

CONSTITUTIONAL LAW — SECOND AMENDMENT — EN BANC  
NINTH CIRCUIT UPHOLDS FELON-IN-POSSESSION BAN UNDER  
*RAHIMI*. — *United States v. Duarte*, 137 F.4th 743 (9th Cir. 2025) (en  
banc).

After *New York State Rifle & Pistol Ass’n v. Bruen*,<sup>1</sup> § 922(g) challenges proliferate.<sup>2</sup> Enacted as the “centerpiece”<sup>3</sup> of the Gun Control Act of 1968,<sup>4</sup> 18 U.S.C. § 922(g) categorically bars certain classes of individuals from possessing firearms.<sup>5</sup> In turn, the federal “background check system,”<sup>6</sup> which prevents firearm sales to “prohibited persons,”<sup>7</sup> primarily relies upon § 922(g)’s easily administrable categories to identify unlawful sales.<sup>8</sup> The “felon-in-possession” ban, 18 U.S.C. § 922(g)(1), is considered the “cornerstone” of this federal system.<sup>9</sup> After the Supreme Court’s decisions in *Bruen* and *United States v. Rahimi*,<sup>10</sup> however, lawsuits challenging the felon-in-possession ban have multiplied nationwide, creating an emerging circuit split over the constitutionality of both § 922(g)(1)’s application to nonviolent felons<sup>11</sup> and § 922(g)’s categorical disarmaments writ large.<sup>12</sup> Recently, in *United States v. Duarte*,<sup>13</sup> the en banc Ninth Circuit upheld the felon-in-possession ban as a categorical disarmament, constitutionally applicable to nonviolent felons under the Second Amendment.<sup>14</sup> In affirming § 922(g)(1)’s categorical ban, however, the Ninth Circuit missed an opportunity to add a critical third question to *Bruen* and *Rahimi*’s required historical analogues for the “why” and “how” of firearm

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<sup>1</sup> 142 S. Ct. 2111 (2022).

<sup>2</sup> See Ian Ayres & Fredrick E. Vars, *The Coming Assault on Categorical Gun Prohibitions*, 77 STAN. L. REV. ONLINE 31, 31–32 (2025). This is not to say that challenges to 18 U.S.C. § 922(g) are entirely new. See Kari Lorentson, Note, *18 U.S.C. § 922(g)(1) Under Attack: The Case for As-Applied Challenges to the Felon-in-Possession Ban*, 93 NOTRE DAME L. REV. 1723, 1730–37 (2018) (surveying earlier as-applied challenges to § 922(g)).

<sup>3</sup> Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1584 (2022).

<sup>4</sup> Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).

<sup>5</sup> See 18 U.S.C. § 922(g).

<sup>6</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1541 (1993) (codified at 34 U.S.C. § 40901(b)).

<sup>7</sup> FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) SECTION 2024 OPERATIONS REPORT 1 (2024), <https://www.fbi.gov/file-repository/2024-nics-operational-report.pdf/view> [<https://perma.cc/66V2-TEV5>].

<sup>8</sup> See Stevenson, *supra* note 3, at 1575.

<sup>9</sup> *Id.*

<sup>10</sup> 144 S. Ct. 1889 (2024).

<sup>11</sup> See Chloe E. Bonds, Comment, *Attempting to Resolve the Felon-in-Possession Prohibition Circuit Split: The Second Amendment Historical Analogue Test After United States v. Rahimi*, 76 MERCER L. REV. 1631, 1644–52, 1657–69 (2025) (assessing circuit split pre- and post-*Rahimi*).

<sup>12</sup> See Ayres & Vars, *supra* note 2, at 36–39.

<sup>13</sup> (*Duarte II*), 137 F.4th 743 (9th Cir. 2025) (en banc).

<sup>14</sup> *Id.* at 748; see *id.* at 752.

regulation — the “who”: That is, whom may the government categorically bar from firearm possession?

In September 2020, Steven Duarte was charged with “knowingly possessing a firearm” despite his previous nonviolent felony conviction, in violation of 18 U.S.C. § 922(g)(1).<sup>15</sup> That provision prohibits any individual previously “convicted . . . of] a crime punishable by imprisonment for a term exceeding one year” from “possess[ing] . . . any firearm.”<sup>16</sup> Before a jury in the U.S. District Court for the Central District of California, Duarte was found guilty and sentenced to fifty-one months in prison.<sup>17</sup> Duarte appealed.<sup>18</sup>

In the interim, the Supreme Court decided *Bruen*, effecting a “sea change” in Second Amendment jurisprudence.<sup>19</sup> After *Bruen*, present-day firearms regulations must be “consistent with the Second Amendment’s text and historical understanding.”<sup>20</sup> Despite some “confusion,”<sup>21</sup> lower courts have generally operationalized *Bruen*’s analysis into two steps.<sup>22</sup> At step one, courts determine whether conduct is presumptively protected by asking “whether the ‘Second Amendment’s plain text covers’ (1) the individual, (2) the type of arm, and (3) the [individual’s] ‘proposed . . . conduct.’”<sup>23</sup> If so, the government bears the burden at step two of identifying a “well-established and representative historical analogue” that justifies a modern regulation.<sup>24</sup> The *Bruen* Court refused to “provide an exhaustive survey of the features that render regulations relevantly similar” but offered two guideposts for lower courts: “*how* and *why* the regulations burden a law-abiding citizen’s right to armed self-defense.”<sup>25</sup>

Following *Bruen*, Duarte introduced a Second Amendment challenge to his appeal, arguing that “§ 922(g)(1) [was] unconstitutional as applied to” nonviolent felons like him.<sup>26</sup>

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<sup>15</sup> *Id.* at 748–49.

<sup>16</sup> 18 U.S.C. § 922(g)(1).

<sup>17</sup> *Duarte II*, 137 F.4th at 748. During that proceeding, Duarte did not challenge his conviction on Second Amendment grounds. *Id.* at 748–49.

<sup>18</sup> *Id.* at 748.

<sup>19</sup> *Id.* at 747 (discussing *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2125–26 (2022)).

<sup>20</sup> *Bruen*, 142 S. Ct. at 2131.

<sup>21</sup> *United States v. Rahimi*, 144 S. Ct. 1889, 1927 (2024) (Jackson, J., concurring) (quoting Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner at 4, *Rahimi*, 144 S. Ct. 1889 (No. 22-915)).

<sup>22</sup> *See, e.g.*, *United States v. Duarte (Duarte I)*, 101 F.4th 657, 670–71, 676–77 (9th Cir. 2024) (quoting and citing *Bruen*, 142 S. Ct. at 2129–30, 2134).

<sup>23</sup> *Id.* at 670–71 (quoting and citing *Bruen*, 142 S. Ct. at 2129–30, 2134).

<sup>24</sup> *Bruen*, 142 S. Ct. at 2133 (emphasis omitted).

<sup>25</sup> *Id.* at 2132–33 (emphases added).

<sup>26</sup> *Duarte II*, 137 F.4th at 749.

A three-judge panel of the Ninth Circuit reversed and vacated Duarte's conviction.<sup>27</sup> Writing for the majority, Judge Bea<sup>28</sup> held that Duarte had "good cause" to bring this argument on appeal, despite not introducing it pretrial, because *Bruen* had abrogated *United States v. Vongxay*,<sup>29</sup> a prior Ninth Circuit decision that had previously "foreclosed" Duarte's Second Amendment challenge.<sup>30</sup> Under *Bruen*, the panel held § 922(g)(1) unconstitutional as applied to Duarte because the government's proposed historical analogues for "'how' and 'why'" were "not 'distinctly similar'" to § 922(g)(1)'s categorical ban.<sup>31</sup>

Judge Smith dissented.<sup>32</sup> He would have held that *Vongxay* continued to bind the panel because its holding was not "clearly irreconcilable" with *Bruen*.<sup>33</sup>

The government sought rehearing en banc, which the Ninth Circuit granted, vacating the panel's opinion.<sup>34</sup> Before the court sat for rehearing, the Supreme Court decided *Rahimi*.<sup>35</sup> That decision "loosen[ed] [the] formalism" of *Bruen*<sup>36</sup> by clarifying that the proper historical inquiry was "principles-based"<sup>37</sup> — it did not require identifying "historical twin[s]" for modern regulations, but merely "consistent . . . principles . . . underpin[ning both] our regulatory tradition" and the law at issue.<sup>38</sup>

The en banc Ninth Circuit affirmed Duarte's conviction.<sup>39</sup> In an opinion written by Judge Wardlaw,<sup>40</sup> the majority held § 922(g)(1)'s categorical application to nonviolent felons constitutional.<sup>41</sup> Before reaching the merits, the majority assumed that de novo review was warranted

<sup>27</sup> *Duarte I*, 101 F.4th at 691.

<sup>28</sup> Judge Bea was joined by Judge VanDyke.

<sup>29</sup> 594 F.3d 1111 (9th Cir. 2010).

<sup>30</sup> *Duarte I*, 101 F.4th at 663 (quoting *Vongxay*, 594 F.3d at 1118; *United States v. Aguilera-Rios*, 769 F.3d 626, 630 (9th Cir. 2014)).

<sup>31</sup> *Id.* at 688 (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2131 (2022)). The panel highlighted the nonviolent nature of Duarte's previous convictions, which, "by Founding era standards," were not "serious enough to justify permanent[]" disarmament. *Id.* at 691.

<sup>32</sup> *Id.* at 691 (Smith, J., dissenting).

<sup>33</sup> *Id.* at 692.

<sup>34</sup> *United States v. Duarte*, 108 F.4th 786, 786 (9th Cir. 2024) (mem.).

<sup>35</sup> See *United States v. Rahimi*, 144 S. Ct. 1889 (2024).

<sup>36</sup> Richard M. Re, Essay, *Legal Realignment*, 92 U. CHI. L. REV. 1965, 1992 (2025).

<sup>37</sup> Joseph Blocher & Reva B. Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. PA. L. REV. (forthcoming 2026) (manuscript at 22), <https://ssrn.com/abstract=5310411> [<https://perma.cc/FT94-Z2L3>].

<sup>38</sup> *Rahimi*, 144 S. Ct. at 1898 (emphases added) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022)). For discussion of the justifications underpinning reference to specific historical sources, see *id.* at 1925–26 (Barrett, J., concurring), and Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1514–16 (2023). For discussion of the underlying methodological disagreements within *Rahimi*'s several opinions, see William Baude, *Fear of Balancing*, 2024 SUP. CT. REV. 169, 172–78 (2025).

<sup>39</sup> *Duarte II*, 137 F.4th at 762.

<sup>40</sup> Judge Wardlaw's opinion was joined by Chief Judge Murguia and Judges Rawlinson, Owens, Thomas, Mendoza, and Desai.

<sup>41</sup> *Duarte II*, 137 F.4th at 748.

under the “good cause” standard of Rule 12(c)(3) of the Federal Rules of Criminal Procedure.<sup>42</sup> Citing a consistent thread of “assurances”<sup>43</sup> from the Supreme Court on the constitutionality of felon-in-possession laws, the majority held that *Vongxay* had not been abrogated by either *Bruen* or *Rahimi*.<sup>44</sup> Nevertheless, the majority applied “*Bruen*’s constitutional test to . . . confirm[] [its] reading.”<sup>45</sup> After finding *Bruen*’s step one satisfied,<sup>46</sup> the court turned to step two.<sup>47</sup> Based on the methodological clarification in *Rahimi*,<sup>48</sup> the majority identified two distinct “regulatory principles” within the country’s historical tradition of firearm regulation, either of which standing *alone* could justify § 922(g)(1).<sup>49</sup>

First, the majority recognized a greater-includes-the-lesser principle.<sup>50</sup> Because felons could historically be sentenced “to capital punishment and estate forfeiture,”<sup>51</sup> the majority concluded that “the lesser restriction of permanent disarmament [was] also permissible.”<sup>52</sup> Duarte argued that this tradition was insufficient because his nonviolent felony convictions did not correspond to any Founding-era felonies.<sup>53</sup> The majority, however, found it “consistent with our nation’s history” for the legislature to exercise discretion in determining what crimes were “serious [enough] . . . to punish perpetrators with severe deprivations of liberty,” including disarmament.<sup>54</sup>

Second, the majority identified a historical tradition permitting the legislature to disarm groups of individuals that it deems dangerous.<sup>55</sup> While that tradition included laws “reflect[ing] . . . abhorrent prejudices that . . . *other* parts of the Constitution” would bar today, the principle was clear that legislatures could “categorically disarm those they deemed dangerous without . . . perform[ing] ‘an individualized determination of

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<sup>42</sup> *Id.* at 749–50.

<sup>43</sup> *Id.* at 750 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (opinion of Alito, J)).

<sup>44</sup> *Id.* at 750–52 (quoting, inter alia, *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should . . . cast doubt on longstanding [felon-in-possession laws] . . .”); *United States v. Rahimi*, 144 S. Ct. 1889, 1902 (2024) (“[S]uch prohibitions . . . are ‘presumptively lawful.’”)).

<sup>45</sup> *Id.* at 752.

<sup>46</sup> *Id.* As a citizen, Duarte was “undoubtedly a member of the national community” protected by the Second Amendment’s plain text, despite being a felon. *Id.* at 753.

<sup>47</sup> *Id.* at 755.

<sup>48</sup> See Blocher & Siegel, *supra* note 37 (manuscript at 22).

<sup>49</sup> *Duarte II*, 137 F.4th at 755.

<sup>50</sup> *Id.* at 756.

<sup>51</sup> *Id.* at 758.

<sup>52</sup> *Id.* at 756 (footnote omitted). The Supreme Court appears to have blessed this manner of reasoning in the Second Amendment context. See *United States v. Rahimi*, 144 S. Ct. 1889, 1902 (2024) (“[I]f imprisonment was permissible[,] . . . then the lesser restriction of temporary disarmament . . . [was] also permissible.”).

<sup>53</sup> *Duarte II*, 137 F.4th at 758.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 759.

dangerousness.”<sup>56</sup> Because § 922(g)(1) sought to prevent the “special danger of misuse” of firearms that felons presented as a class, categorical disarmament was constitutional.<sup>57</sup>

Judge Nelson, concurring in the judgment, would have upheld Duarte’s conviction under a “plain error” standard without reaching the merits.<sup>58</sup>

Judge Collins separately concurred in the judgment.<sup>59</sup> Writing for himself, he disagreed that “*either*” of the majority’s two identified principles “*standing alone*” was sufficient to uphold § 922(g)(1)’s application to nonviolent felons.<sup>60</sup> Instead, he argued that the regulation could survive “only when these two historical traditions are [t]aken together.”<sup>61</sup> While Judge Collins recognized “a tradition of categorical legislative disarmament,”<sup>62</sup> he argued that “the eligible categories of . . . persons” whom Congress may categorically disarm “must *themselves* be historically based.”<sup>63</sup> Thus, the government must present evidence of “historical precedent establishing that . . . [such] persons could *categorically* be subjected to . . . equivalent . . . or more onerous” penalties.<sup>64</sup> Based on the historical evidence presented, Judge Collins concluded that the majority’s “greater-includes-the-lesser” principle ensured that § 922(g)(1)’s categorical disarmament of nonviolent felons fit within Congress’s “well-recognized (if limited) legislative power” to disarm dangerous groups.<sup>65</sup>

Judge VanDyke concurred in the judgment in part and dissented in part.<sup>66</sup> In Part I, Judge VanDyke argued that the court should have upheld Duarte’s conviction on plain error review.<sup>67</sup> Writing for himself, he then proceeded to dissent from the majority’s application of *Bruen* and *Rahimi*.<sup>68</sup> First, he argued that the Supreme Court’s “assurances”<sup>69</sup> as to felon-in-possession laws were mere “dicta.”<sup>70</sup> He then argued that neither of the principles identified by the majority “satisf[ie]d . . . the

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<sup>56</sup> *Id.* at 760 (quoting *United States v. Jackson*, 110 F.4th 1120, 1128 (8th Cir. 2024)).

<sup>57</sup> *Id.* at 761 (quoting *Rahimi*, 144 S. Ct. at 1901).

<sup>58</sup> *Id.* at 762 (Nelson, J., concurring in the judgment). Judge Ikuta joined Judge Nelson’s opinion.

<sup>59</sup> *Id.* (Collins, J., concurring in the judgment).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 762 (alteration in original) (quoting *Rahimi*, 144 S. Ct. at 1901).

<sup>62</sup> *Id.* at 764.

<sup>63</sup> *Id.* at 767.

<sup>64</sup> *Id.* at 768.

<sup>65</sup> *Id.* at 772 n.11.

<sup>66</sup> *Id.* at 773 (VanDyke, J., concurring in the judgment in part and dissenting in part). Judges Nelson and Ikuta joined Part I of Judge VanDyke’s opinion.

<sup>67</sup> *Id.* at 774.

<sup>68</sup> *Id.* at 780 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (opinion of Alito, J.)).

<sup>69</sup> *Id.* at 752 (majority opinion).

<sup>70</sup> *Id.* at 782 (VanDyke, J., concurring in the judgment in part and dissenting in part) (quoting *United States v. Williams*, 113 F.4th 637, 648 (6th Cir. 2024)).

‘how’ nor the ‘why’ of *Bruen*’s test’;<sup>71</sup> instead, those analogues stood for the much narrower principle that the government may categorically disarm only groups “expected to take up arms against the government.”<sup>72</sup>

In upholding § 922(g)(1)’s felon-in-possession ban as a categorical disarmament, the Ninth Circuit exclusively focused on *Bruen*’s and *Rahimi*’s required historical analogues for the “why” and the “how” of a challenged firearm regulation. In doing so, the majority missed an opportunity to add a third metric — the “who.” Under this proposed test, courts should first ensure that modern regulations are consistent with historical principles for “how” (here, categorically disarming a class of individuals) and “why” (often, for perceived dangerousness<sup>73</sup>) the legislature may burden Second Amendment rights. If, however, the regulation only burdens a specific *class* of individuals, then the courts should also ensure that “who” is burdened shares a similar basis in the Second Amendment’s “historical understanding.”<sup>74</sup> That is, courts should require evidence that legislatures were historically empowered to impose comparable burdens (the “how”), for comparable reasons (the “why”), on a comparable class of individuals (the “who”).<sup>75</sup> Without such evidence, lower courts should hold that a legislature has exceeded its authority under the Second Amendment to render that class’s rights “defeasible.”<sup>76</sup>

As a starting matter, requiring a historical analogue for “who” is consistent with the test laid out in *Bruen* and applied in *Rahimi*. Many scholars agree that *Rahimi* reshaped the historical inquiry required after *Bruen*.<sup>77</sup> Few, however, have noted that *Rahimi* enshrined two aspects

<sup>71</sup> *Id.* at 792.

<sup>72</sup> *Id.* at 792–93 (quoting *United States v. Garcia*, 115 F.4th 1002, 1031 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc)).

<sup>73</sup> *Cf.* Ayres & Vars, *supra* note 2, at 41 (“[*Rahimi*’s dangerousness] finding may be sufficient to satisfy the ‘why’ requirement for many — if not all — of the . . . federal categorical [disarmament provisions].”).

<sup>74</sup> *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2131 (2022).

<sup>75</sup> For discussion of the methodological importance of selecting the level of generality at which such evidence should be required, see Amanda L. Tyler, *Levels of Generality, the Limits of Originalism, and the Supreme Court’s Second Amendment Jurisprudence*, 78 SMU L. REV. 265, 270 (2025) (“[C]hoosing the level of generality . . . turns out to be the whole ball game.”).

<sup>76</sup> Jacob D. Charles, *Defeasible Second Amendment Rights: Conceptualizing Gun Laws that Dispossess Prohibited Persons*, 83 LAW & CONTEMP. PROBS., no.3, 2020, at 53, 55. A plausible alternative is to ask whether certain groups fall outside “the people” protected by the Second Amendment at *Bruen*’s step one. *See id.* at 65 (quoting U.S. CONST. amend. II). However, lower courts have largely foreclosed that argument. *See, e.g., Duarte II*, 137 F.4th at 753–54. Then-Judge Barrett identified several flaws with analyzing this as a “coverage” question. *See Charles, supra*, at 58–59 (quoting and citing *Kanter v. Barr*, 919 F.3d 437, 452–53 (7th Cir. 2019) (Barrett, J., dissenting)).

<sup>77</sup> *See, e.g., Re, supra* note 36, at 1992; Blocher & Siegel, *supra* note 37 (manuscript at 22).

of *Bruen*'s methodology popular in the lower courts<sup>78</sup> — the required analogous principles for “[w]hy and how” the government regulates firearms.<sup>79</sup> Yet the Court has never said that “how and why” should be the exclusive metrics along which to analyze modern regulations. In *Bruen*, the Court refused to “provide an *exhaustive* survey of the features that render regulations *relevantly* similar under the Second Amendment.”<sup>80</sup> And in *Rahimi*, the Court directed lower courts to “[d]iscern[] and develop[] the law”<sup>81</sup> in determining “whether [a] new law is ‘relevantly similar’” to a permissible historical analogue.<sup>82</sup> Taken together, these cases counsel lower courts to proactively identify the relevant features that render historic and modern regulations similar on a case-by-case basis.<sup>83</sup>

For § 922(g)'s categorical disarmaments, “*who*,” not “*why*,” is the feature along which Congress has regulated.<sup>84</sup> By contrast, for the law at issue in *Rahimi*, § 922(g)(8)(C)(i), which only disarmed individuals after individualized determinations of dangerousness,<sup>85</sup> the “*how*” (individual disarmament) and the “*why*” (because the individual posed a “credible threat”) were central components of the regulatory scheme.<sup>86</sup> However, § 922(g)(8) is unique among the provisions of § 922(g) — it is the only provision that provides a clear legislative answer for “*why*,” for which courts can seek a historical analogue. The remaining provisions differentiate primarily based on “*who*,” not “*why*.”<sup>87</sup> Lower courts thus should not feel shackled by *Bruen*'s “*how and why*,” but should accept the Court's invitation to focus on the feature — “*who*” — that would render historical regulations relevantly similar to § 922(g)'s categorical disarmaments.

So far, however, lower courts have refused to take up that mantle. And in practice, the lower courts' narrow focus on “*how and why*” has

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<sup>78</sup> See, e.g., *United States v. Rahimi*, 61 F.4th 443, 460 (5th Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2133), *rev'd*, 144 S. Ct. 1889 (2024); *Range v. Att'y Gen.*, 69 F.4th 96, 103 (3d Cir. 2023) (en banc) (quoting *Bruen*, 142 S. Ct. at 2133), *vacated sub nom.*, *Garland v. Range*, 144 S. Ct. 2706 (2024) (mem.).

<sup>79</sup> *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024); see also *id.* at 1932 (Thomas, J., dissenting) (“A historical law must satisfy both considerations to serve as a comparator.”).

<sup>80</sup> *Bruen*, 142 S. Ct. at 2132 (emphases added).

<sup>81</sup> *Rahimi*, 144 S. Ct. at 1898.

<sup>82</sup> *Id.* (quoting *Bruen*, 142 S. Ct. at 2132).

<sup>83</sup> Cf. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 924 (2016) (examining role of lower courts within system of vertical stare decisis).

<sup>84</sup> See 18 U.S.C. § 922(g)(1)–(7), (9) (barring from possession, for example, felons, see *id.* § 922(g)(1); drug users and addicts, *id.* § 922(g)(3); and “illegal[]” “alien[s],” *id.* § 922(g)(5)).

<sup>85</sup> *Rahimi*, 144 S. Ct. at 1901–02.

<sup>86</sup> See § 922(g)(8)(C)(i).

<sup>87</sup> Compare *id.* (barring an individual who “represents a credible threat”), with, e.g., *id.* § 922(g)(1) (barring felons), and *id.* § 922(g)(3) (barring “user[s]” and “addict[s]” of “controlled substance[s]”). An analogue for “*why*” likely remains necessary, see *Rahimi*, 144 S. Ct. at 1898 (“Why and how . . . are central to this inquiry.”); however, perceived dangerousness should often satisfy that burden, see Ayres & Vars, *supra* note 2, at 41.

produced an exceedingly permissive and methodologically confused approach that has engendered a deepening circuit split.<sup>88</sup>

First, lower courts' focus on "how and why" has produced an approach to categorical disarmaments that the Supreme Court is unlikely to adopt. To uphold § 922(g)(1), the majority in *Duarte* held that the legislature "could disarm on a categorical basis those who present a 'special danger of misuse' of firearms,"<sup>89</sup> even if that specific "group" is not "rooted in history."<sup>90</sup> The Fourth and Eighth Circuits have adopted a similar approach.<sup>91</sup> But, as the *Duarte* dissent noted, that approach could be used to uphold the disarmament of *any* group that a legislature deems dangerous.<sup>92</sup> The Court is unlikely to adopt such a permissive stance.<sup>93</sup> Just as the *Bruen* Court rejected the argument that a historical tradition of regulating "sensitive places" empowered modern legislatures to deem *any* site "sensitive," the Court is unlikely to allow Congress to rely on a history of deeming certain groups "dangerous" to deem *any* group dangerous today.<sup>94</sup> Instead, the Court is likely to "distinguish members of the different categories"<sup>95</sup> by requiring "a tradition of disarming analogous groups"<sup>96</sup> — that is, an analogue for "who."

Second, relying on "how and why" has produced methodological confusion because the lower courts have not focused on the relevant feature — "who" — along which Congress has regulated. Two opinions in *Duarte* sought a historical analogue for "who" *within* their analyses of *Bruen*'s "how" and "why."<sup>97</sup> Judge Collins, in his concurrence, argued that the constitutionality of categorical disarmaments required that "the eligible categor[y]" — that is, *who* — "be historically based."<sup>98</sup> Judge Collins, however, would require that historical analogue "to satisfy [*Bruen*'s] 'how' requirement."<sup>99</sup> But requiring a historical basis for the class of persons regulated — the *who* — is a distinct inquiry from whether the legislature possesses the power to impose the challenged burden — the *how*. And in dissent, Judge VanDyke argued that because

<sup>88</sup> See *Bonds*, *supra* note 11, at 1644–52.

<sup>89</sup> *Duarte II*, 137 F.4th at 761 (quoting *Rahimi*, 144 S. Ct. at 1901).

<sup>90</sup> *Id.* at 761 n.19.

<sup>91</sup> See *United States v. Hunt*, 123 F.4th 697, 705 (4th Cir. 2024); *United States v. Jackson*, 110 F.4th 1120, 1127–28 (8th Cir. 2024).

<sup>92</sup> See *Duarte II*, 137 F.4th at 799–801 (VanDyke, J., concurring in the judgment in part and dissenting in part).

<sup>93</sup> Cf. Ayres & Vars, *supra* note 2, at 40–41 (arguing that the Court is unlikely to uphold all of § 922(g)'s categorical prohibitions).

<sup>94</sup> See *Range v. Att'y Gen.*, 124 F.4th 218, 229–30 (3rd Cir. 2024) (en banc) (quoting *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2134 (2022)).

<sup>95</sup> Ayres & Vars, *supra* note 2, at 40.

<sup>96</sup> *United States v. Garcia*, 115 F.4th 1002, 1021 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc).

<sup>97</sup> See *Duarte II*, 137 F.4th at 767 (Collins, J., concurring in the judgment); *id.* at 793 (VanDyke, J., concurring in the judgment in part and dissenting in part).

<sup>98</sup> *Id.* at 767 (Collins, J., concurring in the judgment).

<sup>99</sup> *Id.* at 772 (emphasis added).

the majority's historical analogues regulated different categories of people — a different *who* — “they were motivated by a different ‘*why*’” under *Bruen*.<sup>100</sup> Yet this too elides important differences between the permissible classes of people the legislature can regulate — the *who* — and the permissible reasons for which the legislature can impose burdens — the *why*. By engaging in this distinct inquiry *within* the “how” and “why” prongs, the concurring and dissenting opinions papered over the methodological importance of their disagreement with the majority: whether a separate historical analogue was required for *who* could be disarmed by Congress.<sup>101</sup>

By explicitly requiring a historical analogue for “who,” courts could rectify that methodological confusion and more closely adhere to *Bruen* and *Rahimi*. *Bruen* instructed lower courts to identify “the features that render regulations relevantly similar under the Second Amendment.”<sup>102</sup> To determine if § 922(g)'s group-by-group distinctions are constitutional, lower courts should identify principles within our regulatory tradition that differentiate in “relevantly similar” ways<sup>103</sup> — namely by regulating a similar “who.”

In *Duarte*, the Ninth Circuit missed an opportunity to add “who” to *Bruen*'s and *Rahimi*'s “how and why.” And, in doing so, the Ninth Circuit sharpened a circuit split over the constitutionality of § 922(g)(1) and categorical disarmaments writ large.<sup>104</sup>

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<sup>100</sup> *Id.* at 793 (VanDyke, J., concurring in the judgment in part and dissenting in part) (emphasis added).

<sup>101</sup> *Contrast id.* at 761 n.19 (majority opinion) (“We do not hold . . . [that the legislatively identified category] must be rooted in history.”), *with id.* at 767 (Collins, J., concurring in the judgment) (“[C]ategories . . . must . . . be historically based.”).

<sup>102</sup> *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2132 (2022); *see also* *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (instructing lower courts to “discern[] and develop[] the law”).

<sup>103</sup> *Rahimi*, 144 S. Ct. at 1923 (2024) (Kavanaugh, J., concurring).

<sup>104</sup> *See* *Bonds*, *supra* note 11, at 1634; *Duarte II*, 137 F.4th at 748.