 ("We will not address any of the 20th-century historical evidence brought to bear by respondents or their amici. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their amici does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence.").

178. See Jake Charles, *Bruen, Analogies, and the Quest for Goldilocks History*, DUKE CENTER FOR FIREARMS LAW, SECOND THOUGHTS BLOG (June 28, 2022), <https://firearmslaw.duke.edu/2022/06/bruen-analogies-and-the-quest-for-goldilocks-history/> (discussing how the line at the twentieth century marks "when firearm regulation picked up in response to firearm violence").

179. *Id.* ("Massachusetts had a similar regime starting in 1906 and New York's own law stretched to 1913."). For context, the New York scheme at issue in *Bruen* dated back earlier than *Heller's* presumptively lawful felon prohibitor: "The first federal felon-in-possession law was not enacted until 1938, when it applied to those convicted of violent felonies, and the prohibition was extended to all felons in 1961." United States v. Bena, 664 F.3d 1180, 1182 (8th Cir. 2011).

180. U.S. CONST. amend. XIX (1920) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

181. The two statutes were passed at separate times, but as companions. The restriction for protective orders was passed in 1994 as part of the Violence against Women Act, and the

In the case of the DV prohibitors, a clear “how” and “why” analogy can be drawn: society has historically kept weapons out of the hands of people society considers dangerous. Then-Judge Amy Coney Barrett, dissenting in *Kanter v. Barr*, pronounced that “[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.”<sup>182</sup> Historical evidence suggests broad legislative power to disarm based on a danger principle, regardless of whether the groups we would apply this principle to today (here, domestic abusers) differ from those to whom history labeled as dangerous.<sup>183</sup> Analogous laws include bans on firearm ownership for Native Americans and individuals who failed to swear loyalty oaths to the American Republic. Additionally, during the nineteenth century, surety statutes required certain individuals who had been deemed dangerous to post bail to carry a firearm.

In the seventeenth, eighteenth, and nineteenth centuries, Native Americans’ access to firearms was highly regulated, in part to “protect against Native American attacks.”<sup>184</sup> Regulations at the time broadly encompassed all kinds of firearms and restricted the sale of weapons to Native Americans.<sup>185</sup> Additionally, during the Revolutionary War, the Continental Congress recommended that colonies disarm individuals who refused to associate with the colonies.<sup>186</sup> At least three colonies “enacted laws disarming men of military age who refused to take a loyalty oath,” likely with the purpose of providing for internal security.<sup>187</sup> After the Revolutionary War, laws

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restriction for misdemeanors was passed in 1996 as the Lautenberg Amendment. Lisa D. May, *supra* note 37 at 5–6.

182. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, dissenting). As a note, the now-Justice’s pronouncement “is a historically contestable position.” Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting ‘Dangerous’ Groups and Outsiders* 1 (Sep. 30, 2020), DUKE LAW SCHOOL PUBLIC LAW & LEGAL THEORY SERIES NO. 2020-80 (citing a string of cases expressing that felons were excluded from possessing weapons based on an understanding of virtue, rather than dangerousness).

183. *Id.* (noting this is “notwithstanding the fact that the founding generations applied that power to very different groups than law does today—both more narrowly (for example, by not disarming domestic abusers) and more broadly”).

184. *Id.* at 5.

185. *See id.* at 6 (“Restrictions targeting Native Americans were broadly phrased with regard to the types of weapons they reached, apparently including all guns within their scope. Whether they prohibited possession or merely sale is a closer question.”).

186. *See id.* at 8. (In 1776, the Continental Congress recommended that the colonies disarm those who ‘are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, the[] United Colonies, against the hostile attempts of the British fleets and armies.’”) (internal citation omitted).

187. *Id.* at 8–9.

in states like Massachusetts disarmed political dissidents.<sup>188</sup> A similar phenomenon emerged after the Civil War. Until 1868, no one who had fought against the United States could legally carry a firearm in Kansas.<sup>189</sup> Bans on classes of individuals are analogous to the DV prohibitors, both on a measure of how (an outright ban) and why (due to perceived danger). Although the historical bans certainly would come under scrutiny today for violating other constitutional rights,<sup>190</sup> these bans demonstrate that a historical understanding of the Second Amendment allowed the government to prohibit groups which society deemed dangerous from possessing firearms.

Additionally, in the mid-nineteenth century, “many jurisdictions began adopting [surety] laws that required certain individuals to post bond before carrying weapons in public.”<sup>191</sup> These surety statutes received a good deal of attention in *Bruen*.<sup>192</sup> The Court acknowledged that surety laws allowed the right of public carry to be “burdened only if another could make out a specific showing of ‘reasonable cause to fear an injury, or breach of the peace.’”<sup>193</sup> Thus, under the *Bruen* Court’s own interpretation, these statutes illustrate that when a party establishes a reasonable fear of injury, a state can burden an individual’s right to have a firearm. This, by definition, is precisely what is established when an individual falls under the DV prohibitor—either by virtue of receiving a misdemeanor DV conviction or a DV protective order. Therefore, the surety statutes create a clear “why” analogy. When an individual is dangerous to others, the legal system can take measures to ensure that the dangerous individual does not harm others. The Second Amendment permits this.

Because the United States has historically disarmed individuals who are dangerous to others, and the DV prohibitors are sufficiently similar in both scope and action to historical laws, the DV prohibitors

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188. *See id.* at 10. (“For instance, following Shays’ Rebellion, Massachusetts permitted those who had taken up arms against the state to obtain a pardon if they swore allegiance to the state and delivered their arms to a Justice of the Peace. For a span of three years they were required to keep the peace, and[] were disqualified from serving as jurors or holding office in the state. . . . Similar limitations would emerge in many places in the aftermath of the Civil War.”).

189. *Id.* (“In Kansas, as late as 1868, no person who had ‘ever borne arms against the government of the United States’ could carry a pistol ‘or other deadly weapon’ within the limits of the state.”).

190. Most obviously, these raise concerns relating to Equal Protection or a First Amendment right to free speech.

191. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2148 (2022).

192. *See id.* at 2145, 2148–50, 2152 (discussing surety statutes).

193. *Id.* at 2148. The respondents, on the other hand, argued that surety states showed evidence “that individuals have no public carry right without a showing of heightened need.” *Id.*

can withstand *Bruen* step two. The argument that the DV prohibitors parallel laws disarming dangerous individuals is not new. After *Heller*, when facing Second Amendment challenges, the government characterized the DV prohibitors as “part of a ‘long line of prohibitions and restrictions on the right to possess firearms by people perceived as dangerous or violent.’”<sup>194</sup>

In reviewing § 922(g)(8), however, the Fifth Circuit, the Western District of Texas, and the Eastern District of Kentucky disagreed with the preceding argument. It is unclear from the opinion whether the Eastern District of Kentucky had the opportunity to consider the entirety of the dangerousness argument.<sup>195</sup> The Western District of Texas simultaneously acknowledged that the colonies attempted to keep the public safe from dangerous individuals, but held that the colonies would have needed to consider “domestic abusers a ‘threat to *public safety*’” for the analogy to hold water.<sup>196</sup> But this seemingly contradicts *Bruen*, which expressly notes:

“The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. Fortunately, the Founders created a Constitution—and a Second Amendment—‘intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.’”<sup>197</sup>

There is no logical reason that the Founders’ failure to care about domestic violence guarantees that the Second Amendment provides a right to bear arms to domestic abusers when the Second Amendment has never been interpreted that way.<sup>198</sup>

More critically, the Fifth Circuit panel in *Rahimi* rejected the analogy between § 922(g)(8) and the dangerousness statutes disarming those “unwilling to take an oath of allegiance, slaves, and Native

194. *E.g.*, *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013).

195. *See United States v. Combs*, No. 5:22-136-DCR, 2023 WL 1466614, at \*5 (E.D. Ky. Feb. 2, 2023) (appeal filed)

(“Magistrate Judge Stinnett does not appear to base his decision on historical laws other than surety statutes, and the United States failed to timely object to Magistrate Judge Stinnett’s R&R. However, the United States did not satisfy its burden even if its argument had not been not waived. . . . The United States does not elaborate [about the dangerousness argument], failing to satisfy its burden.”). The court did differentiate between surety statutes and loyalty oath prohibitors and 922(g)(8), finding both to be lacking. *Id.*

196. *United States v. Perez-Gallan*, No. 22-CR-00427-DC, 2022 WL 16858516, at \*11 (W.D. Tex. Nov. 10, 2022) (appeal filed).

197. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022).

198. *See discussion supra* Section II.

Americans.”<sup>199</sup> The panel originally rejected this argument in February, and later withdrew the opinion in March, superseding it with a panel opinion where the same three judges again rejected the argument. Both *Rahimi* panel opinions continually referenced the fact that § 922(g)(8) depends on a civil finding.<sup>200</sup> It is, however, unclear how this factors into a *Bruen* analysis, other than within the step two analogizing.<sup>201</sup>

The February *Rahimi* panel opinion, which has since been withdrawn, identified two dissimilarities between § 922(g)(8) and the dangerousness statutes. First, “[the dangerousness statutes] disarmed people by class or group, not after individualized findings of ‘credible threats’ to identified potential victims.”<sup>202</sup> The original panel’s narrow insistence on what constitutes a group of people versus a series of individuals is almost beside the point. But it bears noting that one could consider “individuals subject to a DV protective order” as a group of people, much in the same way the *Rahimi* panel conceptualized “individuals unwilling to take an allegiance oath” or “Native Americans” as a group of people. More importantly, however, the original panel opinion implied that the reason § 922(g)(8) is problematic is that it is *too* narrowly tailored; if the modern regulation was more generalized it would be more similar to its historical analogue.<sup>203</sup> A regulation eliminating the requirement for a judicially

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199. *United States v. Rahimi*, No. 21-11001, 2023 LEXIS 5114, at \*21 (5th Cir. Mar. 2, 2023).

200. *See id.* at \*18 n. 7 (“The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation’s history. In crafting the Bill of Rights, the Founders were plainly attuned to preservation of these protections . . . . It is therefore significant that § 922(g)(8) works to eliminate the Second Amendment right of individuals subject merely to civil process.”); *United States v. Rahimi*, No. 21-11001, 2023 LEXIS 2693, at \*17, n. 6 (5th Cir. Feb. 2, 2023), *withdrawn and superseded*, 2023 LEXIS 5114 (5th Cir. Mar. 2, 2023) (the same).

201. Certainly, it is reasonable to raise concern over a civil finding depriving a constitutional right, but the original panel simultaneously railed against the civil finding aspect while finding that the statute was too narrowly-tailored in comparison with broad historical prohibitors lacking judicial involvement. And the original panel ultimately (perhaps mistakenly) implies that to be more compatible with the *Bruen* test, the statute should be rid of the judicial findings portion altogether. *See* discussion *infra*, n. 203. As an additional note, American law has allowed restraints on rights without criminal findings; for example the “Supreme Court has long held that states may utilize a ‘clear and convincing’ standard for involuntary civil commitment proceeding” and criminal defendants are often detained prior to a trial by a preponderance of the evidence finding that they are a flight risk. Willinger, *supra* note 23.

202. *Rahimi*, 2023 LEXIS 2693 at \*20–21.

203. *See* Willinger, *supra* note 23 (“The panel’s approach here suggests that the federal government would be on more solid ground if took a less-tailored approach to the problem—then, the modern law would work in a similar way to the potential historical analogue. Say, for example, that domestic violence is most likely to occur among young, low-income people in densely-populated areas. If the federal government decided to prohibit all individuals below a

individualized finding and simply banning “all individuals below a certain age and income level who live in a densely-populated area from possessing a firearm, with the stated goal of reducing gun-involved domestic violence” would be more congruent with *Bruen* under a *Rahimi*-style analysis than § 922(g)(8).<sup>204</sup> This would be a facially absurd result.

The February panel’s second identified dissimilarity relied on distinguishing the purpose of the dangerousness statutes from the purpose of § 922(g)(8). It found that the “purpose of these ‘dangerousness’ laws was the preservation of political and social order, not the protection of an identified person from the specific threat posed by another.”<sup>205</sup> The March panel deleted the February opinion’s first identified similarity and focused more exclusively on the second: “The purpose of laws disarming ‘disloyal’ or ‘unacceptable’ groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of ‘domestic gun abuse,’ . . . posed by another individual.”<sup>206</sup>

Once again, the broader purpose implies that the more specific purpose would be justified. If Congress had passed the DV prohibitor to protect the social order, it would pass scrutiny, but if it is passed to protect against harming one person, it does not? One could view the narrower goal as falling within the scope of the broader goal. Certainly, protecting the ten million individuals in America who experience domestic violence each year would aid in preserving the social order,<sup>207</sup> in addition to protecting the individual requesting the protective order. Additionally, the panel arguably minimizes the purpose of the dangerousness statutes. As there is evidence that the dangerousness statutes were created to protect against attacks from the identified

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certain age and income level who live in a densely-populated area from possessing a firearm, with the stated goal of reducing gun-involved domestic violence, under the analysis in *Rahimi* that law is seemingly more likely to survive a Second Amendment challenge post-*Bruen* than 922(g)(8). The “individualized” piece of 922(g)(8)—the fact that the law only disarms those individuals against whom a protective order is entered after notice and a civil hearing—makes the law constitutionally suspect, in the panel’s view, because it is non-analogous to historical laws that were less targeted.”).

204. *Id.*

205. *Rahimi*, 2023 LEXIS 2693 at \*21.

206. *Rahimi*, 2023 LEXIS 5114 at \*22.

207. See *National Statistics Domestic Violence Fact Sheet*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, [https://assets.speakcdn.com/assets/2497/domestic\\_violence-2020080709350855.pdf?1596828650457](https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457) (“In the United States, more than 10 million adults experience domestic violence annually.”).

groups, the government likely intended the historical statutes to serve an additional protective function.<sup>208</sup>

At bottom, however, the dangerousness statutes illustrate that the government can disarm entire groups without a judicial mechanism without infringing upon the Second Amendment. Certainly, then, the modern government can disarm an individual after they have been found by a court to be a credible threat without unduly burdening the right. Further, many district courts considering the problem have found the dangerousness argument persuasive, even under *Bruen*. In upholding § 922(g)(9), the Western District of Oklahoma characterized the government’s argument as “broad” and not addressing “a history of firearm possession by domestic violence offenders,” but “instead rel[ying] on restrictions historically imposed on felons and . . . analog[izing] to surety laws discussed in *Bruen*.”<sup>209</sup> The court, however, held that this was “sufficient” to satisfy the government’s burden.<sup>210</sup> The Northern District of Iowa similarly stressed that specific history disarming DV misdemeanants was unnecessary, as § 922(g)(9) was sufficiently similar to both the historical denial of weapons to felons and the tradition of denying firearms to dangerous individuals.<sup>211</sup> The Southern District of Western Virginia, also upholding § 922(g)(9), concluded similarly, and additionally noted that “[t]o suggest that only people convicted of crimes with an exact historical analogue can be subject to gun restrictions would lead to absurd results.”<sup>212</sup> When the Western District of Oklahoma considered § 922(g)(8), it acknowledged that “the historical record regarding domestic violence prohibitions is problematic,” but nonetheless found that the government satisfied its

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208. See discussion *supra*, section V.B.

209. *United States v. Jackson*, No. CR-22-59-D, 2022 WL 3582504, at \*3 (W.D. Okla. Aug. 19, 2022).

210. *Id.*

211. See *United States v. Jae Michael Bernard*, No. 22-CR-03 CJW-MAR, 2022 WL 17416681, at \*7–8 (N.D. Iowa Dec. 5, 2022). (“Prohibiting violent criminals from possessing firearms, such as those who have been convicted of a misdemeanor crime of domestic violence, is consistent with and analogous to prohibiting felons from possessing firearms. To be sure, federal law prohibiting domestic violence misdemeanants from possessing firearms is of relatively recent origin and historic treatment of domestic violence has evolved greatly since 1791. Thus, it is not surprising that legal scholars have found little historic evidence of legislation regulating firearm possession due to domestic violence. Nevertheless, the clear import from *Bruen* and its precedents is that regulations run afoul of the Second Amendment when they interfere with possession of firearms by law abiding citizens.”) (internal citations omitted).

212. *United States v. Nutter*, No. 21-CR-00142, 2022 WL 3718518, at \*5 (S.D. W.Va. Aug. 29, 2022).

burden.<sup>213</sup> The court held that “[t]hose subject to a domestic violence protective order should logically be denied weapons for the same reasons that domestic violence misdemeanants are,” and “[l]ike § 922(g)(9), § 922(g)(8)’s prohibition is consistent with the longstanding and historical prohibition on the possession of firearms by felons.”<sup>214</sup> In summary, many courts continue to hold that the DV prohibitors are constitutional under *Bruen*’s interpretation of the Second Amendment,<sup>215</sup> and any court that fails to do so should be reversed on appeal.

### CONCLUSION

Although *Bruen* has made Second Amendment legal analysis significantly more abstracted from modern societal concerns, its holding does not halt all legal analysis. Courts should continue to logically hold that the DV prohibitors withstand Second Amendment scrutiny. The Second Amendment must be interpreted to allow for the disarming of domestic abusers. This is achievable at both steps of the *Bruen* analysis: determining at step one that the Second Amendment only protects “law-abiding” individuals, or determining at step two that the DV prohibitors are relevantly similar to Founding-era statutes which restricted firearm ownership for dangerous individuals. The DV prohibitors have withstood Second Amendment constitutional scrutiny since their inception and should continue to do so now. To hold otherwise would be to deny a common understanding in civil society: the Constitution does not affirmatively provide individuals with the right to a firearm when a court has shown them to have a propensity to cause harm to others.

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213. *United States v. Kays*, No. CR-22-40-D, 2022 WL 3718519, at \*4 (W.D. Okla. Aug. 29, 2022).

214. *Id.*

215. *See United States v. Jackson*, No. CR-22-59-D, 2022 WL 3582504 (W.D. Okla. Aug. 19, 2022) (upholding § 922(g)(9)); *United States v. Nutter*, No. 21-CR-00142, 2022 WL 3718518 (S.D. W.Va. Aug. 29, 2022) (upholding § 922(g)(9)); *United States v. Anderson*, No. 2:21CR00013, 2022 WL 10208253 (W.D. Va. Oct. 17, 2022) (upholding § 922(g)(9)); *United States v. Jae Michael Bernard*, No. 22-CR-03 CJW-MAR, 2022 WL 17416681 (N.D. Iowa Dec. 5, 2022) (upholding § 922(g)(9)); *United States v. Kays*, No. CR-22-40-D, 2022 WL 3718519 (W.D. Okla. Aug. 29, 2022) (upholding § 922(g)(8)).