Stanford Law Review Online

Volume 77 February 2025

The Coming Assault on Categorical Gun Prohibitions

Ian Ayres & Fredrick E. Vars*

Abstract: Lower federal courts are struggling to determine the constitutionality of longstanding federal laws prohibiting felons and those involuntarily committed from purchasing or possessing firearms. While Justice Scalia in *Heller* described such laws as "presumptively lawful," Justice Thomas's more recent *Bruen* decision held that essentially all gun regulations are presumptively unconstitutional unless the government can provide sufficiently analogous Founding- or Reconstruction-era gun regulations. In particular, courts must consider "how and why the regulations burden a law-abiding citizen's right to armed self-defense." Some courts applying the *Bruen* test have had difficulty finding "how" analogs—particularly with regard to the permanent nature of federal prohibitions and their imposition without individualized determinations of dangerousness. For example, is a historical "surety law" requiring an individual to post a bond before carrying a firearm in public sufficiently analogous to a modern law allowing courts to declare an individual too dangerous to possess a firearm? *Bruen* suggested that the answer would be no, but *Rahimi* said yes.

This essay proposes a number of *ex ante* and *ex post* reforms that would simultaneously help to insulate class-based prohibitions from constitutional attack, better target gun restrictions to individuals who pose credible threats to public safety or themselves, enhance individual liberty, and provide greater due process protections. In particular, we propose that state and federal trial court judges *ex ante* include express individualized determinations of dangerousness in criminal sentencing and involuntary commitment orders. We also propose that Congress restart the existing section 925(c) petition mechanism so that any individual subject to a firearm restriction can *ex post* receive an individualized determination of whether the restriction is still warranted.

Introduction

Lower courts are grappling with challenges to what were, until recently, settled Second Amendment laws—most notably, the federal laws prohibiting felons and those involuntarily committed from purchasing or possessing

* Ian Ayres is the Oscar M. Ruebhausen Professor at Yale Law School. Fredrick E. Vars is the Robert W. Hodgkins Chair of Law at the University of Alabama School of Law. We thank Joseph Blocher, Robert C. Post, Reva Siegal, and participants at a Weslyan University Center for the Study of Guns and Society conference for valuable comments. Kamran Kin, Ji Young Kim, and Richard Paey provided excellent research assistance.

firearms. These categorical prohibitions are two of the most prominent so-called "federal prohibitors."[1] People who fall into one or more of the prohibited categories may not lawfully purchase or possess firearms.[2]

At the heart of these disputes is an attempt to reconcile two conflicting Second Amendment presumptions.[3] The first presumption comes from the 2008 *District of Columbia v. Heller* decision.[4] In that ground-breaking decision, Justice Scalia went out of his way to emphasize that, notwithstanding a brand-new individual right to bear arms, prohibitions of firearm possession by "felons and the mentally ill" are "presumptively lawful."[5]

In contrast, the Court's 2022 *New York State Rifle & Pistol Ass'n v. Bruen* decision seems to reverse *Heller*'s lawfulness presumption.[6] Justice Thomas's majority opinion declared that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[7] Federal prohibitors restrict gun rights and therefore trigger *Bruen*'s threshold requirement of regulating conduct protected by the Amendment's plain text. So, it seems that under *Bruen*, federal (and state) class-based gun restrictions are presumptively unconstitutional. To prove otherwise, the government must "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[8] Thus, *Bruen* effectively requires the government to demonstrate that gun regulations have sufficient analogs with regard to both "[w]hy and how the regulation burdens" the Second Amendment right.[9] Instead of presuming that legislators are acting constitutionally, as the Court assumes with respect to other types of legislation,[10] *Bruen* presumes that legislators are acting unconstitutionally whenever they restrict gun rights.

---

1. 18 U.S.C. § 922(g).
2. "Federal prohibitors" restrict categories or classes of people from purchasing or possessing firearms. Other federal laws restrict types of firearms or locations where they may be carried.
3. Range v. Attorney General, 69 F.4th 96, 100 (3d Cir. 2023) (en banc), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024); United States v. Daniels, 77 F.4th 337, 340-41 (5th Cir. 2023); United States v. Rahimi, 144 S. Ct. 1889, 1902, 1931 (2024).
4. 554 U.S. 570 (2008).
5. *Id.* at 626, 627 n.26.
6. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).
7. *Id.* at 2126.
8. *Id.*
9. United States v. Rahimi, 144 S. Ct. 1889, 1898 (2024).
10. The presumption of constitutionality is often asserted without explanation, but it is a very old idea. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 395 (1798) ("[I]f I ever exercise the jurisdiction [to review the constitutionality of legislative acts] I will not decide any law to be void, but in a very clear case.") (emphasis omitted); Ogden v. Saunders, 25 U.S. 213, 270 (1827) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism

The majority in *United States v. Rahimi*—the most recent landmark opinion on gun regulations—seems well aware of doctrinal tension between *Bruen* and *Heller*.[11] The defendant in *Rahimi* possessed a firearm while under a domestic violence restraining order, which violated another federal prohibitor.[12] Emphasizing that the prohibitor was "temporary" and applied "only once a court has found the defendant" to be dangerous, the decision goes out of its way to clarify: "[W]e do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse . . . ."[13] But the Chief Justice never explains *why* these categorical and permanent legislative gun bans are not called into question. On the contrary, as explained below, several plaintiffs after *Bruen* have challenged class-based gun prohibitors with increasing success.[14]

In this essay, we argue that courts deciding challenges to the constitutionality of categorical prohibitors are likely to resolve the "presumption conflict" in favor of *Bruen*. In other words, the Supreme Court will require the government to justify categorical prohibitors with sufficiently similar historic analogs, both in terms of why the federal prohibitor is imposed and how it restricts gun rights. *Rahimi* goes a long way toward satisfying the "why" half of the analog requirements.[15] Chief Justice Roberts forged an 8-1 majority that held that: "Our tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others."[16] This holding by itself may satisfy the "why" justification for

---

of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."). *But see* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). For further discussion of the presumption of constitutionality, see generally James Huffman, *The Presumption of Constitutionality and the Demise of Economic Liberties*, 128 DICK. L. REV. 1 (2023).

11. *Rahimi*, 144 S. Ct. at 1901-02.
12. *Id.* at 1894.
13. *Id.* (citing *Heller*, 554 U.S. at 626).
14. *See* Part 0, *infra*.
15. *Rahimi*, 144 S. Ct. at 1898-1902.
16. *Id.* at 1903 ("The dissent does, however, acknowledge that Section 922(g)(8) is within that tradition when it comes to the 'why' of the appropriate inquiry. The objection is to the 'how.'").

virtually all existing status-based categorical prohibitors, which are legislative disarmaments of classes of people that the legislature believes to be dangerous.[17]

After *Rahimi*, future constitutional challenges to categorical gun prohibitors will likely focus on whether there are sufficient historical analogs as to "how" these laws restrict gun rights.[18] Finding sufficient historical "how" analogs may prove difficult because *Rahimi* upheld the prohibition at issue only because it was temporary and based on an individualized finding of dangerousness.[19] State and federal prohibitions on gun possession and purchase by felons and individuals who have been involuntarily committed share neither of these core *Rahimi* attributes.[20]

To shore up the constitutionality of existing gun prohibitor categories, this essay proposes "*ex ante*" and "*ex post*" reforms that state and federal judges and legislators can deploy, specifically by making the prohibitions less permanent and more individualized. The simplest *ex post* reform is to give all categorically prohibited individuals the right to petition for the restoration of their gun rights. A right to such a petition would transform the permanent possession ban into a mere rebuttable presumption of dangerousness. No loss of gun rights would necessarily be permanent, and anyone subject to a prohibitor would be able to demand an individualized determination of dangerousness.

This proposal is not radical. In fact, this petition right is already enshrined in an existing federal law, 18 U.S.C. § 925(c), with regard to all federal restrictions on gun purchase or possession.[21] This statutory provision creates a mechanism not only to demand a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) determination on whether the applicant is "likely to act in a manner

17. *But see* IAN AYRES & FREDRICK E. VARS, WEAPON OF CHOICE 122 (2020) (arguing that some federal prohibitors—including, for example, people who have renounced their U.S. citizenship—do not have strong evidence-based support as indicia of dangerousness and "might most charitably be explained as excluding groups that Congress found unworthy of bearing arms").

18. Indeed, many of the decisions holding firearms prohibitions unconstitutional that have followed *Bruen* and *Rahimi* have focused on the permanent nature of the dispossession. *See, e.g.*, United States v. Prince, 700 F. Supp. 3d 663, 675 (N.D. Ill. 2023); United States v. Taylor, 23-cr-40001, 2024 WL 245557 (S.D. Ill. Jan. 22, 2024). *But see, e.g.*, United States v. King, 702 F. Supp. 3d 755, 756 (N.D. Ill. 2023) (holding that the burden section 922(g)(1) imposes on firearm possession is akin to historical analogs because a felon may regain the right to bear arms, "specifically through expungement or pardon"); United States v. Ball, 22-cr-449, 2023 WL 8433981 (N.D. Ill. Dec. 5, 2023) (same); United States v. Vaughns, 22-cr-636, 2023 WL 8258575 (N.D. Ill. Nov. 29, 2023) (same).

19. United States v. Rahimi, 144 S. Ct. 1889, 1901-02 (2024) (citing *Heller*, 554 U.S. at 626).

20. *See infra* Section II(0).

21. 18 U.S.C. § 925(c) (2024).

dangerous to public safety,"[22] but also provides for judicial review.[23] But, as detailed below, the § 925(c) petition process has been effectively suspended since 1993, when Congress prohibited any appropriations on the process.[24] Congress justified this decision on the ground that the process was time-consuming and could have "devastating consequences."[25] *Bruen* has led to an assault on categorical prohibitors by requiring historical how and why analogs.[26] To preserve categorical prohibitors, Congress should restart the petition process, making federal prohibitors more analogous to our nation's history of firearm regulation and to the restriction upheld in *Rahimi*.[27]

We also propose the *ex ante* reform that judges sentencing felons or involuntarily committing respondents include individualized findings of whether the individual is a "credible threat to the physical safety of others."[28] Including such judicial findings would by itself convert the statutory categorical presumption of dangerousness to individualized determinations with adequate due process protections.[29] Individual state trial court judges could unilaterally begin to do this now by simply adding: "Because I find you to be a credible threat to the physical safety of others, I hereby order . . ." to their ultimate disposition.[30] Alternatively, state legislatures could require their judges to add such "credible

22. *Id.*

23. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 105, 100 Stat. 449, 459 (1986).

24. *See* Treasury Department Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992) ("[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 USC 925(c)."). Similar defunding provisions have continued to the present in subsequent appropriation bills. *E.g.*, Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459, 4527 (2022). A discussion of the somewhat perverse history of the section's enactment, its defunding, and subsequent competing efforts to repeal and to re-fund the petition process can be found in our working paper. Ian Ayres & Fredrick E. Vars, The Coming Assault on Class-Based Gun Prohibitions 13-18 (Sep. 24, 2024), https://perma.cc/JB97-BUYJ (explaining that the petition option was enacted as a response to the conviction of Olin Corporation, which as a convicted corporate "person" would have been prohibited from manufacturing Winchester rifles).

25. S. REP. NO. 102-353, at 19-20 (1992).

26. *See, e.g.*, *Rahimi*, 144 S. Ct. at 1898.

27. *See id.* at 1895-96. We will also suggest below how Congress might include temporal sunset provisions to categorical prohibitions that the government can extend if it presents credible evidence of a respondent's dangerousness to a court.

28. *Id.* at 1902.

29. These protections are likely to be adequate because they mirror (and may be more robust than) the individualized determination that was affirmed in *Rahimi*, 144 S. Ct. at 1901.

30. *See* Ian Ayres & Fredrick E. Vars, *A Simple Way to Protect Domestic Violence Orders Against the Next Constitutional Challenge*, HARV. L. REV. BLOG (July 3, 2024), https://harvardlawreview.org/blog/2024/07/a-simple-way-to-protect-domestic-violence-orders-against-the-next-constitutional-challenge/ (proposing an analogous way that state court judges could bolster their domestic protective order).

threat" findings to their orders when making determinations that would trigger state or federal firearm prohibitions.

Having judges make *ex ante* determinations of dangerousness not only would help solidify the constitutionality of category-based gun regulations, but it would also represent sound public policy. It would expand liberty by preserving an individual's gun rights when doing so would not appreciably degrade public safety. If a judge at the time of sentencing a non-violent felon determines that they are not a credible threat to public safety, there is a relatively weak basis for eliminating their right to bear arms. While the *Bruen* decision decisively rejected means-end scrutiny to justify gun regulations,[31] the proposals here have the additional benefit of more narrowly tailoring restrictions to further the important objective of reducing gun violence.

The remainder of this essay is divided into two parts. Part I details the brewing judicial conflict over whether the categorical prohibitors of federal law pass constitutional muster post-*Bruen*. Part II then describes the contentious history of section 925(c) and argues that our proposed *ex ante* and *ex post* reforms would help to insulate state and federal category-based prohibitors from constitutional attack.

The Brewing Conflict Over Categorical Prohibitors

Bruen's Threat to Categorical Prohibitors

The *Bruen* presumption potentially undermines existing categorical prohibitors. That is not lost on gun rights proponents, who have continued to bring challenges in virtually every circuit.[32] In this Part, we focus on two post-*Bruen* circuit opinions striking down federal prohibitors with an eye toward predicting how the Supreme Court, given its application of the analog approach in *Rahimi*, is likely to resolve the circuit split.

In *Range v. Attorney General*, the Third Circuit *en banc* declared the federal felon-in-possession ban unconstitutional as applied to an individual with an old, nonviolent conviction.[33] In 1995, Bryan Range pled guilty to making false statements to obtain food stamps in violation of Pennsylvania law.[34] The conviction was classified as a misdemeanor, and Range was only sentenced to

31. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2125-27 (2022).

32. *See* Jacob Charles, *The Second Amendment on Appeal Post-*Bruen, DUKE CTR. FOR FIREARMS L. (Mar. 22, 2024), https://firearmslaw.duke.edu/2024/03/the-second-amendment-on-appeal-post-bruen (surveying second amendment challenges to categorical firearms restrictions in the wake of *Bruen*).

33. 69 F.4th 96, 98 (3d Cir. 2023) (en banc), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024).

34. *Id.*

probation.[35] But because the crime was punishable by up to five years in prison, the conviction placed Range within the permanent prohibitor category.[36]

In attempting to defend the statute, the government first argued that the *Bruen* presumption of unconstitutionality did not apply because the plaintiff did not meet the threshold requirement of showing that the statute burdened rights falling within the text's protection.[37] Specifically, the government argued that felons were not part of "the people" protected by the Second Amendment's command that "the right of the people to keep and bear Arms, shall not be infringed."[38] The Third Circuit rejected the government's interpretation of the phrase as too restrictive, concluding that under the government's theory, "every American who gets a traffic ticket is no longer among 'the people' protected by the Second Amendment."[39]

Because the court concluded that the plaintiff had met their threshold burden, the government was required to supply sufficient *Bruen* analogs.[40] The government failed to do so.[41] The court rejected the historical examples of category-based possession prohibitions that the government provided: "That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that Range is part of a similar group today."[42] The Court concluded that "[a]part from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to Range and his individual circumstances."[43]

Because of *Bruen*, the Third Circuit expressly discounted the more than 80 earlier precedents upholding the felon-in-possession ban:

> As impressive as these authorities may seem at first blush, they fail to persuade. First, the circuit court opinions were all decided before *Bruen*. Second, the district courts are bound to follow their circuits' precedent. Third, the Government's

35. *Id.*

36. *Id.*

37. *Id.* at 100-01.

38. *Id.* at 101.

39. *Id.* at 101-03. The Eighth Circuit, however, accepted an analogous argument in upholding the federal prohibitor barring noncitizens from possessing firearms—finding that "the protections of the Second Amendment do not extend to aliens illegally present in this country." United States v. Sitladeen, 64 F.4th 978, 983 (8th Cir. 2023).

40. *Range*, 69 F.4th at 103.

41. *Id.* at 103-06.

42. *Id.* at 105.

43. *Id.* at 104-05.

> contention that "*Bruen* does not meaningfully affect this Court's precedent," is mistaken . . . .[44]

The government petitioned the Supreme Court to review and reverse the decision, pointing out that the Third Circuit's opinion conflicted with Eighth and Tenth Circuit decisions upholding the felon-in-possession rule.[45]

The Fifth Circuit in *United States v. Daniels* created a similar conflict by striking down the application of 18 U.S.C. § 922(g)(3), which prohibits an individual who "is an unlawful user of or addicted to any controlled substance" from possessing a firearm, to the defendant.[46] The constitutional challenge stemmed from an April 2022 traffic stop in which "two law enforcement officers pulled Daniels over for driving without a license plate."[47] During the stop, the officers found several marijuana cigarette butts and two loaded firearms in the vehicle.[48] Daniels admitted that he had used marijuana since high school and continued to do so regularly.[49] Prosecutors alleged that Daniels was an "unlawful user" of marijuana and charged him with violating section 922(g)(3).[50] Daniels moved to dismiss the indictment, asserting that section 922(g)(3) was inconsistent with the Second Amendment as applied.[51]

As *Range* found with felons,[52] *Daniels* found that the class of drug users were part of "the people," and then found that the government-proffered founding precedents were insufficiently analogous.[53] *Daniels* was particularly concerned

---

44. *Id.* at 106 (citation omitted).

45. *See* DAVE S. SIDHU, CONG. RSCH. SERV., LSB11108, THE SECOND AMENDMENT AT THE SUPREME COURT: CHALLENGES TO FEDERAL GUN LAWS 3 (2024) (citing United States v. Jackson, 69 F.4th 495 (8th Cir. 2023); United States v. Cunningham, 70 F.4th 502 (8th Cir. 2023); United States v. McCane, 573 F.3d 1037 (10th Cir. 2009)).

46. 77 F.4th 337, 340 (5th Cir. 2023), *vacated* No. 23-276, 2024 WL 3259662 (July 2, 2024).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Range v. Att'y Gen., 69 F.4th 96, 103-06 (3d Cir. 2023) (en banc), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024).

53. *Daniels*, 77 F.4th at 342, 354. The opinion acknowledges the somewhat dodgy logic of inferring that a type of regulation was unconstitutional from legislators' failure to enact it at the founding:

> [W]hen the historical record reveals no regulations of a particular kind, we could interpret that silence in one of two ways. We could say that it means nothing (i.e., neither approval nor disapproval), or we could count silence as evidence that the public did not approve of such a regulation. *Bruen* says we should make the latter inference, at least when the public experienced the harm the modern-day regulation attempts to address. *Bruen*, 142 S. Ct. at 2131. By contrast, when the ratifying public did not confront a particular harm, its failure to regulate it says little about whether it approved such regulation.

with giving legislatures "unchecked power to designate a group of persons as 'dangerous' and thereby disarm them."[54] The court worried that "Congress could claim that immigrants, the indigent, or the politically unpopular were presumptively 'dangerous' and eliminate their Second Amendment rights without judicial review."[55] Or that "a state legislature [might] disarm[] all men, citing statistics that men commit more violent crimes than do women."[56]

Of course, a court might have scrutinized whether a particular group was, as a factual matter, sufficiently dangerous to warrant the possession prohibition:

> Applying a standard of scrutiny, we might have interrogated whether Congress had adequately demonstrated that someone who spreads ransomware or pirates television shows is likely to be dangerous with a firearm. Again, *Bruen* heads that analysis off at the pass.[57]

Instead, courts are only allowed to look to see whether the founding lawmakers enacted similar restrictions. While acknowledging that founding firearm prohibitions were attempts to disarm dangerous categories of Americans, the *Daniels* court found a lower, more specific "level of generality" was required in searching for sufficient analogs.[58] Bans on political, racial, and religious minorities were disanalogous because they were enacted to respond to coordinated group violence from members of the banned group "as potential insurrectionists," while the felon-in-possession ban was passed to respond to the possibility of uncoordinated violence by individual criminals and drug users.[59]

The Justice Department petitioned for Supreme Court review because the Fifth Circuit's decision "held an important Act of Congress unconstitutional."[60] After *Rahimi,* the Supreme Court on July 2, 2024, granted, vacated, and remanded the government's petitions for certiorari in both *Range* and *Daniels*, as well as petitions from four defendants whose challenges to the felon-in-possession ban the Eighth and Tenth Circuits had rejected.[61]

Id. at 344; *see* Fredrick E. Vars, *The Dog That Didn't Bark is Rewriting the Second Amendment*, N.Y.U. L. REV. ONLINE, at 1-2 (2024), perma.cc/MTV5-5385. The Fifth Circuit resolved this tension by looking for "similar harms that the Founding generation did confront and the regulations they used to address them." *Daniels*, 77 F.4th at 344.

54. *Daniels*, 77 F.4th at 353.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.* at 354-55.

60. Petition for Writ of Certiorari at 19, United States v. Daniels, 144 S. Ct. 2707 (2024) (No. 23-376).

61. *Id.* at 2. *See* Garland v. Range, 144 S. Ct. 2706, 2707 (2024) (granting certiorari, vacating, and remanding for reconsideration in light of United States v. Rahimi, 144 S. Ct. 1889 (2024)); United States v. Daniels, 144 S. Ct. 2707, 2707 (same); United States v. Perez-Gallan, 144 S. Ct. 2707, 2708 (2024) (same); Vincent v. Garland, 144 S. Ct. 2708, 2708-09

How the Supreme Court is Likely to Resolve the Circuit Split

In this Part, we try to predict how the Supreme Court is likely to resolve the existing circuit splits with regard to felons and people who have been involuntarily committed. In the next, we will propose ways that legislatures can better insulate categorical prohibitors from constitutional challenges.

To begin, it is unlikely that the Court would substantially modify the *Bruen* approach, which asks courts to undertake a threshold analysis followed by a search for "how" and "why" analogs.[62] While Justice Barrett voiced concern with some originalist analysis in *Rahimi* and *Bruen*,[63] there are no indications that any of the other members of the *Bruen*'s six-Justice majority are open to change.

Second, when applying the *Bruen* approach, the Court is unlikely to accept the Justice Department's argument that categorical prohibitors on gun possession do not implicate the Second Amendment because the people in these categories do not qualify as "the people" protected by the amendment.[64] The Court in *Heller* found that the term "the people" "unambiguously refers to all members of the political community, not an unspecified subset."[65] A majority of the Justices are likely to accept the holdings of the Third and Fifth Circuits (despite those opinions being vacated post-*Rahimi)* that felons and drug users still qualify for the amendment's protection.[66] It is possible, though, that the Court will distinguish members of the different categories. Just as the Eighth Circuit has excluded non-citizens from "the people," the Supreme Court might conclude that felons (who can permanently be deprived of the right to vote)[67] are not members of the political community. But it is hard to see how the Court

(July 2, 2024) (same); Antonyuk v. James, 144 S. Ct. 2709, 2709 (2024) (same); Jackson v. United States, 144 S. Ct. 2710, 2710 (2024) (same), Cunningham v. United States, 144 S. Ct. 2713, 2713 (2024) (same); Doss v. United States, 144 S. Ct. 2712, 2712 (2024) (same). There is also a pre-*Bruen* circuit split regarding the mental health prohibitor, section 922(4). *See* Kaitlyn M. Rubcich, *Presumptively Awful: How the Federal Government Is Failing to Protect the Constitutional Rights of Those Adjudicated as Mentally Ill, as Illustrated by the 18 U.S.C. § 922(g)(4) Circuit Split*, 49 PEPP. L. REV. 901, 932 (2022).

62. *Rahimi*, 144 S. Ct. at 1898.

63. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 507 U.S. 1, 81-83 (2022) (Barrett, J., concurring); *Rahimi*, 144 S. Ct. at 1924-26 (Barrett, J., concurring).

64. *See* Range v. Att'y Gen., 69 F.4th 96, 101 (3d Cir. 2023) (en banc) (rejecting the government's argument that "[t]he right to bear arms has historically extended to the political community of law-abiding, responsible citizens" (citation omitted)), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024); United States v. Diaz, 116 F.4th 458, 466 (2024) ("The government also raises the familiar argument that Diaz is not among 'the people' protected by the Second Amendment. We disagree.").

65. District of Columbia v. Heller, 554 U.S. 570, 580 (2008).

66. *Range*, 69 F.4th at 103; United States v. Daniels, 77 F.4th 337, 342 (5th Cir. 2023), *vacated*, 144 S. Ct. 2707 (2024).

67. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

could conclude that non-felon drug addicts and those who have been involuntarily committed fall outside of amendment's protection.

If we are correct that the Court is unlikely to substantially modify *Bruen* and likely to find that challengers meet the threshold requirement of being part of "the people," then the Court will have difficulty avoiding the *Bruen* logic that categorical prohibitors are presumptively unconstitutional. The contrary *Heller* (and *Bruen* concurrence) language that status-based regulations are "presumptively lawful" is mere dicta.[68] We have trouble seeing how five Justices could elevate the *Heller* dicta over the binding command in *Bruen* that the government must provide sufficient evidence that prohibitors fit within our Nation's history and tradition of firearm regulation.

So, in resolving the existing circuit splits, the Supreme Court is likely to require the government to provide sufficient "why" and "how" analogs. As argued above, the *Rahimi* decision may by itself be sufficient to satisfy the "why" inquiry. In addressing the "why" behind the protective order prohibitor at issue in *Rahimi*, the Court found that "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others."[69] This finding may be sufficient to satisfy the "why" requirement for many—if not all—of the other federal categorical prohibitors. In particular, the restrictions on felons, people who have been involuntarily committed, and drug users all have as a legislative purpose disarming groups of people that the legislature has deemed to be dangerous—specifically, likely to commit crime using a firearm.[70]

The more difficult task for the Justice Department will be showing that federal categorical prohibitors impose comparable burdens to historic analogs (the "how"). It is possible that the Supreme Court will not require much of a comparable burden analog because *Rahimi* itself relaxed the "how" analog requirement. In his *Rahimi* dissent, Justice Thomas persuasively argued that the surety analogs proffered by the government imposed substantially less severe burdens than the protective order prohibitors:

Although surety laws shared a common justification with § 922(g)(8), surety laws imposed a materially different burden. Critically, a surety demand did not alter an individual's right to keep and bear arms. After providing sureties, a person kept possession of all his firearms; could purchase additional firearms;

68. *Heller*, 554 U.S. at 626, 627, n. 26; *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *Diaz*, 116 F.4th at 466 ("[B]ecause none of those cases actually concerned § 922(g)(1), they are not binding precedent on the issue now before us. The Court did not complete any historical analysis of laws forbidding felons from possessing firearms, as required by *Bruen*. The mentions of felons in those cases are mere dicta.")

69. *Rahimi*, 144 S. Ct. at 1902.

70. S. REP. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113-14; H.R. REP. No. 90-1577 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 4410, 4413.

and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money. To disarm him, the Government would have to take some other action, such as imprisoning him for a crime.

By contrast, § 922(g)(8) strips an individual of his Second Amendment right. The statute's breadth cannot be overstated. For one, § 922(g) criminalizes nearly all conduct related to covered firearms and ammunition. . . .

The statute revokes a citizen's Second Amendment right while the civil restraining order is in place. And, that revocation is absolute. It makes no difference if the covered individual agrees to a no-contact order, posts a bond, or even moves across the country from his former domestic partner—the bar on exercising the Second Amendment right remains.

That combination of burdens places § 922(g)(8) in an entirely different stratum from surety laws. Surety laws preserve the Second Amendment right, whereas § 922(g)(8) strips an individual of that right. While a breach of a surety demand was punishable by a fine, § 922(g)(8) is punishable by a felony conviction, which in turn permanently revokes an individual's Second Amendment right. At base, it is difficult to imagine how surety laws can be considered relevantly similar to a complete ban on firearm ownership, possession, and use.[71]

Notwithstanding the strength of Justice Thomas's argument, all other Justices signed off on Chief Justice Robert's conclusion that there were sufficient historical analogs for how the protective order regulation burdens Second Amendment rights.[72] If *Rahimi* did substantially loosen the necessary resemblance between the challenged burden and the historic burden, then it is possible that five Justices would be willing to sign off on the constitutionality of the drug use, involuntary commitment, and felony category prohibitors.

There remains, however, a substantial risk that if Congress fails to act, the Supreme Court will resolve the circuit split in favor of the Third and Fifth Circuits and strike down all categorical or status-based prohibitors. The government may have difficulty meeting even a relaxed "how" analog requirement because other federal categorical prohibitors are less analogous to the burden analogs accepted in *Rahimi*. Indeed, Justice Gorsuch provided a

71. *Rahimi*, 144 S. Ct. at 1939-41 (Thomas, J., dissenting) (citations omitted).

72. Justice Thomas similarly argues that the "Going Armed" or "Affray" laws are an inapt historical analog. *Id.* at 1942. He claims that affrays did not criminalize mere possession, but *public* possession in a manner "apt to terrify the people." *Id.* (citation omitted). Moreover, he notes that while affray laws criminally "penalized past behavior," section 922(g)(8) seeks "to prevent future behavior" on the basis of a civil restraining order. *Id.* Thus, he argues, affray laws were aimed at different conduct and featured a different remedy than categorical prohibitions. *Id.* Though Justice Thomas was the lone dissenter in this case, the differences he highlighted may weaken the affray analogy in future section 922 cases.

virtual roadmap for future litigants taking aim at the federal prohibitors in his *Rahimi* concurrence:

> Our resolution of Mr. Rahimi's facial challenge to § 922(g)(8) necessarily leaves open the question whether the statute might be unconstitutional as applied in "particular circumstances." So, for example, we do not decide today whether the government may disarm a person without a judicial finding that he poses a "credible threat" to another's physical safety. We do not resolve whether the government may disarm an individual permanently. We do not determine whether § 922(g)(8) may be constitutionally enforced against a person who uses a firearm in self-defense. Notably, the surety laws that inform today's decision allowed even an individual found to pose a threat to another to "obtain an exception if he needed his arms for self-defense." Nor do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, "not 'responsible.'"[73]

In sum, the categorical prohibitors risk being struck down because they are permanent and lack individualized findings of dangerousness

Ways to Make Categorical Prohibitors More Analogous to Our Founding Tradition

There are straightforward ways for Congress and state legislators (and even individual judges) to make our current prohibitors more analogous to our Nation's history and tradition of firearm regulation. By shoring up analogies, we can not only help the Justices uphold federal (and state) categorical prohibitors, but we can also better tailor the restrictions to balance public safety with individual liberty. This Part describes a variety of reforms that can make the categorical prohibitors on felons, drug users, and people committed involuntarily more analogous to our founding traditions by making those prohibitions less permanent and based on more individualized findings of dangerousness. As Chief Justice Roberts divided *ex ante* ("preventing violence before it occurred") and *ex post* (providing "a mechanism for punishing those who had menaced others with firearms") analogs,[74] we divide our discussion between *ex ante* and *ex post* reforms.

Ex Ante Reforms

A key opportunity for *ex ante* reform is to make categorical prohibitors based on individualized findings of dangerousness. When a state actor places an

73. *Rahimi*, 144 S. Ct. at 1909-10 (Gorsuch, J., concurring) (citations omitted); *see also* United States v. Laykovich, 2024 WL 4376265, at *1 (E.D. Ky. Oct. 2, 2024) (rejecting a facial challenge to the mental health prohibitor, section 922(g)(4)).

74. *Rahimi*, 144 S. Ct. at 1893, 1896.

individual in a prohibitor category, they should make a finding of whether or not that individual's access to guns poses a credible threat to public safety. The crucial point is that inclusion of an individual into a prohibitor category only happens through the decision of a state actor, and that state actor can simultaneously determine whether the individual poses a credible threat of unlawful gun violence.

For example, when a state court judge involuntarily commits an individual to a mental health facility, they could also make a finding of whether that individual's prospective gun ownership poses a credible threat to public safety or to themselves. There is a substantially heightened risk of suicide among this population, and the federal prohibitor has been shown to reduce gun suicide.[75]

Similarly, at the moment of sentencing a felon, any state or federal judge might include a finding of whether or not that individual's prospective gun ownership poses a credible threat to public safety.[76] Such findings might be time limited (i.e. a judge might find that a defendant is a credible risk to public safety for the next three years). And in a world where the vast majority of convictions are a result of plea bargaining, the prosecutors and defense counsel might actively negotiate over whether a finding of dangerousness will be a part of the plea and, if so, for how long.[77]

While any judge can begin including determinations of dangerousness in their sentences or involuntary commitment orders *sua sponte*, state legislatures can amend their statutes to require such determinations in these proceedings. Such amended statutes might also require judges to address the period of time for which they find individuals to be a credible threat and provide objective criteria for those determinations.[78]

We have made an analogous proposal to shore up the constitutionality of domestic violence restraining orders (DVROs).[79] The federal DVRO restriction

75. Fredrick E. Vars, Griffin Edwards, & Ben Meadows, *Slipping Through the Cracks?: The Impact of Reporting Mental Health Records to the National Firearm Background Check System*, 195 J. ECON. BEHAV. & ORG. 52, 52 (2022).

76. Not every felon presents a credible threat. C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 696 (2009).

77. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 1 CRIMINAL PROCEDURE 678-82 (4th ed. 2024) ("[G]uilty pleas often constitute even more than 95% of all convictions.").

78. Some justices seem receptive to the claim that unguided discretion potentially based on non-objective criteria would violate the Second Amendment. Transcript of Oral Argument at 72, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2021) (No. 20-843) (Justice Kavanaugh noting that, "if it's the discretion of an individual officer, that seems inconsistent with an objective constitutional right."). *See generally* Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 453-55 (2022) (discussing prosecutorial discretion).

79. *See* Ayres & Vars, *supra* note 30.

has two parts.[80] The first part, which is known as the "credible threat" prong, prohibits gun possession if a judge has found that the restrained individual "represents a credible threat to the physical safety of [an] intimate partner or child."[81] The Supreme Court in *Rahimi* emphatically (and repeatedly) limited its holding to this type of DVRO.[82]

But the second half of the statute is vulnerable to constitutional challenge. By its terms, this second category of DVRO does not require a judicial finding of dangerousness. If a DVRO "explicitly prohibits" "physical force"––even without a finding of a credible threat of violence––that is enough to trigger the federal prohibitor on gun possession.[83] The *Rahimi* decision leaves open the possibility that people who lose their right to bear arms based solely on the order's prohibition of physical force may not pose enough of a risk of violence to justify suspending their Second Amendment right.[84] States can make clear when a DVRO falls within the *Rahimi* safe harbor by amending their DVRO laws to require an express "credible threat" finding.

In sum, requiring individualized judicial determinations of dangerousness across contexts may be sufficient to protect from Constitutional challenge the categorical prohibitors related to DVROs, felons, drug users, and people committed involuntarily.

Another *ex ante* reform would be for Congress to limit the duration of firearm restrictions for particular prohibitor categories or to empower the Justice Department to promulgate rules designating the number of years the restriction would remain in place. These sunset provisions could vary by type of crime with, for example, shorter periods for non-violent felonies.[85] Making the restrictions temporary would move federal prohibitors closer to the surety analogs relied upon in *Rahimi*, which "could not be required for more than six months at a time."[86] This type of sunsetting might also give the Justice Department or state prosecutors the ability to go to court and extend the period of the restriction if they can prove by a preponderance of the evidence that an individual remains a credible threat to public safety.

---

80. 18 U.S.C. § 922(g)(8).

81. *Id.*

82. United States v. Rahimi, 144 S. Ct. 1889, 1894, 1901 (2024).

83. 18 U.S.C. § 922(g)(8)(c)(ii).

84. *Rahimi*, 144 S. Ct. at 1896, 1898-99.

85. Sunset provisions have been shown to have different valence for conservatives and liberals. *See* Ian Ayres & Kristen Underhill, *Sunsets are for Suckers: An Experimental Test of Sunset Clauses*, 59 HARV. J. ON LEGIS. 101 (2022).

86. *Rahimi*, 144 S. Ct. at 1900. The Chief Justice also was careful to limit the scope of his opinion to non-permanent restrictions: "[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be *temporarily* disarmed consistent with the Second Amendment." *Id.* at 1903 (emphasis added).

Finally, lawmakers at the state or federal level might empower judges to impose surety requirements as a prerequisite of gun possession. A modern surety law would allow judges (at, say, the time of sentencing or civil commitment) to require individuals to post a bond as a prerequisite to purchasing or possessing a firearm, and the bond would be forfeited if the individual was later found to unlawfully use the weapon.[87] Alternatively, judges might require individuals to take out insurance to compensate any victims who are injured by unlawful use of the weapon.[88] Such surety or analogous insurance requirements would almost certainly withstand scrutiny, as the surety analogs were a primary basis for the *Rahimi* ruling upholding the DVRO prohibitor.[89]

Ex Post Petitions

In addition to these *ex ante* reforms, which apply to the moment judges place individuals into the prohibitor categories, there are also *ex post* reforms that provide pathways for people subject to purchase and possession bans to reacquire their gun rights. Providing *ex post* pathways moves the federal prohibitor regime toward historic analogs that the Court accepted in *Rahimi*.[90] In particular, *ex post* petitions respond to three different anxieties that the justices expressed in that case.[91] First, the petition pathway renders firearm prohibitions less permanent. Instead of "trigger[ing] a permanent, life-long prohibition on possessing firearms and ammunition,"[92] a felony conviction would only create a presumption of ongoing prohibition that the individual would be free to rebut at any time. Second, the petition pathway would create an opportunity for individualized judicial determination of dangerousness.[93] And finally, the petition pathway would let courts respond to the potential self-

87. Financial incentives—including taxes and mandatory insurance—might be an important tool in reducing gun violence and compensating its victims. Jason Abaluck & Ian Ayres, *The Case for Mandatory Gun-Liability Insurance*, WASH. POST (June 17, 2022, 1:13 P.M EDT), https://perma.cc/7U7L-QNNL; Ian Ayres & Abraham L. Wickelgren, *A Gun Control Solution Manufacturers Can Get Behind*, BROOKINGS INST. (Mar. 14, 2018), perma.cc/92L7-PN5B.

88. Insurance is especially analogous to bonds, and many bond companies require up-front, non-refundable bond payments that are akin to insurance premia. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 989-90 (1994).

89. *Rahimi*, 144 S. Ct. at 1901-02.

90. *See id.*

91. *Id.* at 1901-03, 1931-32.

92. *Id.* at 1931 (Thomas, J., dissenting).

93. *See id.* at 1903 (emphasizing the importance of a judicial finding of dangerousness to the constitutionality of section 922(g)(8)).

defense needs of the person subject to the prohibition.[94] Courts assessing a petition could be called upon to weigh whether public safety would be better protected by continuing or discontinuing the firearm restriction given potential evidence of a self-defense need. Including this self-defense consideration in the petition process would also make the current federal prohibitors closer the historic analog; as Chief Justice Roberts emphasized, writing for the court, a person who was compelled to post a bond before "go[ing] armed" could "obtain an exception if he needed his arms for self-defense."[95]

One way to provide individualized *ex post* determinations is for federal courts to continue to consider "as-applied" challenges to the prohibitor restrictions. After all, *Daniels* and *Range* were each as-applied challenges of a federal statute.[96] In contrast, *Rahimi* concerned an unsuccessful facial challenge to the DVRO prohibitor.[97] As Chief Justice Roberts explained:

This is the "most difficult challenge to mount successfully," because it requires a defendant to "establish that no set of circumstances exists under which the Act would be valid." That means that to prevail, the Government need only demonstrate that Section 922(g)(8) is constitutional in some of its applications.[98]

Individual litigants could continue to challenge a statute as applied to them because they are not a credible threat of gun violence. This might keep the categorical prohibitors' presumptive application in place for the various statutory categories, while providing a judicial mechanism for individuals who rebut the presumption to regain their firearm rights.[99]

But today's "as applied" holdings can, over time, mature into precedents which exempt substantial subsets of Americans from the federal firearm prohibitor statute's reach. For example, in a *Daniels* concurrence, Judge Higginson opined that it might be difficult to contain the impact of the holding to Daniels' admission of "smoking marihuana multiple days per month."[100] "Although our decision is limited in scope, it is hard for me to avoid the conclusion that most, if not all, applications of § 922(g)(3) will likewise be

94. *Id.* at 1932 (Thomas, J., dissenting) (expressing concern that under section 922(g)(8), a prohibited "individual cannot even possess a firearm in his home for self-defense").

95. *Id.* at 1900 (citation omitted).

96. United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023), *vacated*, 144 S. Ct. 2707 (2024); Range v. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (en banc), *vacated*, 144 S. Ct. 2706 (2024).

97. *Rahimi*, 144 S. Ct. at 1902.

98. *Id.* at 1898 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

99. In a pre-*Bruen* decision, the Sixth Circuit granted an as-applied challenge to the mental health prohibitor because there was no functional state or federal restoration process. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 681, 694 (6th Cir. 2016) (characterizing the ban at issue as "effectively permanent").

100. *Daniels*, 77 F.4th at 339.

deficient."[101] Continued evolution of the law by as-applied challenges is likely to be both inefficient and messy.[102]

The History of Section 925(c)'s Passage and Subsequent Defunding

A more direct way to create an *ex post* pathway is for Congress to authorize individuals who are subject to federal prohibitors to petition to reacquire their Second Amendment rights. A little-known provision of the federal gun control act, 18 U.S.C. § 925(c), already provides this exact opportunity. The section states:

A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.[103]

This provision grants anyone subject to any of the federal prohibitors—including the prohibitors related to DVRO orders, felony conviction, drug usage, and involuntary commitment—the right to make such a petition. The Bureau of Alcohol, Tobacco and Firearms (ATF) makes the initial determination of whether to grant relief under this section.[104]

This provision also enhances due process via an appeals process that includes a possibility of introducing additional evidence:

---

101. *Id.* at 357 (Higginson, J., concurring).

102. The Supreme Court has not yet settled the precedential effect of as-applied challenges on the scope of group injunctions in the Second Amendment context. But the issue is percolating in the lower courts. *See, e.g.*, United States v. Jackson, 69 F.4th 495, 501-02 (8th Cir. 2023) (upholding the constitutionality of section 922(g)(1) as applied and concluding that "there is no need for felony-by-felony litigation regarding the constitutionality" of that provision), *reh'g en banc denied*, 85 F.4th 468, *vacated*, 144 S. Ct. 2710 (2024). Writing for the Court, Justice Kagan has recently discussed an analogous question regarding facial and as-applied challenges in the First Amendment context. *See* Moody v. Net Choice, LLC, 144 S. Ct. 2383, 2397-98 (2024).

103. 18 U.S.C. § 925(c) (2024).

104. The provision as originally enacted provided for petitions to the Secretary of the Treasury. FEDERAL FIREARMS ACT-RELIEF FROM PROVISIONS OF ACT, S. REP. NO. 89-666, at 2 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 3117, 3118-19. The Homeland Security Act of 2002 transferred the ATF's law enforcement responsibilities from the Department of the Treasury to the Department of Justice in January 2003. Homeland Security Act of 2002, Pub. L. No. 107-296, § 111, 116 Stat. 2135, 2274-75. And section 925(c) was amended to direct petitions to the Attorney General, who continued to delegate petition evaluation to the ATF. *See* 28 C.F.R. § 0.130(a)(1); 27 C.F.R. § 478.144(b); 27 C.F.R § 178.44 (1997).

Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice.[105]

This protean provision is little known because Congress stripped the ATF's authority to spend appropriations on the evaluation of section 925(c) petitions in 1993.[106]

Shortly after, in 1994, Justice O'Connor, writing for a unanimous Court in *Beecham v. United States*, construed the exemption clause of the Federal Firearms Act not to empower states to remove federal firearm prohibitions.[107] After these two avenues for relief were closed, a series of litigants pursued section 925(c) claims directly in federal court with some success.[108] But in 2002 the Supreme Court closed this avenue for relief as well, holding that the *Firearm Owners' Protection Act (FOPA) of 1986* provision allowing federal judicial review was, on its own terms, only available to individuals "whose application for relief from disabilities is denied."[109] This ruling effectively closed the door to any section 925(c) adjudication, because federal courts had no jurisdiction until the Attorney General (through their designee, the ATF) had made a determination, and the ATF couldn't make a determination because Congress expressly prohibited it from expending appropriations for such a purpose.

The State Petition Analogs for Mental Health Firearm Restrictions

While *Beecham* and *Bean* ended the ATF's and state courts' roles as adjudicators of petitions for restoration of felon gun rights,[110] Congress has been more successful in encouraging states to provide "relief from disability" (RFD) petition procedures that create pathways for individuals subject to involuntary commitment prohibitions to have their full Second Amendment rights restored. After the Virginia Tech massacre, Congress passed the *NICS Improvement Amendments Act (NIAA)*, which gave states financial incentives to provide the FBI with better information about people who have been involuntarily committed.[111] But the National Rifle Association extracted a

105. 18 U.S.C. § 925(c) (2024).

106. *See supra* note 24

107. 511 U.S. 368, 369-71 (1994).

108. *See, e.g.*, Bean v. Bureau of Alcohol, Tobacco and Firearms, 253 F.3d 234, 240 (5th Cir. 2001), *rev'd*, 537 U.S. 71 (2002).

109. United States v. Bean, 537 U.S. 71, 74 n.1, 78 (2002) (quoting 18 U.S.C. § 925(c)).

110. *Beecham*, 511 U.S. 368; *Bean*, 537 U.S. 71.

111. Pub. L. No. 110-180, 121 Stat. 2559 (2007).

legislative concession that, to qualify for the NIAA grants, states had to provide a "relief from disability" procedure.[112] Specifically, states had to file a form certifying that their relief-from-disabilities program met NIAA criteria, containing, at a minimum, certain indicia of due process, de novo judicial review, and updating of records by removing the person's name from state and federal firearms prohibitors databases. Critically, the individual had to show that they "will not be likely to act in a manner dangerous to public safety" and granting "relief would not be contrary to the public interest."[113] In addition, the NIAA provisions require all federal agencies that impose mental health adjudications or involuntary commitments, such as the Veterans Administration (VA), to provide a process for relief from mental health-related prohibitions.[114]

The carrot incentives of federal grants have been effective in inducing a majority of states to institute mental health RFD programs:

> Before 2008, only a handful of states had RFD programs. Between 2009 and 2016, thirty states received NARIP grants totaling almost $110 million. . . . [A]s of April 2017, thirty-two states have enacted relief programs meeting the federal criteria as determined by BATF. A dozen more states have RFD programs that do not meet federal criteria.[115]

So while Congress has left the 925(c) RFD program unfunded for more than thirty years, it has succeeded in expanding pathways for individuals subject to mental health prohibitions to have their Second Amendment rights restored. And not just at the state level. While the ATF is banned from expending appropriations of RFD adjudication, the VA has a program and funding to provide potential relief for veterans.[116]

But there remain troubling differences in coverage and procedures among the states.[117] Some states, such as Alaska and Kentucky, have no state law

112. Michael Luo, *Some with Histories of Mental Illness Petition to Get Their Gun Rights Back*, N.Y. TIMES (July 2, 2011), https://perma.cc/HQQ3-R45F.

113. 34 U.S.C. § 40915; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES: CERTIFICATION OF QUALIFYING STATE RELIEF FROM DISABILITIES PROGRAM, ATF E-Form 3210.12 (2022).

114. NICS Improvements Amendments Act of 2007, Pub. L. No. 110-180, § 101, 121 Stat. 2559, 2563 (2008); Liza H. Gold & Donna Vanderpool, *Legal Regulation of Restoration of Firearms Rights After Mental Health Prohibition*, 46 J. AM. ACAD. PSYCH. & L. 298, 300 (2018).

115. Gold & Vanderpool, *supra* note 114, at 300 (citations omitted). Connecticut had an RFD program that had been ATF-certified until 2013, when it changed its mental health law. William J. Krouse, CONG. RSCH. SERV., R45970, GUN CONTROL: NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS AND RELATED LEGISLATION 44 (2019).

116. Gold & Vanderpool, *supra* note 116, at 303-04.

117. State laws regarding mental health firearm restrictions and termination of such restrictions "exhibit marked diversity, ranging from no statutory mention whatsoever

preventing firearms ownership because of mental health exclusions; others, like Arkansas and Michigan, have no RFD procedure.[118] Some states require applicants to establish their non-dangerousness by preponderance of the evidence; others require clear and convincing evidence.[119] And there are troubling disparities across states on the impact of granted "relief" that turn on whether (i) the mental health prohibitor is based on federal or state regulation; (ii) whether the relief comes from a federal or state RFD process; and (iii) whether the state RFD process is ATF certified.[120]

In sum, while there has been some progress in securing *ex post* petition rights for individuals with mental health prohibitors, there remain substantial gaps in the system that leave a substantial number of individuals with no legal prospect of restoring their right to bear arms.

Possible Ways Forward

The simplest most straightforward way to provide *ex post* petitions is for Congress to refund section 925(c). Reauthorizing ATF expenditures would give all Americans subject to any federal prohibitor the right to apply for restoration of their gun rights. Refunding would also cure many of the just-described mental health prohibitor disparities across states.[121] Moreover, refunding section 925(c) would end the de jure corporate solicitude described above. Instead of the current laissez-faire approach to convicted covered entities, a refunded ATF could make nuanced decisions on whether particular felonious corporate and human importers, manufacturers, dealers, and collectors should be allowed to continue their operations. For example, we can imagine some arms dealers who have been convicted of illegally supplying gangs with weapons should not be able to continue to operate.

---

to provisions that are significantly more restrictive than those of the Gun Control Act, including the absence of any mechanism for terminating the prohibition." Joseph R. Simpson, *Bad risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY & L., 330, 333 (2007).

118. Gold & Vanderpool, *supra* note 114, at 299, 301.

119. *Id.* at 302.

120. Liza Gold and Donna Vanderpool painstakingly walk through dozens of permutations to highlight these disparities. *Id.* at 301. *See also* Mai v. United States, 952 F.3d 1106, 1110-12 (9th Cir. 2020) (holding that Washington state's RFD program falls short of federal law, such that one who wins relief from disability under that scheme may still be federally prohibited from possessing a firearm by 18 U.S.C. § 922(g)(4)).

121. States that have different criteria or standards of proof might continue to bar residents from purchasing or possessing guns notwithstanding a restoration of federal rights. Gold & Vanderpool, *supra* note 114, at 305.

Alternatively, Congress might statutorily overrule *Beecham* and empower states to remove federal and state firearm restrictions. The key idea is that the state determinations become binding with regard to federal law. Under this hybrid approach, restricted individuals could either petition their state RFD program, or if their state does not have an ATF-certified program, petition the ATF for a determination of whether their gun rights should be restored.[122]

Finally, it might be possible for the Attorney General to act unilaterally to reinitiate processing and making section 925(c) determinations. The appropriation limitations only apply to the ATF (which is one reason the Veterans Administration is able to implement the RFD program required by the NIAA).[123] In contrast, the text of section 925 refers to the Attorney General as the person empowered to make the determination.[124] This creates the potential for the Attorney General to designate non-ATF members of the Justice Department to investigate section 925(c) applications and make relief recommendations to the Attorney General. Several Congressional Research Service reports on legislative action on gun control have raised this possibility:

> Under the GCA, there is also a provision that allows the Attorney General (previously, the Secretary of the Treasury) to consider petitions from a prohibited person for "relief from disabilities" and have his firearms transfer and possession eligibility restored. Since FY1993, however, a rider on the ATF annual appropriations for salaries and expenses has prohibited the expenditure of any funding provided under that account on processing such petitions. While

122. Kaitlyn M. Rubcich has proposed a similar amendment to section 925(c):

> The Attorney General may grant such relief if it is established to his satisfaction that the applicant's disability, record, and reputation have been assessed by a [s]tate court, board, commission, or other lawful authority operating under a [s]tate relief from disabilities program implemented in accordance with 34 U.S.C. § 40915, and such an authority has found that the applicant's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

Rubcich, *supra* note 61, at 942-43. But this proposal merely gives the Attorney General discretion ("may grant such relief") to rely on a state determination, whereas we believe that under this hybrid system, federal authorities should more automatically turn on determinations by ATF-certified state adjudicators. This might be accomplished by changing "may" to "shall." *See also* CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS: AN EVIDENCE-BASED APPROACH FOR FEDERAL POLICY 10-11, Dec. 11, 2013, https://efsgv.org/wp-content/uploads/2013/12/GPHMI-Federal.pdf (proposing model language for state RFD programs).

123. *See* sources cited *supra* note 106.

124. 18 U.S.C. § 925(c) ("A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws . . . .")

a prohibited person arguably could petition the Attorney General, bypassing ATF, such an alternative has never been successfully tested.[125]

Given the continuing hyper-partisan divides impeding government action on so many hot-button items, it might be appropriate to consider the possibility of unilateral executive action to resurrect section 925(c) adjudications.

In this Part, we have proposed a number of *ex ante* and *ex post* reforms to make the federal categorical prohibitors more analogous to our Nation's founding history of gun control regulation. Some of these reforms can be unilaterally implemented by individual judges, some require legislative action and the federal or state level, and the last might be implemented by Presidential fiat. Embracing a combination of these proposals would be most prudent, but even piecemeal adoption may increase the chance that the Supreme Court will sustain the core categorical prohibitors on felons, drug users, and people who have been involuntarily committed.

Conclusion

Attacks on federal categorical or status-based gun prohibitions are in full swing. Several cases challenging the constitutionality of these provisions have been remanded for further consideration in the aftermath of *Rahimi*, but there is little doubt that the Supreme Court will soon be forced to resolve the question of whether these categorical bans are consistent with the Second Amendment.

The *Bruen* decision bizarrely prohibits courts from considering whether a challenged law is effective.[126] Courts cannot engage in means-ends scrutiny to assess whether the benefits of a regulation justify the burden it imposes on the Second Amendment right.[127] It is highly possible post-*Rahimi* that the Supreme Court will presume *all* categorical gun regulation to be unconstitutional. It is not difficult to contemplate a world in which only individuals adjudicated to be dangerous as part of a DVRO (as in *Rahimi*[128]) or a red-flag petition[129] can be

125. William J. Krouse, CONG. RSCH. SERV., R44655, GUN CONTROL: FEDERAL LAW AND LEGISLATIVE ACTION IN THE 114TH CONGRESS 12 (2017) (emphasis added), https://sgp.fas.org/crs/misc/R44655.pdf; *see* William J. Krouse, CONG. RSCH. SERV., R42987, GUN CONTROL LEGISLATION IN THE 113TH CONGRESS (January 8, 2015).

126. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 10-15 (2022).

127. *Id.* at 19 ("Despite the popularity of this two-step approach," in which courts look to history and then apply means end scrutiny, "it is one step too many").

128. United States v. Rahimi, 144 S. Ct. 1889, 1894 (2024).

129. Red-flag petitions are filed under a "red-flag law" that allows petitioners, typically law enforcement officers, close family, and household members, to request a court to order the temporary seizure of firearms from persons they believe may present a danger to themselves or others. *See generally* Tara Sklar, *Elderly Gun Ownership and the Wave of State Red Flag Laws: An Unintended Consequence That Could Help Many*, 27 ELDERLY L.J. 35 (2019).

constitutionally prohibited from possessing firearms. To be sure, DVRO- and red-flag orders are an important tool in reducing gun violence.[130] But thousands more people will die each year if the Supreme Court strikes down wholesale the categorical possession prohibitors concerning felons, drug users, and people who have been involuntarily committed.[131]

In these highly partisan times, it is easy to cynically predict that Congressional gridlock will render many of our proposals infeasible. It is even possible that there might be reversal of party positions with regard to the funding of the section 925(c) program. In the 1990s, Congressional Republicans pushed for the refunding of the program, while Congressional Democrats took the lead in crippling these pathways to restore gun rights.[132] Now that the Supreme Court may demand more individualized determinations of dangerousness, we might see Democrats support refunding as a way to shore up the program's Constitutionality, while Republican may oppose the program as a stepping-stone toward a broader laissez-faire regime.

But we put forward our proposals not merely as a way to accommodate the Supreme Court's literally atavistic approach to the Second Amendment. Our proposals also increase individual freedom and autonomy. There is no good reason to permanently prohibit individuals who have no heightened likelihood of violence from purchasing or possessing firearms.[133] While the Supreme Court has rejected means-ends scrutiny as a part of its Constitutional standard

130. Liza H. Gold, *Domestic Violence, Firearms, and Mass Shootings*, 48 J. AM. ACAD. PSYCHIATRY & L. 1 (2020); *The Effects of Extreme-Risk Protection Orders*, RAND GUN POLICY IN AMERICA (July 16, 2024), perma.cc/E3Q4-6EY6. Indeed, we have proposed a third-petition procedure with regard to disarmed people who unlawfully possess firearms. AYRES & VARS, *supra* note 17, at Chapter 8.

131. *See generally Gun Policy Research Review*, RAND GUN POLICY IN AMERICA, perma.cc/2LU7-QTNU (archived Feb. 9, 2025). Wholesale elimination of the categorical prohibitions would limit government to the kind of "i-frame" interventions which have proven to be less effective than systemic reforms. Nick Chater & George Loewenstein, *The I-Frame and The S-Frame: How Focusing on Individual-Level Solutions Has Led Behavioral Public Policy Astray*, 46 BEHAV. & BRAIN SCIS. e147, 2 (2022) ("in advancing i-frame solutions to problems, we have inadvertently assisted corporations that oppose s-frame reforms").

132. Ryan Laurence Nelson, Note. *Rearming Felons: Federal Jurisdiction under 18 USC § 925(c)*, 2001 U. CHI. LEGAL F. 551, 556 & nn. 36-38 (2001).

133. That is, unless one believes that bringing down the number of armed individuals in the country will reduce the total gun deaths and injuries—an idea reminiscent of the public health approach to firearm safety. *See* The Educational Fund to Stop Gun Violence, *The Public Health Approach to Gun Violence Prevention* (2020), https://efsgv.org/wp-content/uploads/PublicHealthApproachToGVP-EFSGV.pdf. This idea potentially bolstered by the lack of firearm fatality in countries with few guns. However, it is likely constitutionally unsound after the Court's recent Second Amendment decisions. *Cf.* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (rejecting a New York gun control regime that required applicants to demonstrate an extraordinary self-defense need to be permitted to carry a firearm in public for self-defense).

in reviewing gun regulations, lawmakers can and should consider whether the regulation provides a sufficient bang (reduction in violence) for buck (burden on gun rights). An advantage of our proposals, in addition to their impact on Constitutional adjudication, is that they maintain the lion's share of the public-health benefits of categorical prohibitors while simultaneously reducing the regulations' Constitutional burdens.[134] Creating more explicit *ex ante* determinations of dangerousness and more robust *ex post* pathways for restoration of gun rights is an agenda that could thread the hyper-partisan needle on gun rights and gun safety.

134. By better targeting the group subject to the restrictions, our proposal are likely to reduce the "number need to be treated" (NNT). *See* Richard J. Cook & David L. Sackett, *The Number Needed to Treat: A Clinically Useful Measure of Treatment Effect*, 310 BRIT. MED. J. 452, 453 (1995). Instead of measuring the number of people who need to take a vaccine in order to produce some beneficial outcome (say, one fewer death), *see* Ian Ayres, Opinion, *Save a Grandma. Get Your Flu Shot*, L.A. TIMES, Nov. 12, 2018, perma.cc/Y4H5-3ZWH, a firearm NNT would measure the number of people who would have to be subjected to a gun restriction in order to produce a beneficial outcome. Our proposal would predictably reduce the NNT of the categorical prohibitions.