

The Department of Justice Asks the Supreme Court to Review Constitutionality of Federal Prohibition on Felons Possessing Firearms

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Federal appeals courts [disagree](#) as to whether the federal ban on individuals convicted of felonies from possessing firearms—located at [18 U.S.C. § 922\(g\)\(1\)](#) and commonly known as the “felon-in-possession” prohibition—violates the [Second Amendment](#). The Department of Justice (DOJ) has [asked](#) the Supreme Court to review a case on one side of divide: *United States v. Hembree*, in which the U.S. Court of Appeals for the Fifth Circuit (circuits are hereinafter referenced by their jurisdiction, such as “Fifth Circuit”) held that § 922(g)(1) is unconstitutional as applied to a defendant whose underlying felony was the possession of methamphetamine. Although the Supreme Court is not obligated to hear the case, there may be an [increased prospect](#) of review due to several general factors, including the federal appeals courts adopting [conflicting](#) interpretations of a federal statute, a federal appeals court [invalidating](#) an act of Congress, and DOJ [seeking](#) the appeal.

This Sidebar summarizes the circuit split on whether § 922(g)(1) complies with the Second Amendment. The Sidebar begins by providing an overview of the Supreme Court’s modern Second Amendment jurisprudence, including decisions on other class-based firearms restrictions. The Sidebar then outlines the three divergent positions taken by federal appeals courts as to the constitutionality of the felon-in-possession prohibition: (1) that § 922(g)(1) is categorically constitutional because, as a threshold matter, individuals convicted of felonies fall outside of the protections of the Second Amendment; (2) that § 922(g)(1) is categorically constitutional because, as a historical matter, § 922(g)(1) is consistent with the nation’s tradition of firearms regulation; and (3) that, as a historical matter, § 922(g)(1) may be unconstitutional as applied to individuals convicted of nonviolent felonies, such as the drug-possession conviction of the defendant in *Hembree*. The Sidebar closes with considerations for Congress.

Relevant Supreme Court Second Amendment Cases Since 2008

The [Second Amendment](#) provides, “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” In 2008, more than two

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hundred years after the Second Amendment's adoption, the Supreme Court in *District of Columbia v. Heller* engaged in its “first thorough” examination of the meaning of the amendment. The Supreme Court in *Heller* held that the Second Amendment protects an individual right to possess an operable firearm for certain purposes, particularly self-defense in the home. Whatever the full extent of the Second Amendment right, the Court wrote, it “surely” includes “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” In its discussion, the Court cautioned that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons” and others. In a footnote, the Court clarified that these prohibitions are “presumptively lawful regulatory measures.” In 2010, in *McDonald v. City of Chicago*, the Court recognized that, by virtue of the Fourteenth Amendment, firearms laws and regulations enacted at the state and local levels, as well as at the federal level, must comply with the Second Amendment.

In a 2022 decision, *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court announced a history-centric test for courts to apply in evaluating Second Amendment challenges to firearms laws and regulations: “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct”; the government may overcome this presumption by “demonstrat[ing] that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” The Court also made clear that the Second Amendment right applies outside of the home, to nonsensitive public spaces where “confrontation” may occur.

Federal law generally prohibits nine classes of individuals from possessing firearms. In 2024, in *United States v. Rahimi*, the Supreme Court rejected a “facial” challenge to one such prohibition, 18 U.S.C. § 922(g)(8), which bars individuals subject to certain domestic violence restraining orders from possessing a firearm. (A “facial” challenge argues that a statute is unconstitutional in all applications, in contrast with an “as applied” challenge, which argues that a statute is unconstitutional in specific circumstances.) The Supreme Court explained that, at step two of the *Bruen* framework, sufficient historical support existed for the principle that “[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed” temporarily. In its discussion, the Court quoted *Heller*’s language that the felon-in-possession prohibition, among others, is “presumptively lawful,” language that Justice Thomas in dissent characterized as “dicta” (i.e., extraneous, nonbinding commentary).

In 2026, in *United States v. Hemani*, the Supreme Court examined the constitutionality of another categorical prohibition, 18 U.S.C. § 922(g)(3), which forbids any person “who is an unlawful user of or addicted to any controlled substance” from possessing a firearm or ammunition. In the words of the Court, the federal government argued that § 922(g)(3) “automatically disarms anyone who regularly uses any amount of any controlled substance for anything other than its ‘prescribed purpose,’” regardless of individualized circumstances, including “whether [the defendant’s] drug use has ever made him a danger to himself or others.” In *Hemani*, the Court determined that, at *Bruen*’s second step, the government presented insufficient historical support for this broad interpretation of § 922(g)(3) and, in doing so, the Court ruled that the prosecution of the defendant solely because he used marijuana “a few times a week”—without proof of relevant individual circumstances—violated the Second Amendment. In a footnote, the Court repeated *Heller*’s disclaimer that the opinion should not be construed to “cast doubt” on the constitutionality of § 922(g)(1).

Circuit Split on the Constitutionality of the Felon-in-Possession Prohibition

Circuits Holding That § 922(g)(1) Is Constitutional at *Bruen* Step One

In applying *Bruen* to Second Amendment challenges to § 922(g)(1), the [Fourth](#) and [Eleventh](#) Circuits hold that, as a threshold matter, felons are not among those protected by the Second Amendment and that the Second Amendment inquiry comes to an end at step one of the *Bruen* framework. The Fourth Circuit [determined](#) that “conviction of a felony necessarily removes one from the class of ‘law-abiding, responsible citizens’ for the purposes of the Second Amendment,” with the “narrow exceptions” of pardoned convictions or felonies that are found to be “unconstitutional or otherwise unlawful.” The Eleventh Circuit [interpreted](#) *Heller* as “clearly excluding” felons from the universe of “law-abiding and qualified individuals” who are entitled to the Second Amendment right.

Circuits Holding That § 922(g)(1) Is Constitutional at *Bruen* Step Two

The [Second](#), [Ninth](#), and [Tenth](#) Circuits have reached the same result as the Fourth and Eleventh Circuits, although through different legal reasoning. These courts have held that, at step two of the *Bruen* inquiry, violent felons and nonviolent felons alike may be categorically disarmed under the Second Amendment. For instance, the [Second](#) Circuit has proclaimed that, at the first step of the *Bruen* analysis, felons belong to “the people” protected by the Second Amendment. As support, the court quoted *Heller* for the [proposition](#) that “‘the people’ . . . ‘unambiguously refers to all members of the political community, not an unspecified subset.’” The Second Circuit went on to [find](#) at step two of the *Bruen* framework, however, that felons may be categorically barred from possessing firearms due to a historical record showing that “legislatures could disarm people as long as they belonged to an identity group that the legislature perceived as dangerous,” and in the [context](#) of § 922(g)(1) “Congress perceives [felons], broadly, as dangerous.” Felons, including those who have committed nonviolent offenses, have violated the “basic terms of the social contract” and thus indicated that they do not possess the character to be entrusted with firearms, the court [added](#). The court [wrote](#) that “the Second Amendment does not bar Congress from passing laws that disarm convicted felons, regardless of whether the crime of conviction is nonviolent,” and Congress may disarm felons as a class. The court [warned](#) that to make such distinctions would usurp the role of the legislature’s class-based judgment and would present administrability concerns, as “embark[ing] on a line-drawing process . . . would raise endless questions with which the courts have had difficulty in other contexts.”

The [Eighth](#) Circuit has ruled against challengers at both steps of the *Bruen* framework, concluding that a felon “is not a law-abiding citizen, and history supports the authority of Congress to [categorically] prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society.” In the case of felons, the court [held](#) that historical analogues supported disarming classes presenting a risk of dangerousness and that individualized determinations of such risk were not historically necessary for purposes of disarmament.

Circuits Holding That the Prohibition May Be Unconstitutional as to Specific Defendants

The [Third](#), [Fifth](#), [Sixth](#), and [D.C.](#) Circuits have held that the Second Amendment prohibits nonviolent felons from being dispossessed of their firearms. The [Third](#) Circuit took this position in a case involving a defendant who was convicted of making false statements to obtain food stamps in violation of

Pennsylvania law, which qualified as a felony under § 922(g)(1). The Third Circuit first **determined** that the defendant was one of “the people” protected by the Second Amendment. While the government argued that the Amendment covers only “law-abiding, responsible citizens,” the court **found**, among other things, that the government’s conception of this phrase was too restrictive and logically could mean that “every American who gets a traffic ticket is no longer among ‘the people’ protected by the Second Amendment.” The court **decided** that the plain text of the Second Amendment implicates the felon-in-possession ban, which would preclude the defendant from exercising his right to bear arms. The court then **held** that the government did not carry its burden at *Bruen* step two. The court **concluded** that the historical analogues offered by the government fell short, as the government did not show that the defendant belonged to a specific class of historically disarmed individuals, that historical punishments for nonviolent felonies entailed lifetime disarmament, or that historical laws disarming individuals who used firearms in the commission of their offenses would have applied to the defendant (who did not use a firearm to commit his fraud offense). The court thus **ruled** that § 922(g)(1) could not constitutionally be applied to the defendant, stressing that its decision was a “narrow” one applicable only to the defendant based on his particular offense. The United States filed a **petition** for review with the Supreme Court. The Supreme Court **remanded** the case to the Third Circuit after deciding *Rahimi*, and a panel of the Third Circuit again **held** that § 922(g)(1) could not be constitutionally applied to the defendant.

The **Fifth** Circuit similarly has taken a case-by-case approach to evaluating the constitutional validity of § 922(g)(1) as to specific defendants. On one hand, the court has **upheld** the constitutionality of § 922(g)(1) in cases in which a defendant was convicted of an offense that was inherently violent or associated with violence, such as **drug trafficking**; **drug distribution**; **possession with intent to distribute cocaine**; **aggravated battery, burglary, and robbery**; **evading arrest or detention with a vehicle**; **aggravated assault and manslaughter**; **aggravated battery**; **felony assault of family member**; **aggravated assault with a firearm and possession of a firearm while on probation**; **illegal possession of a controlled substance and burglary**; and **bank robbery**. On the other hand, the Fifth Circuit has held that the statute cannot be constitutionally applied where the predicate felony is the **possession of methamphetamine** (as in *Hembree*, which the government has asked the Supreme Court to review) or **failure to pay child support**. Recently, a majority of the active judges on the Fifth Circuit **agreed** to a full circuit review of whether § 922(g)(1) is facially consistent with the Commerce Clause. The majority accepted a reframed petition for review of a three-judge panel decision finding § 922(g)(1) constitutional as applied to a defendant convicted of **drug trafficking**.

The **Sixth** Circuit has also examined the constitutionality of § 922(g)(1) in light of the particular circumstances of the defendant’s offense of conviction and criminal history. The court has recognized three categories of criminal offenses: (1) “**crimes against the person**,” which include “murder, rape, assault, and robbery”; (2) crimes that “do not always involve an immediate and direct threat of violence against a particular person” and that “may nonetheless **pose a significant threat of danger**,” including drug trafficking and burglary; and (3) crimes that often “**cause no physical harm** to another person or the community.” The court **declared** that a defendant who has committed an offense in one of the first two categories “will have a very difficult time, to say the least, of showing he is not dangerous.” The circuit has not, as of this writing, found § 922(g)(1) to be unconstitutional under any of these categories.

These three circuits have split further as to what courts may consider in a § 922(g)(1) challenge. The Fifth Circuit **determined** that, in making these case-by-case assessments of the danger to others posed by the felon, the court should consider only the felony convictions and not any offense conduct that was “unproven.” The court **contrasted** its approach with that employed by the Third and Sixth Circuits, which appear to permit consideration of broader information indicative of dangerousness in a § 922(g)(1) challenge, particularly relevant offense conduct that may not have resulted in a conviction.

The D.C. Circuit has **concluded** that “felons are not protected by the Second Amendment” and are thus excluded from the constitutional right. The court engaged in a historical **analysis** to conclude that, at the

founding, the right to bear arms was limited to the class of “virtuous” or “law abiding, responsible” citizens, which did not include felons—regardless of whether the predicate offense was violent or indicative of dangerousness. That said, the D.C. Circuit [left open](#) the possibility that a felon could “show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it.”

Other Circuits

In upholding the facial constitutionality § 922(g)(1), the [Seventh](#) Circuit reserved the question as to whether certain as-applied challenges may be viable, [explaining](#) that “in this circuit the issue is open.” The court subsequently [held](#) that an individual convicted of violent offenses, including drug distribution, may be disarmed. But the court [added](#) that, it “reserve[s] ruling” on as-applied challenges where the “predicate felony offense is not ‘dangerous.’” The [First](#) Circuit has not made a de novo ruling on the constitutionality of § 922(g)(1). But on plain error review, the First Circuit rejected a Second Amendment challenge to § 922(g)(1), [pointing to](#) the absence of Supreme Court precedent on the constitutionality of the statute; language in Supreme Court opinions suggesting that the statute is “presumptively lawful”; and the defendant’s criminal history, which included a conviction for drug trafficking.

Considerations for Congress

DOJ has [filed](#) a petition for review in the *Hembree* case. In the petition, DOJ [asked](#) the Supreme Court to “grant the petition, vacate the court of appeals’ judgment, and remand the case for further consideration in light of *Hemani*.” Following *Hemani*, however, the Court [did not dispose](#) of the petition as DOJ had requested. Instead, the Court has [allowed](#) the defendant to respond to DOJ’s petition, suggesting that the Court has some interest in considering the petition notwithstanding its decision in *Hemani*. The petition in *Hembree* remains [pending](#). The Supreme Court is [in recess](#) as of this writing. Accordingly, the Court might not formally act on the *Hembree* petition until it sits for its [September “long conference,”](#) which precedes the official beginning of the October 2026 Term and at which the Justices discuss pending petitions that have accumulated over the intervening summer months.

Congress may monitor how the Supreme Court responds to the government’s petition in *Hembree*, which includes the possibility that the Court will grant the petition and directly answer whether and to what extent § 922(g)(1) comports with the Second Amendment. Congress retains the authority to amend § 922(g)(1) either in response to, or anticipation of, an eventual Supreme Court ruling. Should the Court deny the petition, Congress still may amend § 922(g)(1), perhaps to adopt one of the positions taken by the circuit courts; Congress also may leave further constitutional developments to the lower courts.

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