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United States District Court For The District of Hawaii

KIRK FISHER.,
Plaintiff,
vs.

LOUIS KEALOHA, as an individual
and in his official capacity as Honolulu
Chief of Police, PAUL PUTZULU, as
an individual and in his official capacity
as former acting Honolulu Chief of
Police, and CITY AND COUNTY OF
HONOLULU,.;
;

Defendants.

Civ. No. 11-00589 ACK-BMK
Supplemental Amicus Brief

Supplemental Amicus Brief

Comes now the Amicus Curiae Hawaii Defense Foundation ("HDF") and submits this supplemental brief in support of Plaintiff Kirk Fisher challenge to Defendants denial of a permit to acquire firearms. For purposes of this brief, HDF assumes Defendant's most recent allegations are true and Mr. Fisher underlying crime satisfies HRS 134-7 requirements. As applied to Mr. Fisher H.R.S. 134-7 is unconstitutional.. Moreover, all arguments that cold have been raised in the original briefing are improper.

Defendants Improperly Raise Arguments

"The purpose of a motion for reconsideration is to allow parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 114, (1992) (citations omitted) (in affirming circuit court's denial of Amfac's motion for reconsideration, holding that Amfac's only "new" argument advanced in support of its motion for reconsideration could and should have been made in support of its underlying motion for summary judgment).

Defendants have filed a motion for reconsideration in light of the Supreme Court's decision in *United States v. Castleman*, No. 12-1371. This Court should only entertain those arguments that could not have been in the

original briefing. Defendants could have and did not raise qualified immunity in the previous briefing. Accordingly, this argument should be ignored by the Court. To the extent Defendants expand upon their argument regarding Mr. Fisher's alcohol treatment, that to should be ignored as well.

H.R.S. 134-7 Has No Federal Mandate

Defendants suggest that H..R.S. 134-7 is an application of federal law onto Mr. Fisher. As the Ninth Circuit ruling in *United States v. Chovan*, 735 F.3d 1127, (9th Cir. 2013) illustrates, H.R.S. 134-7 has no federal mandate and is unconstitutional as applied to Mr. Fisher. The Ninth Circuit applied intermediate scrutiny in finding California's adoption of Lautenberg fulfills federal intent and is constitutional largely because California has an expungement process which allows domestic violence offenders to regain their firearms rights.

Unlike California, Hawaii has no means to expunge or set aside a conviction of *any* crime of violence. Accordingly, Hawaii can not purport to properly apply federal law because Lautenberg explicitly requires States to have some means to restore rights in order to properly apply its provisions. The plain language of the Lautenberg Amendment contemplates some mechanism for reinstating Second Amendment rights after a misdemeanor

conviction for domestic violence by having the conviction set aside or expunged. 18 U.S .C. § 9 21(a)(33)(B)(i i)[1]. Such is the case in California.

> California, where Chovan was convicted, makes expungement of misdemeanor convictions a right. Under § 1203.4a(a) of the California Penal Code, all misdemeanants can have their convictions expunged after completion of their sentences if they have not been charged with or convicted of a further crime and have "lived an honest and upright life." Moreover, defendants must be informed of this right to expungement "either orally or in writing, at the time he or she is sentenced." *Id.* at § 1203.4a(c)(1). Prosecuting attorneys have fifteen days from the filing of the petition for dismissal with the court to object. *Id.* at § 1203.4a(f). This participation of the district attorneys in the process allows California to maintain some adversarial integrity in the expungement proceedings, as the district attorney can oppose the motion if the convict's rehabilitation is doubtful. This system places the evaluation of the convict's rehabilitation, *vel non*, in the state. Indeed, California courts have interpreted § 1203.4a(a) to *mandate* expungement when misdemeanants have complied with its terms. *See, e.g., People v. Chandler*, 203 Cal.App.3d 782, 250 Cal.Rptr. 730, 734 (1988) ("[A] defendant moving under Penal Code section 1203.4a is entitled as a matter of right to its benefits upon a showing that he has fulfilled the conditions of probation for the entire period of probation. It was apparently intended that when a defendant has satisfied the terms of probation, the trial court should have no discretion but to carry out its part of the bargain with the defendant.")

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[1] HDF concedes that in accordance with Planck's constant a gubernatorial pardon could in theory partially restore Second Amendment rights. Mr. Fisher would still be unable to purchase firearms in other states in order to own in Hawaii as these pardons only apply within Hawaii. As a more practical matter a pardon must specifically state it restores Second Amendment rights and these pardons are not granted. Moreover, there is no procedure or guidelines to apply for such a pardon, if Defendants rely on this theoretical pardon, HDF requests it be allowed additional briefing to address the numerous constitutional violations relying on this process alone would impose upon Mr. Fisher.

> (citations and quotation marks omitted). *United States v. Chovan*, 735 F.3d 1127, 1152 (9th Cir. 2013) (Justice Pregerson concurring).

Mr. Fisher Only Challenges Hawaii Law

This Court has no need to look beyond H.R.S. 134-7 to determine whether Defendants conduct is constitutional. Unlike the litigant in *Chovan supra*, Mr. Fisher grievance is Hawaii law unconstitutionally deprives him of his Second Amendment rights. As *Chovan* supports, Hawaii law has no federal mandate and any reliance Defendants place on it is fallacious.

> Section 922 is in part a federalism-based statute. It looks to state law, passing restrictions on certain convicts based on decisions made by state legislatures and courts. Section 922 also ceases to apply if convicts have satisfied the state procedures for expungement. This helps the statute satisfy the narrow tailoring prong of strict scrutiny. It allows those who no longer pose a threat to society to demonstrate their rehabilitation and reclaim their Second Amendment rights. It is not a blunt instrument. Rather, it targets only those whom the states continue to deem not rehabilitated. *Id* at 1152 (Justice Pregerson concurring).

Unlike what federal law requires, Hawaii gives no means for its citizens to prove that they have been rehabilitated. Accordingly, H.R.S. 134-7 does not have a federal mandate and must be judged on its own merits. As applied to Mr. Fisher it unconstitutionally deprives him of his Second

Amendment rights for life without any means to show he has been rehabilitated. As such, strict scrutiny should apply.

Strict Scrutiny Applies

The first Ninth Circuit District Court to apply the *Chovan* analysis held in *Morris v. U.S. Army Corps of Engineers* (D. Idaho Jan. 10, 2014);

> To evaluate this argument, the Court will employ the two-step analysis set out in *U.S. v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). The Court must determine first "whether the challenged law burdens conduct protected by the Second Amendment." Id. at 1136. The second step is to "apply an appropriate level of scrutiny." Id. The "appropriate level" depends on (1) "how close the law comes to the core of the Second Amendment right," and (2) "the severity of the law's burden on the right." *Id*. at 1138 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir.2011)). The Court must ask first whether the Corps' regulation burdens conduct protected by the Second Amendment. It does. The Second Amendment protects the right to carry a firearm for self-defense purposes. *Heller*, 554 U.S. at 628 (stating that "the inherent right of self-defense has been central to the Second Amendment right"). The second step is to apply the appropriate level of scrutiny. That inquiry turns on how close the regulation cuts to the core of the Second Amendment and how severe the burden is on that right. No court has identified those core rights comprehensively. But one core right was described by the Supreme Court: The right of a law-abiding individual to possess a handgun in his home for self-defense. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In addressing the need for self-defense in the home, the Supreme Court held that the home is "where the need for defense of self, family, and property is most acute." *Id*. at 628. The same analysis applies to a tent. While often temporary, a tent is more importantly a place – just like a home – where a person withdraws from public view, and seeks privacy and security for himself and perhaps also for his family and/or his property…The regulation at issue would ban firearms and

> ammunition in a tent on the Corps' sites. This ban poses a substantial burden on a core Second Amendment right and is therefore subject to ***strict scrutiny.***(emphasis added) *Id at 4-5*.

Unlike *Chovan* which dealt with a proper state application of Lautenberg which provided a clear and defined mechanism for restoration of rights, Mr. Fisher is permanently barred from possessing firearm in defense of hearth and home. This amounts to a destruction of the Second Amendment right and strict scrutiny must be applied.

The Conviction Must Still Be Evaluated For Conduct

This Court should apply the analysis from its September 30th 2013 order to determine what type of conduct applies to Defendants depriving Mr. Fisher of his Second Amendment rights. H.R.S. has no federal mandate which means the Mr. Fisher is barred solely due to H.R.S. 134-7. While any violation of HRS. § 711-1106(1)(a), is a crime of violence, this Court must still determine the severity of the underlying act to properly decide the constitutionality of Defendants actions. This crime ranges from a slight offensive poke to a blow which causes injury. This impacts egregiousness of the conduct, whether the named Defendants should have known denying a permit to Mr. Fisher violated his rights, and likely other aspects of this case.

Consistent with this Court's recent decision the modified categorical approach should be applied. There is no admissible evidence. Accordingly the question before this Court is whether a slightly offensive touching i.e. the common law crime of battery is grounds for permanent removal of Second Amendment right.

Chovan is highly distinguishable. It follows a series of cases addressing the constitutionality of removing firearms rights for domestic violence as defined by Congress. In order to have a federal mandate a state must have enacted a restoration process. Mr. Fisher had no means to establish he no longer is a person that should not possess firearms. Congress did not intend for persons so situated to be punished via Lautenberg.

This Court must use *Chovan*'s two step analysis and independently analyze H.R.S. 134-7 which relies solely on common law to define a crime of violence. The first step is did Mr. Fisher commit a crime that at Common Law disqualified one from Second Amendment rights? HDF has already largely briefed this issue in a supplemental brief. However the treason was not addressed so it does so here for the convenience of this Court.

There were two types of treasons at common law. These were petit treasons and high treasons. Petty treason or petit treason was an offence under the common law of England which involved the betrayal of a superior by a subordinate. It differed from the high treason in that high treason can only be committed against the Sovereign. The common law offence of petit treason covered the murder of ones master[2] and various other types of betrayals[3]. Common law petit treasons were codified in the Treason Act 1351 and removed all betrayals listed in footnote 3 from the definition of treason other than counterfeiting which it elevated to a high treason. As the Common Law of England is applicable to our law at the time of the ratification of the U.S. Constitution the removed betrayals are not part of our Common Law.

In England, there was no clear common law definition of high treason; it was for the king and his judges to determine if an offence constituted high treason. The Treason Act 1351 was the first

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[2] Hale's *History of Pleas of the Crown* (1800 ed.) vol. 1, chapter XXIXX at 380. (these were a wife killing her husband, a clergyman killing his prelate, or a servant killing his master or mistress, or his master's wife)

[3] These were a wife attempting to kill her husband, a servant forging his master's seal, or a servant committing adultery with his master's wife or daughter and finally counterfeiting. *Ibid.*

attempt to enumerate the high treasons. It found high treason encompassed causing the death of the sovereign, or of the sovereign's wife or eldest son and heir, violating the sovereign's wife, or the sovereign's eldest unmarried daughter, or the sovereign's eldest son's wife levying war against the sovereign in the realm adhering to the sovereign's enemies, giving them aid and comfort, in the realm or elsewhere killing the King's Chancellor, Treasurer (an office long in commission) or Justices.

The list of high treasons was built upon via subsequent treason acts throughout English history. A compete list is not necessary as they all follow the same theme. As applied to our nation, any act of sedition which constitutes a federal felony should be deemed the equivalent to a high treason.

Just as with the felonies, conviction for treasons permanently cast one outside the law[4]. Accordingly, those convicted of their

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[4] In the common law of England, a judgment of (criminal) outlawry was one of the harshest penalties in the legal system, since the outlaw could not use the legal system to protect them if needed, e.g. from mob justice. To be declared an outlaw was to suffer a form of civil death. The outlaw was debarred from all civilized society. No one was allowed to give him food, shelter, or any other sort of support — to do so was to commit the crime of aiding and abetting, and to be in danger of the ban oneself. An outlaw might be killed with impunity; and it was not only lawful but meritorious to kill a thief flying from justice — to do so was not murder. Because the outlaw has

modern day equivalents are presumptively disqualified from Second Amendment rights. Conviction of a common law misdemeanor does not presumptively remove Second Amendment rights. Hence, removal of rights pursuant to a common law misdemeanor[5], must survive heightened scrutiny in order to survive constitutional muster. Strict scrutiny should be used evaluate the use of a slight offensive touching as a basis to remove Second Amendments rights.,

However as held in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and more recently by the Ninth Circuit in *Peruta v. County of San Diego* (9th Cir. Feb. 13, 2014) a categorical/permanent ban on Mr. Fisher's right to own a handgun is unconstitutional applying any level of scrutiny. This is because Defendants actions result in a complete destruction of Mr. Fisher's rights. This is all the argument required, but this matter is further distinguishable from *Chovan.*

Restoring Mr. Fisher's Rights Impacts Few People

The *Chovan* Court noted ruling in favor of the litigant's as applied challenge would create a "a significant exception to §

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defied civil society, that society was quit of any obligations to the outlaw — outlaws had no civil rights, could not sue in any court on any cause of action, though they were themselves personally liable. In effect, (criminal) outlaws were criminals on the run who were "wanted alive or dead

[5] That includes crimes that are considered felonies by modern day Courts.

922(g)(9)" when "Congress permissibly created a broad statute that only excepts those individuals with ***expunged***, pardoned, or ***set aside convictions***". Ruling in favor of Mr. Fisher will impact a very small group of Hawaiian residents who would be entitled and eligible to have their rights restored if the H.R.S. adopted federal law appropriately.

In every other state in the Union, Mr. Fisher would be entitled to and qualified to have his firearms right restored just as Congress intended. Furthermore, federal Law provides a means for disqualified persons to have their "right to keep and bear arms" restored under procedures promulgated and implemented by the Attorney General. 18 U.S.C. § 925(c). That remedy is currently unavailable as Congress refuses to fund the program. *U.S. v. Bean*, 537 U.S. 71 (2002). Assuming Mr. Fisher did have his rights restored via federal law, H.R.S. 134-7 would still find his crime of violence grounds to disqualify him which is further support it has no federal mandate.

Defendants Have Not Provided Applicable Empirical Data

The *Chovan* Court's ruling was heavily impacted by Defendants submitting empirical data which showed a high rate of recidivism among all persons prohibited by Lautenberg in order to show the legitimacy of

Congress enacting this provision. The as applied challenge in Chovan was denied in large part because the Court wished to give Congress deference in enacting aggregate policy when it has mandated states provide a mechanism to restore rights. ("[S]ome categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court.").

Defendants have not provided similar research to show the benefits H.R.S. 134-7 provides the State of Hawaii. H.R.S. 134-7 disarms for life over any "crime of violence". This includes consensual fist fights and other benign behavior associated with ones formative years. Unsurprisingly and unlike the Defendants in *Chovan*, Defendants took no effort to defend H,R.S. 134-7 indefensible restrictions via empirical data.

It referenced one study on dealing with the purchasing habits of 21-34 year olds convicted of domestic violence under California's proper adoption of Lautenberg and is not relevant. To what degree academic research is needed to aid this Court's ensuing decision it should rely on "A Longitudinal Study of Arrested Batterers, 1995-2005: Career Criminals" (attached). It supports Congress passage of Lautenberg for the purpose of reducing crime. It found almost 75% of offenders were arrested within nine

years of their initial arrest. However, recidivism is most prevalent within the first two years after conviction. After that recidivism greatly decreases. The study concludes after tracking its subjects for ten years. Over 25% of the population leaves study without committing a violent crime.

This directly supports the propriety of California's intent to restore firearms rights through its automatic restoration of civil rights after ten years without incident. *See* California Penal Code § 12021 (c)(1) [29805]. The federal government does not recognize this provision and the *Chovan* Court found that civil rights did not include firearm rights as contemplated by § 921(a)(33)(B)(ii). *Chovan* at 9. However the underlying policy is supported by the submitted research. The Court found that California's other restoration mechanisms were sufficient to apply federal law and a person who is law abiding post conviction is eligible within ten years of conviction for a misdemeanor conviction in nearly all cases.

Conclusion

HDF concedes that it revised its brief beyond what was contemplated. However the study it belatedly discovered put many unconnected facts into alignment. Constitutional avoidance and legislative deference are code words for Article III Courts respect federalism. Only at the outer limits of state experimentation do they apply constitutional safeguards. Hawaii has

past into that outer realm due to indifference rather than intent. The government refuses to expend resources needed to update state law which is required to properly apply the federal law.

It proceeded to refuse the opportunity given by this Court and continued to assault Mr. Fisher's rights. Without this Court applying its authority granted to it by Article III of the U.S. Constitution nothing will be done to restore the basic principles of ordered liberty every other State ensures for its citizens.

Respectfully submitted this 10th day of April, 2014

/ s/Alan Beck
Alan Beck (HI Bar No. 9145)

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CERTIFICATE OF SERVICE

On this, the 10th of April, 2014, I served the foregoing pleading by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Alan Beck
Alan Beck (HI Bar No. 9145)

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A Longitudinal Study of Arrested Batterers, 1995-2005: Career Criminals

Andrew R. Klein and Terri Tobin
VIOLENCE AGAINST WOMEN 2008; 14; 136
DOI: 10.1177/1077801207312396

The online version of this article can be found at:
http://vaw.sagepub.com/cgi/content/abstract/14/2/136

Published by:
SAGE Publications
http://www.sagepublications.com

Violence Against Women
Volume 14 Number 2
February 2008 136-157

10.1177/1077801207312396
http://vaw.sagepub.com
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http://online.sagepub.com

A Longitudinal Study of Arrested Batterers, 1995-2005

Career Criminals

Andrew R. Klein
Terri Tobin
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An examination of the abuse and criminal careers of 342 men arraigned in the Quincy, Massachusetts, District Court for a crime of domestic violence between 1995 and 1996 through 2004 reveals decade-long criminal and abuse careers largely undeterred by arrest, prosecution, probation supervision, incarceration, and batterer treatment. Although only a minority reabused (32%) or were arrested for any crime (43%) within a year of the study court arraignment, over the next decade, the majority (60%) reabused, and almost three fourths were rearrested for a domestic abuse or non–domestic abuse crime. The research suggests that short-term cessation of domestic violence achieved after a variety of interventions may not indicate longer-term behavior change.

Keywords: *criminal careers; domestic violence; offenders; reabuse; recidivism; restraining order; victims*

The research designed to determine the efficacy of various interventions targeting domestic violence employs a variety of measures to define reabuse and/or recidivism and uses various methodologies to analyze these interventions. Almost all, however, employ limited follow-up periods. The Spousal Assault Replication and related arrest studies (Felson, Ackerman, & Gallagher, 2005; Maxwell, Garner, & Fagan, 2001; Sherman & Berk, 1984), for example, looked at rearrests from 6 months to 3 years. The major research on civil restraining orders to date has employed follow-up periods between 4 months and 2 years (Carlson, Harris, & Holden, 1999; Grau, Fagan, & Wexler, 1985; Harrell & Smith, 1996; Holt, Kernic, Lumley, Wolf, & Rivara, 2002; Holt, Kernic, Wolf, & Rivara, 2003; Keilitz, Hannaford, & Efkerman, 1997; Klein, 1996). Batterer intervention studies similarly have had follow-up periods from 4 months to 1 year (Chen, Bersani, Myers, & Denton, 1989; Davis, Taylor, & Maxwell, 1999; Dunford, 2000; Feder & Forde, 2000). The one exception is Gondolf (2001), who followed batterers for 4 years. More recently, a study of probation intervention in Rhode Island followed abusers up to 2 years (Klein, Wilson, Crow, & DeMichele, 2005).

Authors' Note: The authors would like to acknowledge the work of Dr. Doug Wilson on the original report of this study.

As a result, to the extent these studies successfully address various methodological challenges to produce reliable results, they reveal only the short-term efficacy of interventions. The question remains whether any of these interventions, even multiple interventions, have a longer-term effect in deterring repeat domestic abuse or arrests for any crime.

Although there is no agreement why abusers abuse (McCarroll, 2004), it is generally conceded that at least those identified by the criminal justice system have relatively long established patterns of abuse and/or other criminal behavior. Harrell and Smith (1996), for example, concluded that victims of court-restrained abusers "had endured considerable abuse" before the temporary orders were issued (p. 230). The average number of abusive behaviors inflicted on the women was 12.74. The median duration of abuse was 2.4 years. This, the researchers suggested, demonstrates "that formal intervention through petition to the court for relief is used, not as a form of early intervention, but rather as a signal of desperation following extensive problems" (p. 231).

Similarly, domestic violence arrest studies have found that victims do not generally call police and/or police do not generally arrest suspects for their first abuse incident. Buzawa, Hotaling, Klein, and Byrnes (1999) found victims ($n = 117$) had called police an average 2.5 times before the study arrest call. Felson et al. (2005) found that 59.3% of sample victims ($n = 2,564$) had been victimized by the abuser previous to the study incident, but only 22.0% of the incidents resulted in arrests. Roehl, O'Sullivan, Webster, and Campbell (2005) interviewed select abused women, including 628 seeking protective orders in New York family courts, 400 who made a 911 domestic call to the Los Angeles Sheriff's Department, 175 in a New York City or Los Angeles shelter, 28 seeking emergency care from New York City hospitals, and 11 women in a community domestic violence program. Only 6% reported that their abusers were arrested.

Not only do victims suffer repeated abuse before their abusers are arrested or restrained by courts, but their abusers often have a prior criminal history. Klein (1996) found that 78% of the male abusers ($n = 644$) brought to court for a civil restraining order by their female victims had extensive prior court involvement and criminal histories, averaging 13 prior criminal complaints per abuser.

A small 1995 study of nighttime domestic violence police incident responses in Memphis, Tennessee, found that two thirds of the domestic assailants ($n = 62$) were on probation or parole at the time of the assault (Brookoff, 1997). In the

> overwhelming majority of incidents (89%), the primary victim had suffered a previous assault by the current assailant; 91% had reported a prior incident to police, 73% within the prior two weeks. Most reported daily (35%) or weekly (55%) battering. Of the women assaulted by a current or former partner, 44% reported an assault by that man during pregnancy. (p. 2)

The Spousal Assault Replication studies also found that 40% of sample abusers (n = 4,032) had prior criminal histories (Maxwell et al., 2001). If the anomalous Dade County results (12%) are excluded, the average rises to 48%. Buzawa et al. (1999) found that 86% of the men arrested for domestic violence on the south shore of Massachusetts had criminal court records. A study of 519 misdemeanor domestic violence cases in the Toledo, Ohio, Municipal Court documented that 89.0% had at least one or more prior arrests for a nonviolent misdemeanor; 69.0% had at least one prior violent misdemeanor arrest, including 59.0% with one or more prior arrests for domestic violence; 49.0% had at least one nonviolent felony arrest; and 26.4% had at least on violent felony arrest (Ventura & Davis, 2004).

Batterer intervention and probation studies have also documented that most abusers are not strangers to abuse or the criminal justice system. Baba, Galaka, Turk-Bicakci, and Asquith (1999), in Santa Clara County, California, documented that 54% had at least one prior court *conviction* for domestic violence; more than one fourth (26%) had two or more prior convictions for domestic violence.

Given that abusers identified by the criminal justice system are, in effect, repeat offenders, is it even reasonable to believe that any intervention or multiple interventions over relatively short periods can change long-term behavior such as domestic violence? Reviewing criminal histories of abusers identified in a Quincy, Massachusetts, arrest study from 1995 to 1996 and followed for the subsequent decade suggests not. Although they resemble career criminals in many respects, they appear to differ from them in several critical measures.

Research Method

Study Population

The abusers in this longitudinal study were first identified in a National Institute of Justice–funded study completed in 1998 (Buzawa et al., 1999; Buzawa, Hotaling, & Klein, 1998). The study identified a population of 356 males arrested for the crime of domestic abuse, most involving violence, against a female intimate partner in the jurisdiction of the Quincy District Court covering the Massachusetts south shore between February 1995 and March 1996. A little more than two thirds of the men were arrested and prosecuted for assaults and battery, 44 of them with a dangerous weapon. Another 8% were arrested for rape, kidnapping, robbery, or armed assault. A little more than 20% were arrested for violating a civil restraining order, including 15% who were also arrested for an assault and battering during the order violation. Only 5% were arrested and charged with a nonviolent offense, including threatening to commit a crime, stalking, and making annoying phone calls. The high proportion of study arrests for domestic assaults is consistent with that found in other studies of court-involved abusers (Baba et al., 1999; Klein et al., 2005; Maxwell et al., 2001).

In the follow-up longitudinal study, researchers tracked the criminal and civil records for the following decade through the end of 2004 for all but 14 of the study abusers. Researchers could not locate these files for follow-up examination, leaving 342 study abusers (96%).

1995 to 1996 Profile of Abusers ($n = 356$)

Consistent with other studies (Klein et al., 2005; Ventura & Davis, 2004), the average age of abusers in the initial study was 34, the median age was 33, although they ranged in age from 17 years to 66. Reflecting the area's demographics, 85% were White and 15% were African American, although the latter were overrepresented, given they constituted only 6% of the area's population at that time. Overrepresentation of African Americans as abusers is consistent with national surveys (Greenfield et al., 1998; Rennison & Welchans, 2000-2002). Only 28% were married, as found in many studies of court-involved abusers (Baba et al., 1999; Klein et al., 2005; Ventura & Davis, 2004). Of the cases, 23% involved ex-spouses or ex-intimates, according to the victims.

As in many other studies of court-involved abusers, the vast majority of abusers were repeat offenders. Only 16.4% had no record of any prior criminal court arraignments. The average abuser had 11 prior criminal complaints on his record; the median was 5. Although not all prior charges resulted in convictions, the majority (55.0%) had been under probation supervision (after a guilty finding) in the past, and 29.5% had been sentenced to a period of incarceration.

In another indication of prior criminality, the average age of the abusers' first arrest was 23, and the median age was 19. One fourth of the abusers had records of juvenile delinquency arrests (age 16 or younger).

Researchers were unable to determine if prior crimes-against-person arrests involved intimate partners in all cases. However, based on the face of these prior records, no less than one fourth of the abusers had at least one prior arrest for domestic abuse. On average, their first known domestic violence arrest preceded their study domestic violence arrest by almost 8 years, with a median time of 4.3 years. For those with no known prior domestic violence arrests, their first arrest preceded their study domestic violence arrest by 10.4 years on average, with a median time of 9.3 years.

In another indication of prior abuse history, 29% had at least one civil restraining order issued against them. One third of those with orders had multiple orders taken out against them. Combining criminal and civil records, 150 of the abusers, constituting 44% of the study population, had known prior criminal and/or civil court records of domestic abuse.

Most of the abusers (56%) had prior records for crimes against persons, including nonintimates. More than a few of the abusers had severe records of violence. Approximately 10% had prior felony convictions for murder, armed robbery, or rape and had been sentenced to state prison in the past. Although half of these were identified on the record as crimes involving intimate partners, more may have been.

Less than 5% of the abusers had court records restricted to domestic violence alone. Several studies of batterer typologies include batterers who are "family-only" abusers (Holtzworth-Monroe & Stuart, 1994; Stuart, 2005). If these categories of batterers did exist, they were not prevalent, at least not in this population of arrested abusers in the Quincy Court jurisdiction between 1995 and 1996. It may also be that "family-only" abusers do not come to the attention of law enforcement or are not arrested if they do.

Consistent with other research that documents a correlation between substance abuse and domestic violence (Felson et al., 2005; Gondolf, 2001; Saunders, 1994), the majority of abusers (58%) also had prior records of alcohol and illicit drug offenses, a slight majority (52%) had prior charges of crimes against property, and 44% had crimes against public order on their records.

Initial Study Dispositions

Excluding those defendants who defaulted (did not show) in court, it took an average of 8.5 months for the study abusers' charges to be disposed of in court, with a median time of 6.5 months. This proved consequential because many of the abusers who were rearrested quickly reoffended. As a result, of those subsequently rearrested for any crime, including domestic violence, 44% had their first new arrest while their initial study arrest case was pending. The current research reveals similar periods for subsequent charge disposal in Quincy and other courts during the following 9 years.

Unlike many other jurisdictions where domestic violence prosecution studies have been completed (Klein, 2004), the majority of the Quincy domestic abuse arrests were prosecuted and resulted in convictions for the initial charges. Quincy Court, at the time, had one of the first specialized domestic violence prosecution teams in the country, which attempted to prosecute all cases. Only 31.5% of the study defendants' charges were dismissed by prosecutors (*nolle prossed*) prior to trial (18.5%) or were subsequently dismissed in court (13.0%).

A little less than half (49.5%) were placed under probation supervision, half after a finding of guilt and half after a finding of or admission of sufficient facts of guilt, but in which the judge "continues the case without a finding." If these defendants satisfactorily completed their probationary period, the case was subsequently dismissed. The probationary conditions for all defendants under supervision generally included completion of a 50-week batterer intervention program, reporting to a probation officer weekly for the first 3 to 6 months, maintaining abstinence from alcohol and illicit drugs, and submitting to periodic, random urine screens. Although prohibitions on victim contact were not generally imposed as a condition of probation, some of the victims had restraining orders against the probationers during the course of their supervision. If so, the "no contact" order was incorporated into the probationary conditions and enforced as a condition of probation.

The survival rate for defendants placed under probation supervision was limited. Almost one third of the abusers, 31.3%, released to the community under probation supervision were subsequently incarcerated for violating those conditions. The average sentence for those revoked was 11 months, with a median sentence of 10 months.

In addition, 12% of the abusers were sentenced to jail, half receiving "split" sentences that required them to complete a term of probation on their release. Sentences of imprisonment were served in either county houses of corrections for misdemeanors or state prisons for felonies. The average sentence of incarceration was 13.6 months, with a median of 1 year. A little more than 5% of the cases included not guilty findings or fines or were not disposed because the defendants defaulted and were never tried.

Unlike other studies of domestic violence prosecution (Belknap et al., 1999; Davis, Smith, & Nickles, 1998; Ford & Regoli, 1993; Ventura & Davis, 2004), the sentencing correlated directly with prior criminal history. Those whose cases were dismissed, as shown in Table 1, were older at first arrest and less likely to have arrest records or prior probationary or jails sentences than those prosecuted and found guilty. On the other hand, those prosecuted and sentenced to probation, to a suspended sentence, to a split sentence, or to a jail sentence were younger, started their criminal careers earlier, and were more likely to have prior arrest records, prior records for crimes against persons and abuse, and prior probation and/or jail sentences in the past. Those defendants placed under probation supervision whose cases were continued without a finding more closely resembled those whose cases were dismissed than those placed under probation supervision or jailed.

Not only were those sentenced to probation or jail more likely to have criminal records than were those dismissed or continued without a finding, but their records were also lengthier. Those jailed averaged 25 prior charges, with a median of 17; those probated had 18 on average, with a median of 13; and those continued without a finding or dismissed had an average of only 4, with a median of 3.

Perhaps not surprising, those who received an initial continuance without a finding that was later revoked also began their criminal careers earlier and had more substantial criminal histories than did those whose initial continuance without a finding was not revoked. They resembled their peers, who were sentenced more severely to begin with.

Current Longitudinal Study Data Sources

To determine subsequent criminal and abuse histories, researchers obtained data on (a) any arrest that resulted in an arraignment in a Massachusetts court and (b) any civil restraining order filed against the defendant in any court through 1998 and thereafter filed in the Quincy Court. Although Massachusetts does not have a "domestic violence crime" per se, researchers investigated all criminal complaints for crimes against persons filed in Quincy and adjacent court houses to determine, based on complainant

Table 1
Prosecution and Sentencing By Offender Criminal Records

Criminal Record	Dismissed[a]	Continued Without Finding[b]	Guilty (Probation, Suspended, Split, Imprisoned)[c]
Age at first arrest			
Average	25	25	19
Median	20	22	17
Prior arrests (%)	69.3	76.8	98.5
Crimes against persons (%)	48.5	38.4	72.9
Probation (%)	45.5	36.4	77.4
Jail (%)	17.8	12.1	49.6
Prior domestic violence arrest (%)	20.8	20.0	38.3
No prior arrests (%)	30.7	23.2	1.5

a. $n = 101$.
b. $n = 99$.
c. $n = 133$.

information and addresses, whether or not a subsequent charge involved an intimate female partner.

Although the vast majority of new arrests were filed in the Quincy Court jurisdiction or adjacent district courts, others occurred across the commonwealth. In these cases, the identity of some victims could not be determined. However, if there were accompanying charges indicating that the crime most probably did not involve an intimate partner, such as robbery or breaking and entering a commercial property, the new offense was not considered to be domestic. When in doubt, the research classified these new offenses as nondomestic.

The centralized Massachusetts criminal history file contains information of all criminal cases beginning with a court arraignment, even if the defendant defaults (fails to show) for his or her arraignment. If the defendant has been arrested by police, whether held or bailed at the station house, the arraignment is held the next morning the court is open. Consequently, although the study uses the court arraignment date as the study start date, at most this is within 4 days of the arrest date for all of the study defendants, except for 3 who had defaulted previously and were not arraigned immediately after their arrest.

In Massachusetts, arrests are not generally screened prior to charges being filed. Consequently, all but one of the study arrests resulted in court charges and subsequent arraignment.

Statistical Analysis

We summarized offender characteristics, court interventions, and outcomes from study arrests to final criminal and civil record checks in 2005. We also explored, more

specifically, bivariate associations between each of the independent variables and the three dependent outcome variables. Bivariate analyses were employed to examine the following relationships: (a) basic defendant characteristics, including age, marital status, and prior criminal history; (b) court interventions, including dismissed (nolle prossed by prosecutors or dismissed in court), placed under probation supervision (with or without a finding of guilty), jailed, or found not guilty or not prosecuted as defendant failed to appear in court; and (c) outcomes more than 9 years following the study arrest, including (a) at least one new abuse incident, (b) at least one new arrest for a nonabuse offense, and (c) multiple new abuse incidents.

Two age measures were used: (a) age at time of the study arrest and (b) age at first arrest. One dichotomous variable was used for marital status—either married or not. Prior criminal history included (a) at least one prior arrest, (b) at least one prior arrest for violence, (c) at least one prior arrest for domestic abuse or a prior civil restraining order for abuse filed against the defendant, (d) at least one prior sentence involving probation supervision, and (e) at least one prior sentence of incarceration. The outcomes measures for new abuse included new arrests for domestic abuse (crimes against persons in which the victim was a female intimate partner of the defendant) and/or new civil restraining orders filed against the defendant. The victims of these reabuse incidents included the same and different victims from the study victims.

For each of the dependent variables, multiple logistic regression was used to examine the odds of reabuse, multiple reabuse, and rearrest for nonabuse offenses while controlling for all of the other independent variables. Two logistic models were used, with dismissed cases and then jailed cases as reference categories. The same variables were employed in the logistic regression as the bivariate correlations, except that "probation supervision" was further broken down for those placed under probation supervision whose cases were "continued without a finding" to be dismissed if the defendant subsequently completed his supervision successfully and those who were sentenced to probation or a suspended sentence after a finding of guilt was entered onto their records.

The two groups of supervised defendants, those with guilty findings and those without, are distinguished because prior probation research (Klein et al., 2005) and batterer intervention program research (Gondolf, 2001) suggest that these groups of defendants respond to interventions differently. Those with lesser prior criminal histories and who are older are more amenable to treatment and/or supervision. The extensive arrest deterrence research similarly found that suspects' ages and prior arrest records were consistently and significantly related to reabuse in all but one of the arrest deterrence studies (Maxwell et al., 2001).

Victim characteristics other than relationship with the abuser were not included, as the prior Quincy research, based on a 1-year follow-up, found that victim characteristics "have little or nothing to do with eventual re-offending" (Buzawa et al., 1999, p. 138). These findings are consistent with an earlier study of Quincy restraining order violators (Klein, 1996). In both of these prior studies, defendant age and prior

criminal history significantly predicted reabuse. These findings are also consistent with a wide range of abuser research summarized by Klein (2004, pp. 36-37; also see Felson et al., 2005; Maxwell et al., 2001).

Findings

Reabuse and Rearrests for Any Offenses

Nine years after their initial study arrest through December 2004, more than 70% of the abusers were rearrested for at least one new crime, and 60% were returned to court for at least one new domestic abuse incident as measured by an arrest for domestic abuse or a civil restraining order taken out against the abuser.

Of the 342 study abusers, 224 were arrested at least one more time, representing 71% of the follow-up sample. Half of the defendants (174) were arrested at least once for a subsequent domestic violence offense. In addition, 135 abusers had restraining orders taken out against them for new abuse. Of the abusers who had new restraining orders, 32 were not also arrested for new abuse. Adding new domestic violence arrests and new restraining orders together, 206 of the study defendants were returned to criminal and/or civil court for reabuse at least once, representing 60.2% of the study sample.

Like their prior criminal and civil abuse histories, the study defendants' subsequent criminal and civil histories were extensive. They were arrested 632 times for non–domestic abuse offenses and were either arrested for domestic abuse or brought to court for "civil" abuse (the victim obtained a restraining order against them) 622 times.

The majority of study abusers who were rearrested and/or returned to court for new restraining orders were rearrested or returned to court multiple times for both abuse and/or nonabuse offenses. Almost one third who were rearrested were rearrested at least five more times, and 20% who reabused did so at least five more times.

Only 22% of those rearrested were not also identified as reabusers, and only 20% of those who were identified as reabusers were not also arrested for non–domestic abuse offenses.

The majority of defendants (148) who were rearrested were rearrested within the first year following the study arraignment. A little more than half of the first new arrests (83) were for domestic violence. A majority of defendants (112) who reabused, as measured by arrest and new restraining orders, also did so during the first year. The average time to first new arrest was 536 days, and the median time was 259 days; to the first new domestic violence arrest, the average was 769 days and the median was 434 days; and to the first restraining order, the average was 770 days and the median was 451 days.

Table 2
Nonabuse Arrest and Reabuse Patterns Over Time

Reabuse (Arrest or Civil)	1 Year	2 Year	3 Year	4 Year	5 Year	6 Year	7 Year	8 Year	9 Year
Reabusers by year	112	70	42	39	34	36	30	33	28
Cumulative reabuse incidents	183	287	343	403	446	491	530	583	622
Cumulative number of reabusers	112	147	160	174	183	189	195	201	206
Nonabuse rearrests									
Rearrestees by year	95	61	54	46	45	39	40	52	48
Cumulative rearrests	134	212	280	342	405	460	507	563	632
Cumulative number rearrested	95	125	150	163	172	179	182	191	196

As Table 2 illustrates, the number of abusers who reabused or were rearrested for a nonabuse crime each year after the study arraignment markedly declined after the first 2 years. The numbers held fairly steady thereafter. On average, a little more than 34 of the abusers were brought to court each year after the initial 2 years for reabuse and a little more than 46 were arrested each year after the initial 2 years for nonabuse offenses.

There were significant gaps in reabuse and general rearrest patterns following the study abuse arrest. A little more than 20% reabused or were arrested for a non–domestic abuse offense after remaining abuse or arrest free from 2 to almost 3 years following the study arraignment, and a little more than 10% reabused or were arrested for a non–domestic abuse offense after remaining abuse and arrest free from 4 to almost 5 years following the study arraignment. Even after 8 years, 5 study abusers were brought back to court for reabuse for the first time since the study abuse arrest, and 5 were arrested for a non–domestic abuse offense for the first time since the initial study arrest. Furthermore, even after 8 years, some of the abusers charged with new abuse were charged with multiple incidents. Similarly, some of the abusers arrested for nonabuse offenses the 9th year were arrested multiple times that year.

The reabuse rate did not constitute a fixed percentage of all new arrests. Only 12% of the abusers with no new arrests after the study arrest were brought back to court for new abuse (indicated by a new restraining order). That percentage rose to 56% for those abusers who were arrested again from one to three times and to 83% for those arrested four or more times. In other words, it appears that the more a defendant was rearrested, the more likely he was to be identified as an abuser.

The reverse also appears to be true. Those with the greatest prior abuse histories, as indicated by domestic violence–related arrests or prior civil restraining orders filed against them, were the most likely to have the most numerous subsequent arrests. Of those arrested four or more times subsequent to the study arrest, 41% had a prior criminal record for domestic abuse, compared to 26% of those arrested only one to three times subsequent to the study arrest, and 13% with no subsequent arrests

after the study arrest. The same relationships existed based on prior civil restraining order abuse history.

Reabuse and Rearrest Predictors

Table 3 contains the bivariate correlations for both the independent and dependent variables. Age and prior criminal history are significantly associated with outcome over 9 years. Specifically, age at first arrest is positively associated with having a prior criminal and abuse history and negatively associated with new abuse, new multiple abuse, and new nonabuse arrests. Age also positively and significantly correlates with being married. However, being married does not have a significant relationship with new abuse, although it significantly and negatively correlates with new nonabuse crimes. This suggests that married abusers as they get older may be significantly more likely to stop committing crimes, outside but not inside the family.

All of the demographic and criminal history variables examined except marital status are significantly correlated with reabuse and being arrested at least once for a nonabuse offense in the 9 years following the study abuse arrest. Dismissals are significantly and negatively associated with new abuse and nonabuse arrests. Jail sentences are significantly and positively correlated with reabuse and nonabuse arrests. As previously detailed, dismissals are positively correlated with the abuser's age and negatively correlated with prior criminal history. The correlation between dismissals and outcomes may be because of the defendants' significant lack of prior criminal history and age, the prosecutorial acumen in deciding to dismiss these specific cases against these defendants, or the absence of a criminogenic effect of prosecution. On the other hand, those sentenced to jail or prison may be significantly associated with reabuse and being arrested for new nonabuse offenses because of their greater criminal histories and younger age, prosecutorial acumen in deciding they were the most deserving of punishment, or the criminogenic effects of prosecution and/or incarceration. By contrast, dispositions involving probation supervision have no significant correlation with reabuse or new nonabuse arrests.

Reabuse is significantly correlated with new nonabuse arrests, and new nonabuse arrests is significantly correlated with reabuse.

Table 4 contains the results of the multivariate analysis, using logistic regression. In the logistic regression models, marital status and age at the time of the study arrest are not significant predictors of outcomes. Age at first arrest significantly decreases the odds for reabuse (odds ratio [OR] = 0.966, $p = .038$) and new nonabuse offenses (OR = 0.921, $p = .000$), but not new multiple abuse incidents. Extensive research similarly finds age at first offense negatively associated with likelihood of reoffending generally and reabusing specifically (Blumstein, Cohen, Roth, & Visher, 2000; Klein, 2004).

Prior criminal history continues to be significantly associated with reabuse, new nonabuse arrests, and multiple new abuse. However, the specific prior history variables

Table 3
Bivariate Correlations

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Demographic variables														
1. Age at study arrest	N/A	.504**	.244**	*ns*	*ns*	*ns*	*ns*	*ns*	*ns*	*ns*	–.112*	–.205**	–.284**	–.146**
2. Age at first offense	.504**	N/A	.204**	–.480**	–.242**	–.176**	–.316**	–.261**	.182**	*ns*	–.209**	–.295**	–.319**	–.255**
3. Married	.244**	.204**	N/A	–.168**	*ns*	*ns*	–.116*	–.107**	*ns*	*ns*	–.117*	*ns*	–.198**	*ns*
Criminal or abuse history variables														
4. Prior arrest	*ns*	–.480**	–.168**	N/A	.240**	.293**	.269**	.217**	–.233**	*ns*	.154**	.219**	.307**	.225**
5. Prior violence arrest	*ns*	–.242**	*ns*	.240**	N/A	.279**	.513**	.634**	–.131*	*ns*	.261**	.203**	.176**	.234**
6. Prior abuse	*ns*	–.176**	*ns*	.293**	.279**	N/A	.235**	.217	*ns*	*ns*	.187**	.187**	.159**	.194**
7. Prior probation	*ns*	–.316**	–.116*	.269**	.513**	.235**	N/A	.693**	–.121*	–.116*	.294**	.135*	.306**	.137*
8. Prior jail	*ns*	–.261**	–.107*	.183**	.634**	.217**	.693**	N/A	–.117*	–.201**	.398**	.184**	.225**	.222**
Criminal justice interventions variables														
9. Dismissed	*ns*	.182**	*ns*	–.233**	–.131*	*ns*	–.121*	–.117*	N/A	N/A	N/A	–.204**	–.131*	–.140**
10. Probation supervision	*ns*	*ns*	*ns*	*ns*	*ns*	*ns*	–.116*	–.107*	N/A	N/A	N/A	*ns*	*ns*	*ns*
11. Jail or prison	–.112*	–.209**	–.117*	.154**	.261**	.187**	.294**	.398**	N/A	N/A	N/A	.147**	.117*	.259**
Outcome variables														
12. New abuse	–.205**	–.295**	*ns*	.219**	.203**	.187**	.135*	.184**	–.204**	*ns*	.147**	N/A	.344**	.672**
13. New nonabuse arrests	–.284**	–.319**	–.198**	.307**	.176**	.159**	.306**	.225**	–.131*	*ns*	.117*	.344**	N/A	.228**
14. New multiple abuse	–.146**	–.255**	*ns*	.225**	.243**	.194**	.137*	.222**	–.40**	*ns*	.259**	.672**	.228**	N/A

Note: N/A = not applicable.
*$p < .05$, two-tailed. **$p < .01$, two-tailed.

differ for different outcomes. Prior arrest for violence significantly increases the odds for new abuse (OR = 2.11, $p = .016$) and new multiple abuse (OR = 2.073, $p = .017$), whereas prior arrest for any crime significantly increases the odds for new nonabuse arrests (OR = 4.983, $p = .001$). Prior probationary sentences significantly increase the odds for new nonabuse arrests (OR = 1.234, $p = .037$) but negatively for new multiple abuse (OR = 0.905, $p = .037$). The significance of prior abuse is no longer a significant variable in the logistic regression. This is similar to findings from the Rhode Island probation study (described elsewhere in this article), which found that prior arrest for any crime and prior arrest specifically for a domestic abuse crime had the same association with reabuse over 1 to 2 years (Klein et al., 2005).

In terms of court interventions, compared to case dismissals, probation with guilty findings (probation or suspended sentence) or sentences of incarceration significantly increased the odds for new abuse (OR = 4.150, $p = .001$) and new multiple abuse (OR = 2.172, $p = .05$). Compared to defendants who were sentenced to jail, probation with guilty findings significantly increased the odds only for new nonabuse arrests (OR = 2.631, $p = .042$); dismissals significantly decreased the odds for new abuse (OR = 0.371, $p = .041$) and multiple new abuse (OR = 0.275, $p = .007$). Continued without a finding cases also decreased the odds for new multiple abuse (OR = 0.288, $p = .003$).

The estimated Nagelkerke R^2 indicates that this set of variables explains 29% of the variance for new abuse, 36% for new non–domestic abuse arrests, and 26% for multiple new abuse. The correctly predicted percentages of those who reabused, were arrested only for non–domestic abuse offenses, or reabused multiple times increased from 60% (with no independent variable in the model) to 72%, 57% to 75%, and 60% to 70%, respectively.

Conclusions and Implications for Research

1. Short-term measures of reabuse and/or recidivism following arrest, prosecution, probationary supervision, and/or imprisonment may not necessarily reflect longer-term abuse or criminal conduct over the subsequent decade. Although the majority of abusers may desist from being rearrested for abuse or any other crime and victims may not file new restraining orders against them for the first year, during the course of the next decade the majority of abusers may be arrested for new crimes and be arrested or brought to civil court for new abuse.

If the abusers arrested in the Quincy Court between 1995 and 1996 are representative of abusers elsewhere, the number of abusers who cease their abuse as indicated by new arrests for domestic abuse or new restraining orders filed against them erodes from 84% over 6 months down to 39% over 9 years. Furthermore, it should be pointed out that the measures employed for reabuse in this study are conservative and do not include victim reports of reabuse. In the initial Quincy study (Buzawa

Table 4
Logistic Regression: New Abuse and Multiple Abuse Over 9 Years

	New Abuse				
Independent Variables or Scales	*B*	*SE*	Exp(*B*)	*p*	95% CI
A. Reference dismissed cases					
Abuser characteristics					
Age at study arrest	–0.035	0.017	0.966	.038	0.934, 0.998
Abuse or criminal history					
Prior arrest	*ns*	*ns*	*ns*		
Prior arrest for violence	0.747	0.311	2.110	.016	1.148, 3.879
Prior jail or prison	*ns*	*ns*	*ns*		
Prior probation	*ns*	*ns*	*ns*		
Initial court disposition					
Probation	1.423	0.407	4.150	.000	1.870, 9.211
Jail or prison	0.993	0.485	2.699	.041	1.042, 6.987
Continued without finding	*ns*	*ns*	*ns*		
B. Reference jail or prison sentences					
Abuser characteristics					
Age at study arrest	–0.035	0.017	0.966	.038	0.934, 0.998
Abuse or criminal history					
Prior arrest	*ns*	*ns*	*ns*		
Prior arrest for violence	0.747	0.311	2.110	.016	1.148, 3.879
Prior jail or prison	*ns*	*ns*	*ns*		
Prior probation	*ns*	*ns*	*ns*		
Initial court disposition					
Probation	*ns*	*ns*	*ns*		
Dismissed	–0.933	0.485	0.371	.041	0.143, 0.959
Continued without finding	*ns*	*ns*	*ns*		
	New Multiple Abuse				
Independent Variables or Scales	*B*	*SE*	Exp(*B*)	*p*	95% CI
A. Reference dismissed cases					
Abuser characteristics					
Age at study arrest	*ns*	*ns*	*ns*		
Abuse or criminal history					
Prior arrest	*ns*	*ns*	*ns*		
Prior arrest for violence	0.729	0.306	2.073	.017	1.139, 3.773
Prior jail or prison	*ns*	*ns*	*ns*		
Prior probation	–0.100	0.048	0.905	.037	0.824, 0.994
Initial court disposition					
Probation	0.776	0.396	2.172	.05	1.000, 4.719
Jail or prison	1.290	0.478	3.634	.007	1.424, 9.275
Continued without finding	*ns*	*ns*	*ns*		

(continued)

Table 4 (continued)

	New Multiple Abuse				
Independent Variables or Scales	*B*	*SE*	Exp(*B*)	*p*	95% CI
B. Reference jail or prison sentences					
Abuser characteristics					
Age at study arrest	*ns*	*ns*	*ns*		
Abuse or criminal history					
Prior arrest	*ns*	*ns*	*ns*		
Prior arrest for violence	0.729	0.306	2.073	.017	1.139, 3.773
Prior jail or prison	*ns*	*ns*	*ns*		
Prior probation	–0.100	0.048	0.905	.037	0.824, 0.994
Initial court disposition					
Probation	*ns*	*ns*	*ns*		
Dismissed	–1.290	0.478	0.275	.007	0.266. 1.343
Continued without finding	–1.245	0.422	0.288	.003	0.126, 0.657
	New Nonabuse Arrests				
Independent Variables or Scales	*B*	*SE*	Exp(*B*)	*p*	95% CI
Exhibit 4: Logistic regression: New nonabuse arrests over 9 years					
A. Reference dismissed cases					
Abuser characteristics					
Age at study arrest	–0.082	0.018	0.921	.000	0.889, 0.945
Abuse or criminal History					
Prior arrest	1.606	0.475	4.983	.001	1.964, 12.643
Prior arrest for violence	*ns*	*ns*	*ns*		
Prior jail or prison	*ns*	*ns*	*ns*		
Prior probation	0.210	0.071	1.234	.003	1.073, 1.420
Initial court disposition					
Probation	*ns*	*ns*	*ns*		
Jail or prison	*ns*	*ns*	*ns*		
Continued without finding	*ns*	*ns*	*ns*		
	New Arrest, Not Domestic Violence				
Independent Variables or Scales	*B*	*SE*	Exp(*B*)	*p*	95% CI
B. Reference jail or prison sentences					
Abuser characteristics					
Age at study arrest	–0.082	0.018	0.921	.000	0.889, 0.954
Abuse or criminal history					
Prior arrest	1.606	0.475	4.983	.001	1.964, 12.643
Prior arrest for violence	*ns*	*ns*	*ns*		
Prior jail or prison	*ns*	*ns*	*ns*		
Prior probation	0.210	0.071	1.234	.003	1.073, 1.420
Initial court disposition					
Probation	0.967	0.477	2.631	.042	1.034, 6.696
Dismissed	*ns*	*ns*	*ns*		
Continued without finding	*ns*	*ns*	*ns*		

Note: CI = confidence interval.

et al., 1999), a sample of victims self-reported 123% higher reabuse (new assaults and/or violations of restraining orders) rates over 1 year than the rates captured in official arrest and/or civil records.

This study does not mean that arrest, prosecution, and various court interventions had no effect. There was no control comparison of abusers with equivalent records and characteristics who were released after arrest with no subsequent court intervention. Those whose cases were nolle prossed or dismissed did not resemble most of those who were further prosecuted.

Furthermore, the various interventions studied may have had at least a short-term suppression effect. Davis et al. (1999), in their study of batterer programs in New York City, found that batterer intervention programs deter repeat abuse while abusers are assigned to them, but not afterward. Second, although the interventions examined may not have indefinitely stopped the abuse, the quality and quantity of the abuse may have been altered. The current research does not speak to these issues.

Batterer intervention research with shorter follow-up periods have uniformly found that the majority of abusers do not reabuse after arrest, after prosecution, after referral to a batterer program, after supervision by probation, and/or after a restraining order is lodged against them (Davis et al., 1998; Gondolf, 2001; Holt et al., 2002; Klein et al., 2005; Maxwell et al., 2001). The current research suggests that these studies may have failed to reveal the chronic and persistent nature of the abusers' abusive and unlawful behavior in the longer run.

2. Given repeated abuse incidents as indicated by prior and subsequent arrests for domestic abuse and/or restraining orders filed against them, it does not appear that at least the abuse behaviors of those abusers arrested for domestic violence in this study were transitory or episodic, generated by unique situational or short-term emotional upheavals in the offenders' lives. Furthermore, given the extensive prior and subsequent arrests for non–domestic abuse crimes for the majority of study abusers, it appears that their abuse may be part of an overall pattern of criminal behavior. However, marriage, although associated with reduced risk of nonabuse arrests, is not associated with risk of reabuse.

The research suggests the arrested abusers' criminal and abuse behaviors are ingrained and intertwined, not easily eliminated over the long run. Of the sample, 43% were arrested four or more times during the 10-year study following the study abuse arrest; the majority (55%) were arrested three or more times. All but 16% had prior arrests, with the average number of prior arrests totaling 11 and a median number of 5.

In terms of reabuse, the majority of abusers reabused, and the majority of reabusers did so more than once. In addition, the overwhelming majority had prior criminal histories, beginning with juvenile records for one fourth, and almost half had prior histories of abuse, having begun that abuse almost 8 years on the average before the study arrest.

The average criminal career of those rearrested for any crime or court restrained was 16.5 years, with at least 10% still active in terms of new arrests issued in 2004, when final record checks were completed. The median criminal careers based on median ages of first and last offenses ran just short of 20 years. The defendants' abuse careers were shorter, averaging 8.4 years, with a median of 7.5 years. However, at least 13% of the defendants were still being arrested for new abuse and/or having restraining orders taken out against them in 2004, when final record checks were completed. The full abuse careers are probably underassessed because domestic violence arrests were not common before the mid-1980s, and restraining orders were not recorded in Massachusetts until 1992. As a result, early abuse incidents are not included, which, if they had occurred, would have added years to these abuse careers.

The criminal and abuse careers of these arrested abusers appears, on their face, to be longer than the shorter time span of 5 years, averaged by adult career criminals (Blumstein et al., 2000). However, as Blumstein et al. (2000) point out, this average "hides major differences across offenders" (p. 5). Although the residual career length is 5 years for 18-year-old index offenders, it is 10 years for index offenders who are still active in their 30s, and it does not begin to decline for active offenders until their 40s. Those active in their 30s display the lowest termination rates and the longest residual careers.

The current study compares to that reported by Gondolf (2001), who followed up a multistate sample of abusers referred to batterer intervention programs in three states over 4 years. He also found that reabuse rates increased over time from a little more than one third in the first 15 months from program assignment to nearly one half after 4 years. As in the Quincy study, those who reabused their partners did so quickly. Two thirds of the reassaulters did so within 9 months of program intake. Gondolf also found substantial de-escalation of reassault and other forms of abuse during the full year after program intake, which remained at lower levels during the next 3 years. The vast majority of men eventually were not violent for a sustained period. At 30 months, more than 80% of the men had not reassaulted a partner during the previous year. At 48 months, more than 90% had not reassaulted during the previous year. Only a little more than 20% of the men repeatedly reassaulted their partners throughout the study period.

The current study also shows a decrease in domestic abuse over time. However, it also suggests that cessation of abuse incidents for a year does not suggest a permanent cessation. The Quincy study also found a larger percentage appeared to be chronic abusers, with 36% having four or more domestic abuse arrests over the longer study period. The differences could be attributed to differences in study populations. Gondolf's sample was made up of nonincarcerated abusers, compared to the larger pool of abusers in the Quincy study, including those whose cases were dismissed, those who were probated, and those who were incarcerated. Also, Gondolf's follow-up was more limited than that in the current study, and his study involved different study starting points. Gondolf's study began at batterer program assignment, compared to court arraignment in Quincy. In the Quincy study, most abusers ordered into

batterer intervention programs were not so ordered until 8 months on average after their study arrest. Also, Gondolf restricted reabuse measures to reassaults, whereas the Quincy study also included new abuse as indicated by the filing of restraining orders against study abusers. Finally, the arrest rates for domestic abuse vary from jurisdiction to jurisdiction and may be higher in Massachusetts than in the states in which Gondolf assembled his study samples.

The current study suggests that abuse not only is part of an abuser's overall criminal pattern but also may be associated with an intensification of that criminality for nonabuse offenses and for domestic abuse–related offenses. This suggests a link between abusive and overall criminal behavior.

However, the career abusers identified in this study differ from other career criminals in several respects, including the relationship of martial status to reoffending and the relationship of various criminal justice interventions to subsequent criminal behavior. Although age and marriage have been found as major factors in ending criminal careers (Laub, Nagin, & Sampson, 1998), with the Quincy abusers, marriage seems to offset the effects of aging in terms of association with new abuse or multiple abuse compared to new nonabuse offenses. This suggests that marriage may not be "the safest place for women and children," as suggested by marriage promotion advocates (Rector, Fagan, & Johnson, 2004). As these abuser–criminals age, they simply continue their criminal behavior within their families.

Criminal justice interventions also appeared to have different effects on the abusers' abuse behavior from their nonabuse criminal behavior. Probation supervision of defendants who were continued without a finding was negatively associated in this study with new multiple abuse over 9 years. Probation supervision of defendants sentenced to probationary or suspended sentences was not significantly associated with reabuse. Both of the above associations use jail or prison cases as a reference. The Rhode Island probation research (Klein et al., 2005) similarly found probation supervision of abusers (modeled after the Quincy probation department) significantly reduced reabuse among those defendants with lesser prior criminal histories, but not those with more substantial criminal histories.

On the other hand, probation supervision of cases continued without a finding had no significant relationship with new nonabuse arrests, and probation supervision of abusers with lengthier records (those sentenced to probation or suspended sentences) was not significantly associated with new abuse or multiple abuse over 9 years but was positively associated with new non–domestic abuse arrests using jailed cases as a reference. This suggests that probation supervision of higher-risk abusers may have the unintended effect of increasing nonabuse arrests.

Study Limitations

There are a number of study limitations, including the measurement of reabuse, the study population, and the interpretations of the findings.

As previously mentioned, reabuse measures were conservative, excluding victim self-reports of new abuse, although measures included victim-initiated restraining orders. Furthermore, new domestic violence arrests were restricted to crimes against persons, although in the initial study the domestic abuse–related arrests included a broader range of offenses. As a result, although found to be significant, reabuse rates were undoubtedly higher than measured.

The Quincy arrest population and its criminal justice environment do not represent the entire population of abusive men and the full range of possible criminal justice responses to them. Any of the findings of this study, therefore, must be reexamined in other jurisdictions before they can be assumed to be representative of other abusers in other jurisdictions.

Correlation is not causation. The association between defendant characteristics and intervention variables and subsequent reabuse and rearrests may have less to do with the specific independent variables studied than with other variables not studied. Such other independent variables may include, for example, whether or not the victim remained with the abuser after the study arrest, abuser employment patterns, drug use, stake in social conformity, and other variables that have been found to be related to career criminal behavior (Blumstein et al., 2000) but that were not included in this research. On the other hand, Felson et al. (2005) found that socioeconomic variables, including education, poverty, race, and gender of offender, were not associated with reabuse likelihood. Similarly, the arrest deterrence studies found that employment and use of intoxicants were inconsistent in the direction of their relationship in terms of prevalence or frequency of reabuse (Maxwell et al., 2001).

Furthermore, the current research focuses on a specific criminal justice intervention at a specific point in time to determine its association with various outcomes. Selection of any specific intervention at any specific time may be arbitrary given the lengthy criminal and abuse careers of most of the study abusers. Most of the study abusers, for example, were involved in repeated criminal justice interventions both before and after the study incident. The various interventions in various combinations over time may have had a cumulative effect on the abusers that is more significant than the specific incident interventions singled out in this study. This is suggested in the logistic regression that found that prior sentences of probation predicted a greater likelihood of having a new nonabuse arrest and a decreased likelihood of multiple new abuse incidents. It also revealed that former sentences to jail or prison did not predict a greater likelihood of reabuse or new nonabuse arrests when controlling for defendant characteristics and study interventions suggesting that, at least in regard to these abusers, incarceration did not prove criminogenic.

Any analysis of the cumulative effect of criminal justice interventions over time is complicated by the fact that the criminal justice interventions, in this study, did not conform to a consistent pattern and varied widely from one abuser to another. For example, 36 of the defendants who were initially incarcerated for their study domestic violence offense were rearrested for new domestic violence on their release. Yet,

only 39% were reincarcerated for their first subsequent domestic violence arrest. Furthermore, although some were rearrested multiple times for new domestic violence offenses, a little more than 20% of those arrested for new abuse were never sanctioned at all, as their new cases were dismissed.

The lack of a consistent pattern of prosecution and sentencing was also present for other study defendants who were initially given noncustodial sentences. For example, of the study defendants, 60 were initially given suspended sentences. Subsequently, 44 were arrested again for domestic violence. Only 7 were subsequently sentenced to incarceration, whereas 8 defendants had their cases dropped by prosecutors or dismissed in court. More than half of these abusers were arrested for a second subsequent domestic violence offense. Of these, only 7 were sentenced to incarceration, whereas 2 had their cases continued without a finding—a disposition usually reserved for first offenders to "save" their record from a conviction. Also, 8 were given new suspended sentences or probation. The remaining cases were filed (2), dismissed (4), nolle prossed (1), or found not guilty (1).

On the other hand, many of the defendants who were not initially sentenced to jail for their crimes of domestic violence were subsequently jailed as a result of probation revocations, although these sentences were often concurrent with sentences imposed for new abuse arrests. As a result, the revocations did not necessarily result in additional time defendants spent in jail. Nonetheless, as a result, it would be difficult to isolate the effects of the probation supervision from the subsequent incarceration in terms of subsequent behavior.

The inconsistency in sentencing was exacerbated as defendants spread out over time across the commonwealth, involving different courts other than the Quincy District Court. Some of the subsequent arrests were in different counties, which means different district attorneys offices prosecuted these cases. Different district attorneys may have different policies in relation to the prosecution of domestic violence offenses. A study of restraining order violation prosecutions across the commonwealth in 1994, for example, found great variety in dismissal and sentencing rates from one district attorney to another (Bass, Nealon, & Armstrong, 1994).

In addition to subsequent domestic violence offenses, these same abusers were arrested for even more non–domestic violence offenses. These additional offenses also involved a variety of prosecution rates and sentences over time. The interplay between domestic and non–domestic violence criminal justice interventions is not explored in this study. Some of the abusers, for example, may have been abuse free for periods of time because they were incarcerated for subsequent non–domestic abuse offenses.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DANIEL EDWARD CHOVAN, *Defendant-Appellant*.	No. 11-50107 D.C. No. 3:10-cr-01805-JAH-1 OPINION

Appeal from the United States District Court
for the Southern District of California
John A. Houston, District Judge, Presiding

Argued and Submitted
February 15, 2012—Pasadena, California

Filed November 18, 2013

Before: Harry Pregerson, Michael Daly Hawkins,
and Carlos T. Bea, Circuit Judges.

Opinion by Judge Pregerson;
Concurrence by Judge Bea

SUMMARY*

Criminal Law/Second Amendment

The panel affirmed the district court's denial of a motion to dismiss an indictment in a case in which the defendant contended that 18 U.S.C. § 922(g)(9), which prohibits persons convicted of domestic violence misdemeanors from possessing firearms for life, violates his Second Amendment right to bear arms and does not apply to him because his civil rights have been restored.

The panel held that the defendant's 1996 misdemeanor domestic violence conviction did not divest him of civil rights because it did not divest him of the right to vote, the right to serve on a jury, or the right to hold public office, and that he therefore cannot qualify for the "civil rights restored" exception to § 922(g)(9). The panel also rejected the defendant's argument that the civil rights restored exception violates the Equal Protection Clause.

The panel held that intermediate scrutiny applies to the Second Amendment claim, and that § 922(g)(9) is constitutional on its face and as applied to the defendant.

Concurring in the result, Judge Bea wrote separately to express his disagreement with the majority's default determination that persons convicted of domestic violence misdemeanors are thereby disqualified from the core right of

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

the Second Amendment to possess firearms for defense of the home.

COUNSEL

Devin Burstein, Federal Defenders of San Diego, Inc., San Diego, California, for Defendant-Appellant

Caroline P. Han, Assistant United States Attorney, San Diego, California, for Plaintiff-Appellee.

OPINION

PREGERSON, Circuit Judge:

Following the entry of a conditional guilty plea, Daniel Chovan appeals the district court's denial of his motion to dismiss an indictment against him for violation of 18 U.S.C. § 922(g)(9). Section 922(g)(9) prohibits persons convicted of domestic violence misdemeanors from possessing firearms for life. Chovan contends that § 922(g)(9) is unconstitutional both on its face and as applied to him because it violates his Second Amendment right to bear arms. In the alternative, he argues that § 922(g)(9) does not apply to him because his civil rights have been restored within the meaning of 18 U.S.C. § 921(a)(33)(B)(ii). We have jurisdiction pursuant to 28 U.S.C. § 1291. We reject Chovan's "civil rights restored" argument, hold that intermediate scrutiny applies to his Second Amendment claim, and uphold § 922(g)(9) under intermediate scrutiny.

FACTUAL & PROCEDURAL BACKGROUND

In 1996, Daniel Chovan was convicted in California state court of the misdemeanor of inflicting corporal injury on a spouse in violation of California Penal Code § 273.5(a). The victim, Cheryl Fix,[1] was living with Chovan at the time.[2] Chovan was sentenced to 120 days in jail and three years of supervised release.

Because of this conviction, Chovan was prohibited from possessing firearms under both state and federal law. Under California Penal Code § 12021(c)(1), which at the time applied to misdemeanants generally, Chovan was barred from owning, purchasing, receiving, or having in his possession or under his custody or control, any firearm for a ten-year period following his conviction. But under 18 U.S.C. § 922(g)(9), a federal statute that applies only to persons convicted of misdemeanor domestic violence crimes, Chovan was barred from possessing any firearm for life.

Section 922(g)(9) establishes two exceptions under which the statute will no longer apply: (1) "if the conviction has been expunged or set aside"; or (2) if the offender "has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." 18 U.S.C. § 921(a)(33)(B)(ii).

[1] Fix married Chovan in 1997 and changed her last name to "Chovan." We refer to her as Fix throughout this opinion for the sake of clarity. Fix and Chovan separated in 2009.

[2] California Penal Code § 273.5(a) does not require that the parties be married, but rather applies to any person who willfully inflicts corporal injury "upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child . . . ."

These exceptions are not met if "the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.*

In 2009, Chovan applied to purchase a firearm from a San Diego area gun dealer. He completed a required application form and answered "no" to the question whether he had ever been convicted of a misdemeanor crime of domestic violence. His purchase application was denied after a background check revealed his 1996 misdemeanor conviction of domestic violence. At the time of his application, Chovan could legally possess a firearm under California law because ten years had passed since his 1996 conviction, but § 922(g)(9) continued to bar him from possessing a firearm.

The FBI received information about Chovan's attempted purchase and began investigating Chovan. During their investigation, FBI agents found videos on the Internet depicting Chovan and others shooting rifles and conducting "border patrols" near the U.S.-Mexico border.

The FBI also learned that in March 2010, San Diego County Sheriff deputies responded to a domestic dispute at Chovan's residence. Fix, Chovan's then-estranged wife, told the officers that Chovan had become violent, hit her with a cell phone, and threatened to hunt her down and shoot her if she ever left him. Fix said that she believed Chovan's threats because he had weapons inside his house.

On April 15, 2010, FBI and Bureau of Alcohol, Tobacco, Firearms and Explosives agents executed a search warrant of Chovan's house. In the course of their search they found and confiscated four firearms, including a High Standard .22 caliber handgun that belonged to Chovan, and 532 rounds of

assorted ammunition. Federal agents arrested Chovan the day after the search. During his arrest, Chovan admitted that he had possessed and fired the firearms several times since his 1996 domestic violence conviction. A two-count indictment was brought against Chovan. Count One alleged that Chovan had knowingly possessed firearms in violation of § 922(g), and Count Two alleged that he had made a false statement in the acquisition of a firearm in violation of 18 U.S.C. § 924(a)(1)(A).

Chovan moved to dismiss Count One, contending that (1) § 922(g)(9) is an unconstitutional violation of the Second Amendment; (2) his civil rights were "restored" within the meaning of § 921(a)(33)(B)(ii), and therefore § 922(g)(9) did not apply to him; and (3) § 922(g)(9)'s application to him was a violation of equal protection. The district court denied Chovan's motion to dismiss, concluding that § 922(g)(9) "is a presumptively lawful prohibition and represents an exemption from the right to bear arms under the Second Amendment as articulated in [*District of Columbia v. Heller*, 554 U.S. 570 (2008)]."

Chovan pled guilty to Count One of the indictment, pursuant to a conditional plea agreement that preserved his right to appeal the denial of his motion to dismiss.[3] Chovan was sentenced to five years probation. Chovan timely appealed the denial of his motion to dismiss.

[3] Count Two was dismissed as a part of the plea agreement and is not at issue in this appeal.

STANDARD OF REVIEW

We review de novo the constitutionality of a statute. *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010). We also review de novo constitutional challenges to a district court's denial of a motion to dismiss. *Id.*

DISCUSSION

Chovan argues on appeal that § 922(g)(9) violates the Second Amendment because it is an impermissible restriction on the individual and fundamental right to bear arms. He alternatively argues that § 922(g)(9) does not apply to him because his civil rights were restored when his ten-year ban on owning firearms under California state law expired, and thus that his conviction should be vacated. We disagree with both arguments.

I. Civil Rights Restored

We start by addressing Chovan's non-constitutional argument that § 922(g)(9) does not apply to him because his civil rights have been restored.[4] Section 921(a)(33)(B)(ii) prevents the application of § 922(g)(9) in situations where a defendant's "civil rights" have been restored. Chovan contends that his civil rights were restored within the meaning of § 921(a)(33)(B)(ii) when his right to own

[4] *See Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343–44 (1999) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")).

firearms was restored under California law ten years after his 1996 conviction.

Section 921(a)(33)(B)(ii) does not define the term "civil rights." In *United States v. Brailey*, however, we addressed how to interpret the term. 408 F.3d 609, 611–13 (9th Cir. 2005). In 1997, James David Brailey was convicted in Utah of a misdemeanor crime of domestic violence. *Id.* at 610–11. As a result of this conviction, he was barred from possessing firearms under then-existing Utah state law. *Id.* at 611. In 2000, however, Utah amended its statutes such that Brailey and other misdemeanants were no longer prevented from possessing firearms. *Id.* at 610–11. Brailey was subsequently charged with firearm possession in violation of § 922(g)(9). *Id.* at 610. He appealed the § 922(g)(9) conviction, maintaining that his civil rights had been restored within the meaning of § 921(a)(33)(B)(ii) because his right to possess a gun had been restored under Utah law. *Id.*

We rejected Brailey's argument, concluding that his civil rights had never been "lost" because his misdemeanor conviction had not taken away his "core civil rights": the right to vote, to sit as a juror, or to hold public office. *Id.* at 613. Because Brailey's civil rights had never been lost, we reasoned that they could not have been restored. We noted that most other circuits had also concluded that, "where civil rights are not divested for misdemeanor convictions, a person convicted of a misdemeanor crime of domestic violence cannot benefit from the federal restoration exception." *Id.* at 612 (citing *United States v. Jennings*, 323 F.3d 263 (4th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002); *United States v. Smith*, 171 F.3d 617 (8th Cir. 1999)); *see also Logan v. United States*, 552 U.S. 23, 37 (2007) (holding that a different "civil rights restored" exception did

not apply to "an offender who lost no civil rights"). Thus, we concluded that Brailey failed to meet § 922(g)(9)'s civil rights restored exception.

Chovan argues that *Brailey*'s reading of the civil rights restored exception is too narrow and "create[s] an equal protection problem." According to Chovan it is unfair that under *Brailey*, individuals who lose the right to vote, serve on a jury, or hold public office because of their convictions but later have these rights restored can possess firearms, while individuals like Chovan who never lost these rights cannot.

Chovan's equal protection argument is foreclosed by our decision in *United States v. Hancock*, 231 F.3d 557 (9th Cir. 2000). In 1994 and 1995, Gary Hancock was convicted of four Arizona state misdemeanors involving violence or threats of violence against his wife. *Id*. at 560. In 1999, Hancock was convicted of possessing a firearm in violation of § 922(g)(9). *Id*. On appeal, Hancock argued that his indictment should have been dismissed on equal protection grounds. *Id*. at 565. He argued that in Arizona, domestic violence misdemeanants are treated more harshly under § 922(g)(9) than felons because Arizona misdemeanants, unlike felons, are not deprived of their civil rights and as a result can never have their civil rights restored. *Id.* at 566.

Applying rational basis review, we rejected Hancock's equal protection claim. *Id.* at 566–67. First, we explained that when Congress enacted § 922(g)(9), it "was aware of the discrepancies in state procedures for revoking and restoring civil rights . . . . [D]isparate treatment of some offenders was the inevitable result of Congress' decision to 'look to state law to define the restoration exception.'" *Id.* (citing *United States v. Smith*, 171 F.3d 617, 625 (8th Cir. 1999)). Second,

we noted that in addition to the civil rights restored exception, § 922(g)(9) provides "several adequate legal mechanisms" for which *both* misdemeanants and felons can qualify: "pardon, expungement, and setting aside of convictions." *Id.* at 567. Viewing the two exceptions together, we found that "Congress reasonably could conclude that felons who had been through a state's restoration process and had regained their civil rights . . . were more fit to own firearms than domestic-violence misdemeanants who had not had their convictions expunged or been pardoned." *Id*. We therefore upheld the civil rights restored exception under rational basis review as at least "minimally rational." *Id.*

Here, we apply *Brailey* and conclude that Chovan's 1996 misdemeanor domestic violence conviction did not divest him of civil rights because it did not divest him of the right to vote, the right to serve on a jury, or the right to hold public office. Because Chovan never lost these "core" civil rights, he cannot qualify for the civil rights restored exception to § 922(g)(9). Further, we reject Chovan's argument that the civil rights restored exception violates the Equal Protection Clause for the same reasons we articulated in *Hancock*. *Id.* at 566–67.

II. Second Amendment Challenge

Having concluded that Chovan does not qualify for the "civil rights restored" exception, we turn to his Second Amendment challenge to § 922(g)(9). Chovan's Second Amendment argument is predicated on the Supreme Court's holding in *District of Columbia v. Heller* that the Second Amendment protects "an individual right to keep and bear arms." 554 U.S. 570, 595 (2008).

In *Heller*, the Supreme Court struck down District of Columbia laws banning handgun possession in the home and requiring all firearms in homes to be unloaded and disassembled or "bound by a trigger lock or similar device." *Id.* at 630, 635. While the *Heller* Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," it did establish that the individual right guaranteed by the amendment is "not unlimited." *Id.* at 626–27.

The *Heller* Court suggested that the core of the Second Amendment right is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. The Court indicated that determining the scope of the Second Amendment's protections requires a textual and historical analysis of the amendment. *See id.* at 576–605. Finally, the Court established that "weapons not typically possessed by law-abiding citizens for lawful purposes" are not protected by the Second Amendment, *id.* at 625, and that certain "longstanding prohibitions" are "presumptively lawful regulatory measures":

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626–27; *see also id.* at 627 n.26; *McDonald v. City of Chicago*, 561 U.S. __, 130 S. Ct. 3020, 3047 (2010).

The constitutionality of § 922(g)(9) is a question of first impression in this circuit, although a number of other circuits have upheld the statute using varying rationales. We briefly summarize the different approaches taken by these circuits.

A. Approaches Taken By Other Circuits

1. Upheld as a "Presumptively Lawful Longstanding Prohibition": Eleventh Circuit

The Eleventh Circuit considered the constitutionality of § 922(g)(9) and upheld it as a "presumptively lawful longstanding prohibition[]." *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010). That court analogized § 922(g)(9) to the felon-in-possession ban the *Heller* Court listed as a presumptively lawful restriction, noting that "although passed relatively recently, § 922(g)(9) addresses the thorny problem of domestic violence, a problem Congress recognized as not remedied by 'longstanding' felon-in-possession laws." *Id.* at 1206. Concluding that "*Heller* does not cast doubt" on § 922(g)(9)'s constitutionality because § 922(g)(9) is a presumptively lawful prohibition, and without further constitutional analysis, the Eleventh Circuit upheld the statute. *Id.*

Two other circuits have criticized *White*'s approach. In *United States v. Chester*, the Fourth Circuit stated that "for all practical purposes" *White* treats "*Heller*'s listing of presumptively lawful measures" as a sort of "safe harbor for unlisted regulatory measures, such as 28 U.S.C. § 922(g)(9)" that are "analogous to those measures specifically listed in *Heller*." 628 F.3d 673, 679 (4th Cir. 2010). The *Chester* court criticized the approach as "approximat[ing] rational-basis review, which has been rejected by *Heller*." *Id.* In

United States v. Skoien, the Seventh Circuit sitting en banc declined to address whether § 922(g)(9) is presumptively lawful, stating, "We do not think it profitable to parse the[] passages of *Heller* [that list presumptively lawful measures] as if they contained an answer to the question whether § 922(g)(9) is valid." 614 F.3d 638, 640 (7th Cir. 2010) (en banc).

2. Remanded to District Court to Apply Intermediate Scrutiny: Fourth Circuit

In *Chester*, the Fourth Circuit considered William Samuel Chester's argument that his § 922(g)(9) conviction abridged his right to keep and bear arms under the Second Amendment. 628 F.3d at 674. The court held first that a two-part inquiry applies to Second Amendment claims:

> The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." . . . If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.

Id. at 680 (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). After canvassing the historical evidence on the Second Amendment rights of domestic violence misdemeanants and finding it "inconclusive," the court stated, "We must assume, therefore, that Chester's Second Amendment rights are intact and that he is entitled to some

measure of Second Amendment protection to keep and possess firearms in his home for self-defense." *Id.* at 681–82.

In its discussion of the second step—whether the challenged regulation survives the appropriate level of scrutiny—the Fourth Circuit noted that the *Heller* Court left open the question of what level of scrutiny applies to a law burdening Second Amendment-protected conduct, although the Court made clear that rational basis review was not sufficient. *Id.* at 682. The *Chester* court went on to state:

> Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue of Chester's criminal history as a domestic violence misdemeanant. *Heller*, [554 U.S. at 635]. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.

Id. at 682–83. The *Chester* court found that the government had not "carried its burden of establishing a reasonable fit between the important object of reducing domestic gun violence and § 922(g)(9)'s permanent disarmament of all domestic-violence misdemeanants," and it therefore remanded the case to afford the parties the opportunity to present evidence on this question in the first instance. *Id*. at 683.

3. Upheld After Application of Intermediate or Heightened Scrutiny: First, Fourth, and Seventh Circuits

In *United States v. Skoien*, the Seventh Circuit sitting en banc upheld § 922(g)(9) after assuming that intermediate scrutiny or its equivalent applied, and therefore that an "important governmental objective" and "substantially related" means were necessary to uphold the statute. 614 F.3d at 641–42. The Seventh Circuit examined a number of studies supporting the relationship between § 922(g)(9) and the important government interest of preventing gun violence. *Id.* at 642–44. The court noted, for example, that it is established that "firearms cause injury or death in domestic situations," and that "[d]omestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." *Id.* at 643 (citing Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Med. Ass'n 3043 (1992)). The court also noted that "[t]he presence of a gun in the home of a convicted domestic abuser is 'strongly and independently associated with an increased risk of homicide.'" *Id.* (quoting Arthur L. Kellermann, et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New England J. Med. 1084, 1087 (1993)). In light of "[b]oth logic and data," the Seventh Circuit held that keeping guns from domestic violence misdemeanants is substantially related to the government interest of preventing gun violence. *Id.* at 642.

The *Skoien* court also held that § 922(g)(9) was constitutional as applied to Skoien. *Id.* at 645. Skoien contended that § 922(g)(9) was not substantially related to an

important government objective because it "perpetual[ly]" disqualifies all persons convicted of domestic violence, even people who had not been in legal trouble for many years. *Id.* at 644. The court rejected Skoien's argument, emphasizing the statute's exceptions under which domestic violence misdemeanants may regain their rights to possess firearms. The court also noted,

> Skoien is poorly situated to contend that the statute creates a lifetime ban for someone who does not pose any risk of further offenses [because] Skoien is himself a recidivist, having been convicted twice of domestic battery. . . . A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present.

Id. at 645 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

The First Circuit similarly upheld § 922(g)(9) after applying the equivalent of intermediate scrutiny. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011). The *Booker* court found that while § 922(g)(9) "appears consistent with *Heller*'s reference to certain presumptively lawful regulatory measures," any "categorical ban on gun ownership by a class of individuals must be supported by some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." *Id.* at 25. The court upheld § 922(g)(9) after concluding that social science research supported a finding of "a substantial relationship between § 922(g)(9)'s disqualification of domestic violence misdemeanants from gun ownership and

the governmental interest in preventing gun violence in the home." *Id.*

Finally, the Fourth Circuit in *United States v. Staten* considered the constitutionality of § 922(g)(9) on a full record after its decision in *Chester*. Unlike in *Chester*, where the court remanded the application of intermediate scrutiny to the district court because the record was incomplete, in *Staten* the court upheld § 922(g)(9) under intermediate scrutiny. 666 F.3d 154, 167 (4th Cir. 2011). The *Staten* court first held that the government had carried its burden of establishing that reducing domestic gun violence is a substantial government objective. *Id.* at 161. The court then examined the social science studies cited by the government and found that the government had established that:

> (1) domestic violence is a serious problem in the United States; (2) the rate of recidivism among domestic violence misdemeanants is substantial; (3) the use of firearms in connection with domestic violence is all too common; (4) the use of firearms in connection with domestic violence increases the risk of injury or homicide during a domestic violence incident; and (5) the use of firearms in connection with domestic violence often leads to injury or homicide.

Id. at 167. The court concluded that the government had therefore "carried its burden of establishing a reasonable fit between the substantial government objective of reducing domestic gun violence and keeping firearms out of the hands of [domestic violence misdemeanants]". *Id.*

B. Chovan's Second Amendment Challenge

After considering the approaches taken by other circuits that considered the constitutionality of § 922(g)(9), we hold as follows. We adopt the two-step Second Amendment inquiry undertaken by the Third Circuit in *Marzzarella*, 614 F.3d at 89, and the Fourth Circuit in *Chester*, 628 F.3d at 680, among other circuits. Applying that inquiry, we hold that § 922(g)(9) burdens conduct falling within the scope of the Second Amendment's guarantee and that intermediate scrutiny applies to Chovan's Second Amendment challenge. Finally, like the First, Fourth, and Seventh Circuits, we apply intermediate scrutiny to § 922(g)(9) and hold that it is constitutional on its face and as applied to Chovan.

1. The Two-Step Inquiry

The two-step Second Amendment inquiry we adopt (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny. *Chester*, 628 F.3d at 680; *see also Marzzarella*, 614 F.3d at 89.

We believe this two-step inquiry reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited. 554 U.S. at 626–27. The two-step inquiry is also consistent with the approach taken by other circuits considering various firearms restrictions post-*Heller*. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1251–58 (D.C. Cir. 2011) ("*Heller II*"); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800–05 (10th Cir. 2010). We join the Third, Fourth, Seventh, Tenth, and D.C. Circuits in holding

that the two-step framework outlined above applies to Second Amendment challenges.

2. Applying the Two-Step Inquiry: Section 922(g)(9) Affects Second Amendment Rights and Intermediate Scrutiny Applies

At the first step of the inquiry, we conclude that by prohibiting domestic violence misdemeanants from possessing firearms, § 922(g)(9) burdens rights protected by the Second Amendment.

Section 922(g)(9) is not mentioned in *Heller*. The government argues that § 922(g)(9) is a presumptively lawful regulatory measure and does not burden rights historically understood to be protected by the Second Amendment. According to the government, § 922(g)(9) is part of a "long line of prohibitions and restrictions on the right to possess firearms by people perceived as dangerous or violent."

We do not agree. First, it is not clear that such prohibitions are so longstanding. The first federal firearm restrictions regarding violent offenders were not passed until 1938, as part of the Federal Firearms Act. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698, 708 (2009) (noting that "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I"). Second, and more importantly, the government has not proved that *domestic violence misdemeanants* in particular have historically been restricted from bearing arms. The Federal Firearms Act of 1938 only restricted firearm possession for those individuals convicted of a "crime of violence," defined as "murder, manslaughter, rape, mayhem,

kidnapping, burglary, housebreaking, and certain forms of aggravated assault—assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." *Id.* at 699 (internal quotation marks omitted). Domestic violence misdemeanants—like Chovan, who was convicted of simple misdemeanor assault under California Penal Code § 273.5(a)—would not be restricted from possessing firearms under the Federal Firearms Act. In fact, domestic violence misdemeanants were not restricted from possessing firearms until 1996, with the passage of the Lautenberg Amendment to the Gun Control Act of 1968. Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996).

Because of "the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that [Chovan]'s Second Amendment rights are intact and that he is entitled to some measure of Second Amendment protection to keep and possess firearms in his home for self-defense." *Chester*, 628 F.3d at 681–82.

We now reach the second step of the Second Amendment inquiry. In *Heller*, the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment. The *Heller* Court did, however, indicate that rational basis review is not appropriate. *See Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). Having concluded that § 922(g)(9) burdens Second Amendment rights, we reject rational basis review

and conclude that some sort of heightened scrutiny must apply.

In determining the appropriate level of scrutiny, other circuit courts have looked to the First Amendment as a guide. *See, e.g.*, *Chester*, 628 F.3d at 682; *Marzzarella*, 614 F.3d at 89 n.4, 96–97; *Ezell*, 651 F.3d at 703, 707. We agree with these courts' determination that, just as in the First Amendment context, the level of scrutiny in the Second Amendment context should depend on "the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *See Chester*, 628 F.3d at 682; *see also Marzzarella*, 614 F.3d at 96–97. More specifically, the level of scrutiny should depend on (1) "how close the law comes to the core of the Second Amendment right," and (2) "the severity of the law's burden on the right." *Ezell*, 651 F.3d at 703.

Heller tells us that the core of the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Section 922(g)(9) does not implicate this core Second Amendment right because it regulates firearm possession for individuals with criminal convictions. "Although [Chovan] asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue of [Chovan]'s criminal history as a domestic violence misdemeanant." *Chester*, 628 F.3d at 682–83; *cf. Ezell*, 651 F.3d at 708 (finding that a challenged statute implicated the core Second Amendment right because "the plaintiffs *are* the 'law-abiding, responsible citizens' whose Second

Amendment rights are entitled to full solicitude under *Heller*").

The burden the statute places on domestic violence misdemeanants' rights, however, is quite substantial. Unlike the regulations in *Marzzarella* or *Heller II*, § 922(g)(9) does not merely regulate the *manner* in which persons may exercise their Second Amendment rights. *Cf. Marzzarella*, 614 F.3d at 97 (concluding that obliterated serial numbers regulation "does not severely limit the possession of firearms" because "[i]t leaves a person free to possess any otherwise lawful firearm he chooses"); *Heller II*, 670 F.3d at 1258 (reasoning that the District of Columbia's gun registration requirements were not a severe burden because they do not "prevent[] an individual from possessing a firearm in his home or elsewhere"). Instead, as Chovan argues, § 922(g)(9) amounts to a "total prohibition" on firearm possession for a class of individuals—in fact, a "lifetime ban." As such, the statute is a more "serious encroachment" on the Second Amendment right. *See Ezell*, 651 F.3d at 708. But Chovan goes too far when he argues that § 922(g)(9) is too broad because it "contains no provision limiting its applicability." As explained above, § 922(g)(9) exempts those with expunged, pardoned, or set-aside convictions, or those who have had their civil rights restored. Therefore, while we recognize that § 922(g)(9) substantially burdens Second Amendment rights, the burden is lightened by these exceptions.

In sum, § 922(g)(9) does not implicate the core Second Amendment right, but it does place a substantial burden on

the right. Accordingly, we conclude that intermediate rather than strict scrutiny is the proper standard to apply.[5]

3. Applying Intermediate Scrutiny, We Uphold § 922(g)(9) and Its Application to Chovan

Although courts have used various terminology to describe the intermediate scrutiny standard, all forms of the standard require (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective. *Chester*, 628 F.3d at 683. As we explain below, § 922(g)(9), both on its face and as applied to Chovan, survives intermediate scrutiny.

a. Important Government Interest

Chovan concedes that § 922(g)(9) was motivated by the important government interest of "keeping firearms away from those most likely to misuse them" or "preventing gun violence." We agree that § 922(g)(9) advances an important government objective, but define the objective slightly more narrowly, as preventing *domestic* gun violence.

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[5] Most courts have also found that intermediate scrutiny or its equivalent is the proper standard to apply to Second Amendment challenges to § 922(g)(9) and similar statutes. *See, e.g.*, *Booker*, 644 F.3d at 25; *Chester*, 628 F.3d at 682–83; *Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny to Second Amendment challenge of 18 U.S.C. § 922(k), a ban on possession of firearms with obliterated serial numbers); *Reese*, 627 F.3d at 802 (applying intermediate scrutiny to Second Amendment challenge of 18 U.S.C. § 922(g)(8), which bans the possession of firearms by those subject to domestic protection orders); *Heller II*, 670 F.3d at 1257 (applying intermediate scrutiny to District of Columbia's firearm registration requirements).

That the government interest behind § 922(g)(9) was to prevent domestic gun violence is apparent from the face of the statute and its legislative history. As the government explains, the 1996 passage of § 922(g)(9) was motivated by the concern that guns were not being kept away from domestic abusers under felon-in-possession laws because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." *Skoien*, 614 F.3d at 643 (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg) (internal quotation marks omitted)); *see also United States v. Hayes*, 555 U.S. 415, 426 (2009); *United States v. White*, 593 F.3d 1199, 1205 (11th Cir. 2010). Through § 922(g)(9), Congress sought to "close this dangerous loophole" and "establish[] a policy of zero tolerance when it comes to guns and *domestic* violence." *Booker*, 644 F.3d at 16 (quoting 142 Cong. Rec. S8831 (daily ed. July 25, 1996) (statement of Sen. Lautenberg) (internal quotation marks omitted) (emphasis added)). Thus, the legislative history of § 922(g)(9) shows that Congress did not enact the statute for the purpose of "preventing gun violence," as Chovan argues. Instead, Congress passed § 922(g)(9) to prevent *domestic* gun violence.

We and other circuits have previously defined the government interest behind § 922(g)(9) in this way. In *United States v. Belless*, we noted that the purpose of § 922(g)(9) is "to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy custodians of deadly force." 338 F.3d 1063, 1067 (9th Cir. 2003). In *Booker*, the First Circuit similarly defined the interest behind § 922(g)(9) as "keeping guns away from people who have been proven to engage in violence with those with whom they share a domestically intimate or familial relationship, or who live with them or the

like." 644 F.3d at 25. Finally, in *Staten*, the Fourth Circuit defined the interest behind § 922(g)(9) as "reducing *domestic* gun violence." 666 F.3d at 161 (emphasis added).

It is self-evident that the government interest of preventing domestic gun violence is important. *See Booker*, 644 F.3d at 25 ("[K]eeping guns away from people who have been proven to engage in [domestic] violence . . . is undeniably important." (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."))). We hold that the government has met its burden to show that reducing domestic gun violence is an important government objective.

b. Substantially Related to Government Interest

Keeping guns from domestic violence misdemeanants is substantially related to the broader interest of preventing domestic gun violence for four related reasons. First, we agree with the government that the legislative history indicates that Congress enacted § 922(g)(9) because it sought to reach the people who had demonstrated violence, but were not kept from possessing firearms by § 922(g)(1) because domestic abusers are not often convicted of felonies. *See Hayes*, 129 S. Ct. at 1087.

Second, we agree with the government that "a high rate of domestic violence recidivism exists." The government relies on *Skoien*, in which the Seventh Circuit pointed to a number of studies estimating a rate of domestic violence recidivism between 35% and 80%. *See Skoien*, 614 F.3d at 643–44. Estimates of "[t]he full recidivism rate," which "includes violence that does not lead to an arrest," "range from 40% to

80% 'when victims are followed longitudinally and interviewed directly.'" 614 F.3d at 644 (citing Carla Smith Stover, *Domestic Violence Res*., 20 J. Interpersonal Violence 448, 450 (2005)). The *Skoien* court also cited two other studies that estimated the full recidivism rate to be 35% and 52%, respectively. *Id.* (citing Julia C. Babcock, et al., *Does Batterers' Treatment Work? A Meta-Analytic Review of Domestic Violence Treatment*, 23 Clinical Psychol. Rev. 1023, 1039 (2004) (estimating a 35% recidvism rate based on partners' reports); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 Crime & Just. 1, 31 (2001) (estimating that only 48% of domestic abusers "suspended" their abusive conduct within three years of conviction)).

Third, we agree with the government that domestic abusers use guns. The government explains that "Congress acknowledged that the use of guns in incidents of domestic violence was a compelling concern," and cites to the Congressional Record in which Congress found that "annually, over 150,000 incidents of domestic violence involve a gun." *See United States v. Smith*, 742 F. Supp. 2d 855, 867 (S.D.W.Va. 2010) (citing Cong. Rec. 22,986)). The government further relies on the fact, articulated in *Booker*, that "nearly 52,000 individuals were murdered by a domestic intimate between 1976 and 1996, and the perpetrator used a firearm in roughly 65% of the murders." *Booker*, 644 F.3d at 26.

Finally, we agree with the government that the use of guns by domestic abusers is more likely to result in the victim's death. The government cites a medical study relied upon in *Skoien* for the proposition that incidents of domestic violence involving firearms are twelve times more likely to

end in the victim's death than incidents where a perpetrator is either unarmed or armed with a knife alone. *See Skoien*, 614 F.3d at 643 (citing Linda E. Saltzman, James A. Mercy, Patrick W. O'Carroll, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Medical Ass'n 3043 (1992)).

Putting these four conclusions together, the government has demonstrated that domestic violence misdemeanants are likely to commit acts of domestic violence again and that, if they do so with a gun, the risk of death to the victim is significantly increased. We hold that the government has thereby met its burden to show that § 922(g)(9)'s prohibition on gun possession by domestic violence misdemeanants is substantially related to the important government interest of preventing domestic gun violence. Because § 922(g)(9) is supported by an important government interest and substantially related to that interest, the statute passes constitutional muster under intermediate scrutiny.

c. Chovan's As-Applied Challenge

Chovan argues that § 922(g)(9) is unconstitutional as applied to him because his 1996 domestic violence conviction occurred fifteen years before his § 922(g)(9) conviction, he is unlikely to recidivate, and he has in fact been law-abiding for those fifteen years.

Chovan cites several statistics in support of his argument that he is at low risk of recidivism. He cites the Sentencing Commission's *Measuring Recidivism* study, which establishes that those with stable employment are less likely to recidivate and that "'[r]ecidivism is comparatively low for

the lowest sentences (less than six months or probation).'" *See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 12, 14). He also cites a National Institute for Justice study for the proposition that people who remain offense free for as long as Mr. Chovan (and indeed for much shorter periods) pose a recidivism risk equal to that of the general population. *See* Blumstein & K. Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, NIJ Journal, June 2009, at 10).

But the Sentencing Commission statistics do not reveal the actual rate of recidivism for those with stable employment or short sentences; the statistics only establish that individuals in those two categories have *comparatively lower* recidivism rates than individuals in other categories. *Measuring Recidivism* at 14. Moreover, none of Chovan's statistics has to do with individuals convicted of domestic violence crimes specifically. The National Institute for Justice study mentions only burglary, robbery, and aggravated assault; it does not mention domestic violence, nor does it make conclusions about individuals convicted of crimes generally. *'Redemption'* at 12. Meanwhile, the government has referred to domestic violence studies mentioned by the *Skoien* court showing that the recidivism rates for individuals convicted of domestic violence is significant—between 35 and 80 percent. *See Skoien*, 614 F.3d at 643–44.

Chovan also argues that he has not been arrested for domestic violence since the 1996 conviction and has otherwise been law-abiding. He argues that a March 2010 domestic violence call made by his estranged wife and victim of the act of domestic violence underlying the 1996 conviction, Cheryl Fix, should not be held against him

because it did not result in a charge or even arrest and amounts to "unsubstantiated allegations." When San Diego County Sheriff deputies responded to the call, Fix told them that Chovan had become violent with her, struck her with a cell phone, and threatened to hunt her down and shoot her if she ever left him.

Although Chovan was not arrested for domestic violence, we nonetheless consider the March 2010 domestic abuse call and Fix's statements. The call is part of the record. And it should be considered, especially in light of one of the underlying rationales of § 922(g)(9): acts of domestic violence are under-reported and often do not lead to arrest or conviction. *See Skoien*, 614 F.3d at 643 (explaining that in enacting § 922(g)(9) Congress recognized that the felon-in-possession ban did not keep guns away from domestic abusers because many domestic abusers are never charged with or convicted of felonies (quoting 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg))). The March 2010 domestic abuse call supports the conclusions that Chovan is at risk of recidivism for domestic violence and that Chovan might use a gun to commit future domestic violence. In light of the domestic abuse call, § 922(g)(9)'s application to Chovan is substantially related to the goal of reducing domestic gun violence.

But even if we were to set aside the March 2010 domestic abuse call and assume that Chovan has had no history of domestic violence since 1996, Chovan has not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high. Nor has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again. In the absence of such

evidence, we conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence.

Finally, we note that if Chovan's as-applied challenge succeeds, a significant exception to § 922(g)(9) would emerge. If Congress had wanted § 922(g)(9) to apply only to individuals with recent domestic violence convictions, it could have easily created a limited duration rather than lifetime ban. Or it could have created a good behavior clause under which individuals without new domestic violence arrests or charges within a certain number of years of conviction would automatically regain their rights to possess firearms. But Congress did not do so. Congress permissibly created a broad statute that only excepts those individuals with expunged, pardoned, or set aside convictions and those individuals who have had their civil rights restored. *See Skoien*, 614 F.3d at 641 ("[S]ome categorical disqualifications are permissible: Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons, nor need these limits be established by evidence presented in court."). The breadth of the statute and the narrowness of these exceptions reflect Congress's express intent to establish a "zero tolerance policy" towards guns and domestic violence.

Because the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence, Chovan's as-applied challenge fails.

CONCLUSION

For the foregoing reasons, we reject Chovan's "civil rights restored" claim, hold that intermediate scrutiny is the proper standard to apply to his Second Amendment claim, and uphold § 922(g)(9) and its application to Chovan under intermediate scrutiny. **AFFIRMED.**

BEA, Circuit Judge, concurring:

I concur in the result of this case. I write separately to express my disagreement with the majority's default determination that persons convicted of domestic violence misdemeanors are thereby disqualified from the core right of the Second Amendment to possess firearms for defense of the home. First, however, let me detail the points on which the majority and I agree.

I.

Based on the weight of authority of our sister circuits, the majority opinion decides to apply to this Second Amendment case the familiar "scrutiny" tests that have become the method of analysis of challenged legislation under the First Amendment. Because appellant does not argue this point but accepts it, *see* Blue Br. at 24 (arguing that strict scrutiny should apply), I will treat the point as waived and accept the application of the tiers of scrutiny analysis to the Second Amendment jurisprudence. *But see Heller v. Dist. of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("Are gun bans and regulations to be analyzed based on the Second Amendment's text, history,

and tradition[,] . . . [o]r may judges re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right? . . . In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1443, 1461–73 (2009) ("[U]nitary tests such as 'strict scrutiny,' 'intermediate scrutiny,' 'undue burden,' and the like don't make sense here" in the Second Amendment context because the language of *Heller* seems to foreclose scrutiny analysis).

I agree with the majority that, if we are to apply the "tiers of scrutiny" to our Second Amendment jurisprudence, the correct way to do so is the two-step inquiry adopted by several other circuits, whereby we "(1) ask[] whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, . . . apply the appropriate level of scrutiny." Maj. Op. at 18.

I also agree with the majority's application of step one. It correctly holds that there is insufficient evidence to conclude that the prohibition on misdemeanants owning firearms is "longstanding." Therefore, Chovan's "Second Amendment rights are intact." Maj. Op. at 20 (quoting *United States v. Chester*, 628 F.3d 673, 681–82 (4th Cir. 2010)).

I further agree with the majority opinion when, at step two, it "recognize[s] that 18 U.S.C. § 922(g)(9) substantially burdens Second Amendment rights."[1] Maj. Op. at 22.

Finally, I agree with the majority that *if* one applies intermediate scrutiny, § 922(g)(9) would satisfy this level of scrutiny. The governmental interest in preventing a possible recidivist from committing more serious violence through the use of a gun is a "substantial governmental interest," and § 922(g)(9) constitutes a "reasonable fit" between the legislation and its goal. Maj. Op. at 23–27.

II.

The sole basis of my disagreement with the majority opinion is the "default" effect of the misdemeanor conviction. I call it "default" because, without explanation,[2] the majority held Chovan's domestic violence misdemeanor conviction deprives him of his core right to gun possession for self-defense in the home, which, the Supreme Court held in *Heller*, the Second Amendment gives a "law-abiding,

[1] I do not, however, think the burden "is lightened" to some degree by the exceptions for those whose convictions have been pardoned, expunged, or set-aside, and for those who have had their civil rights restored. Maj. Op. at 22. If the convictions are no longer extant, there is no burden whatsoever. If the conviction remains, the full burden obtains. There is no "light" burden.

Removal of the convictions *is* relevant, however, to the narrow-tailoring requirement of the strict scrutiny test. *See infra*, at 49–51.

[2] I would say *ipse dixit*, except some other courts *dixerunt'd* first. *See, e.g.*, *Chester*, 628 F.3d at 682–83. So, this is more of an argument from the non-binding authority of our sister circuits' opinions.

responsible citizen."[3] The majority opinion in our case states that Chovan's constitutional "claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue of [his] criminal history as a domestic violence misdemeanant." Maj. Op. at 14 (quoting *Chester*, 628 F.3d at 682–83). Therefore, it concludes, because § 922(g)(9)'s burden, although "substantial[]," is not total, intermediate scrutiny is the correct standard. *Id.* at 22. "In sum," the majority opinion concludes, "§ 922(g)(9) does not implicate the core Second Amendment right . . . ." *Id.* at 23.

Why?

a.

The majority opinion holds that Chovan forfeited his core Second Amendment right when he was convicted of a misdemeanor. *Id.* at 22 (stating that Chovan can no longer be considered a "law-abiding, responsible citizen . . . by virtue of [his] criminal history as a domestic violence misdemeanant"). In this, the majority are not alone. The Fourth Circuit has made a similar conclusion. *See Chester*, 628 F.3d at 682–83.

This default disqualification of misdemeanants from the "core" right of the Second Amendment resembles the Supreme Court's "disqualification" language regarding felons in *Heller*. The Court in *Heller* seemed to equate the status of

[3] It should be noted that the guns Chovan was found to possess were (1) at his home, and (2) of the kind traditionally used for defense of the home (a Winchester shotgun, a .22 caliber rifle, .22 caliber handgun, and a Baldwin & Company antique shotgun).

a felon or of one mentally ill with a presumptive disqualification from the Second Amendment right. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 631 (2008) (linking "disqualifi[cation]" with being a felon or insane); *id.* at 635 ("Assuming that Heller is not *disqualified* from the exercise of Second Amendment rights, the District *must* permit him to register his handgun and *must* issue him a license to carry it in the home.") (emphasis added).

Just as *Heller* found felons to be presumptively disqualified from the protection of the Second Amendment, so the majority have found a domestic violence misdemeanant, Chovan, to be presumptively disqualified from the "core" protection of the Second Amendment. This conclusion seems to stem from a perceived similarity between felons and domestic violence misdemeanants. This conclusion, however, is mistaken. Throughout history, felons have been subject to forfeiture and disqualification, but misdemeanants, in direct contrast to felons, have not.

At common law, there was a fundamental difference between felons and misdemeanants. In particular, felonies resulted in forfeiture of property and rights. 2 William Blackstone, *Commentaries* *96–97 (discussing forfeiture as the historical foundation of felony); *id.* at *377 (describing the possible punishments of serious crime as including "confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like"); *see* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 715 (2009) (recognizing that at common law a felony could result in attainder and "civil death," whereby the felon could no longer "perform[] legal functions, such as being a witness or suing").

Misdemeanors, on the other hand, did not; as the historian Theodore Plucknett put it, "most of the characteristics of criminal proceedings did not attach to misdemeanours. Thus, they were not subject to . . . forfeiture . . . ." Theodore Frank Thomas Plucknett, *A Concise History of the Common Law* 456 (1956). Even today, felons can suffer numerous restrictions on their constitutional rights. *See United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) ("[T]he application of § 922(g) to a violent felon . . . would appear appropriate under any Second Amendment reading. After all, felons lose out on fundamental rights such as voting and serving on juries, and face discrimination that need only survive rational basis review."). Indeed, as this court has held, "felons are categorically different from the individuals who have a fundamental right to bear arms." *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010); *see McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 975 (S.D. Miss. 1995) (finding that "The historical distinction between felonies and misdemeanors is more than semantic. Traditionally, dire sanctions have attached to felony convictions which have not attached to misdemeanor convictions. Many of these sanctions are in force today. Disenfranchisement was, and remains, one such sanction. Another such sanction is that which prohibits felons from owning or possessing firearms" and concluding that laws disenfranchising misdemeanants are subject to strict scrutiny).

Thus, although felon disqualification from the scope of the Second Amendment makes sense from an historical perspective, the same cannot be said for misdemeanants. Felon disqualification from the entire *scope* of the Second Amendment does not justify misdemeanant disqualification from the *core* of the Second Amendment. *See* Volokh, *supra*,

at 1498 ("If felon bans are upheld on the grounds that felons have historically been seen as outside the scope of various constitutional rights, then felon bans would offer a poor analogy for bans on possession by misdemeanants (even violent misdemeanants) . . . .").

b.

Not only does the status-based analogy of felons to misdemeanants not make sense; selecting intermediate scrutiny as the correct level at which to review a categorical, status-based disqualification from the core right of the Second Amendment also does not make sense.

Many circuits have chosen intermediate scrutiny to analyze statutes that undeniably burden Second Amendment rights. They have often done so based on an analogy between the right to free speech and the right to keep and bear arms. Indeed, as the Seventh Circuit has recognized, "[b]oth *Heller* and *McDonald* suggest that First Amendment analogues are . . . appropriate." *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011). The Seventh Circuit went on to summarize the tiers of scrutiny at work in the realm of the First Amendment:

> In free-speech cases, . . . content-based regulations are presumptively invalid, and thus get strict scrutiny. On the other hand, time, place, and manner regulations on speech need only be reasonable and justified without reference to the content of the regulated speech. . . . [R]egulations in a traditional public or designated public forum get strict scrutiny, while regulations in a nonpublic

> forum must not discriminate on the basis of viewpoint and must be reasonable in light of the forum's purpose.

Id. at 708 (internal quotations marks and citations omitted). As the Tenth Circuit has stated, the right to keep and bear arms "is qualified by what one might call the 'who,' 'what,' 'where,' 'when,' and 'why.'" *United States v. Huitron-Guizar*, 678 F.3d 1164, 1165–66 (10th Cir. 2012). The "when" and "where" qualifications are known in free-speech jurisprudence as time, place, and manner restrictions. The "what" and "why" qualifications are content-based restrictions.

That leaves the "who," and it remains a sticking point. Categorical restrictions of constitutional rights based on an individual's class or status fit ill with free-speech jurisprudence. The Seventh Circuit has argued that categorical limits on the Second Amendment are analogous to the categorical limits in the free-speech context, such as obscenity or defamation. *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) ("Categorical limits on the possession of firearms would not be a constitutional anomaly. Think of the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others."). These categorical limits on free speech, however, are based on what is said, not who is saying it. *Cf. Skoien*, 614 F.3d at 649–51 (Sykes, J., dissenting) ("Adapting First Amendment doctrine to the Second Amendment context is sensible in some cases . . . . But this particular First Amendment analogy doesn't work here."). Our constitutional jurisprudence does not analyze status-based restrictions on free speech under intermediate scrutiny. A street-corner harangue on the beauties of revolution can perhaps be

prohibited on grounds that it presents a clear and present danger of violence; but it cannot be prohibited solely because the speaker has a misdemeanor record.

Judge Jones of the Fifth Circuit recognized this incompatability between intermediate scrutiny and status-based disqualifications in her recent dissent from a denial of rehearing en banc. *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc). She disagreed with the opinion's conclusion that intermediate scrutiny was the correct standard to apply to §§ 922(b)(1) and (c)(1), which prohibit federally licensed firearms dealers from selling handguns to persons under the age of twenty-one. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012). The majority in that case chose intermediate scrutiny because "the ban on handgun sales to minors under 21 is analogous to longstanding, presumptively lawful bans on possession by felons and the mentally ill." *Id.* at 206. Judge Jones argued that such categorical exclusions should not be analyzed under intermediate scrutiny.

> The panel's level of scrutiny is based on an analogy between young adults and felons and the mentally ill, as if any class-based limitation on the possession of firearms justifies any other, so long as the legislature finds the suspect "discrete" class to be "dangerous" or "irresponsible." On such reasoning, a low level of scrutiny could be applied if a legislature found that other groups—e.g. aliens, or military veterans with PTSD—were "dangerous" or "irresponsible."

NRA, 714 F.3d at 345 (Jones, J., dissenting). Judge Jones is correct. Categorical curtailment of constitutional rights based on an individual's status requires more rigorous analysis than intermediate scrutiny.

c.

Moreover, when the majority hold that Chovan's status as a misdemeanant excludes him from the core protection of the Second Amendment, it construes *Heller* as erecting not one but *two* barriers preventing persons from asserting their right to keep and bear arms.

The majority quote two passages from *Heller* as pertinent to ascertaining Chovan's Second Amendment rights. The first *Heller* passage discusses presumptive disqualifications from the scope of the Second Amendment.

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

Heller, 554 U.S. at 626–27. In a footnote, the Court held that these restrictions were "presumptively lawful,"[4] and that the "list does not purport to be exhaustive." *Id.* at 627 n.26.

A second *Heller* passage, according to the majority, defines the "core" right protected by the Second Amendment: "And whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

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[4] Although the court in *Heller* said laws that disqualify felons from possessing firearms were "presumptively lawful," it did not explain this phrase. *See United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (stating that "the phrase 'presumptively lawful' could have different meanings . . . . [It] could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny," but preferring the first reading); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (stating that "'presumptively lawful' . . . by implication[] means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge"). *Heller* does not say whether this "presumption" was rebuttable or irrebuttable. If it is rebuttable, moreover, by what can it be rebutted? Again, the opinion is silent. Perhaps the best reading of this footnote is that the presumption is irrebuttable. Just as structural error "requires automatic reversal," *Washington v. Recuenco*, 548 U.S. 212, 218 (2006), so the status of being a felon automatically establishes that those individuals do not have the constitutional right to possess firearms. *See United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010) (upholding § 922(g)(1)'s restriction on firearm possession for felons, and noting that "to date no court that has examined *Heller* has found 18 U.S.C. § 922(g) constitutionally suspect" (internal quotation marks omitted)). The language in *Heller* suggests that felons are, for now at least, conclusively outside the scope of the Second Amendment.

The majority construe the *Heller* Court in these two passages to be recognizing two different hurdles separating citizens from the core right of the Second Amendment. The first hurdle determines whether someone is a felon or mentally ill. If so, this person is presumptively disqualified from the Second Amendment's protection. I agree with this interpretation of the first passage.

The majority construe the second passage, however, as recognizing a further hurdle over which individuals must leap to assert their *core* right to keep and bear arms in defense of the home. Although individuals have access to a non-core Second Amendment right if they are not felons or mentally ill, the majority conclude, only those deemed "law-abiding" and "responsible" can lay claim to the "core" right of the Second Amendment to possess firearms for self-defense in the home. Without articulating a reason, the majority construe the terms "law-abiding" and "responsible" as recognizing a second standard, stricter than the "presumptively lawful" disqualification of felons and the mentally ill. That second standard, the majority conclude, again without explanation, excludes domestic violence misdemeanants. Maj. Op. at 14.

I construe the second passage differently. The terms of the second passage correspond precisely to the terms of the first passage. They are two sides of the same coin. "Law-abiding" in the second passage corresponds to "felon" in the first passage. "Responsible" in the second passage corresponds to "mentally ill" in the first passage. Thus, I read *Heller*'s second passage as restating the first passage. *Heller* does not cast doubt on "prohibitions on the possession of firearms by felons and the mentally ill," which is another way of saying that the Second Amendment establishes rights to

possess firearms for defense of the home in "law-abiding, responsible citizens."

If, as under the majority's reading, the terms "law-abiding" and "responsible" are not tied to "felons" and "mentally ill," how are the lower courts to recognize the limits of the "law-abiding, responsible citizen" standard? Why should we stop with domestic violence misdemeanors in defining categorical disqualifications from the core right of the Second Amendment? Why not all misdemeanors? Why not minor infractions? Could Congress find someone once cited for disorderly conduct to be "not law-abiding" and therefore to have forfeited his core Second Amendment right? Why should not legal determinations that were made without any trial at all disqualify individuals from the core Second Amendment right? Note, § 922(g) does *not* stop with convictions. Section 922(g)(8), for instance, even curtails Second Amendment rights based on restraining orders, with no trial at all, but rather with only a hearing of which the defendant received notice and the opportunity to participate.[5]

[5] The statute 18 U.S.C. § 922(g)(8) states:

> [It shall be unlawful for any person] who is subject to a court order that—**(A)** was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; **(B)** restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and **(C)(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or **(ii)** by its terms explicitly prohibits the use, attempted use, or threatened use of physical

Compare United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) (finding intermediate scrutiny to be the correct level of scrutiny under which to analyze § 922(g)(8) because it targets a "narrow class[] of persons who, based on their past behavior, are more likely to engage in domestic violence," and upholding the law on that ground), *with United States v. Knight*, 574 F. Supp. 2d 224, 226 (D. Me. 2008) (finding that § 922(g)(8) satisfies *strict* scrutiny because "reducing domestic violence is a compelling government interest" and the prohibition is "temporary" and therefore "narrowly tailored"). Why should we not accept every congressional determination for who is or is not "law-abiding" and "responsible" for Second Amendment purposes?

Why not? Because *Heller* was a constitutional decision. It recognized the scope of a passage of the Constitution. The boundaries of this right are defined by the Constitution. They are not defined by Congress. *See NRA*, 714 F.3d at 345 (Jones, J., dissenting) ("In any event, it is circular reasoning to adopt a level of scrutiny based on the assumption that the legislature's classification fits that level.").

As we have seen, in the Founding period, felonies historically resulted in disqualification from certain rights, but misdemeanors did not, nor did infractions, nor restraining orders. I therefore conclude that domestic violence misdemeanants are not disqualified from the core protection of the Second Amendment, and that § 922(g)(9) accordingly should be analyzed, not under intermediate scrutiny, but

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> force against such intimate partner or child that would reasonably be expected to cause bodily injury, [to possess in or affecting commerce, any firearm or ammunition.]

under strict scrutiny. *See United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231 (D. Utah 2009) (finding that strict scrutiny is the correct rigor of analysis to apply to § 922(g)(9) because, first, *Heller* described the right to keep and bear arms as "fundamental," 554 U.S. at 593, and second, because *Heller* classified the Second Amendment right alongside the First and Fourth Amendments which are traditionally analyzed under strict scrutiny, but still upholding the statute under strict scrutiny analysis).

III.

To be sure, strict scrutiny is a rigorous standard. The Supreme Court has called it "'strict' in theory but usually 'fatal' in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) ("Only rarely are statutes sustained in the face of strict scrutiny.") (citing Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972)). *But see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.") (internal quotation marks omitted).

Scholarly analysis shows that federal courts uphold around thirty percent of the laws they analyze under strict scrutiny. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 862–63 (2006). Moreover, federal courts uphold Congressional statutes under strict scrutiny about half the time. *Id.* at 818.

There are several theories regarding what the purpose of strict scrutiny is, and what sorts of governmental acts can

satisfy its rigorous requirements. One theory defines strict scrutiny as upholding laws that undeniably burden constitutional rights only "when the government can demonstrate that infringements are necessary to avoid highly serious, even catastrophic harms." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1302 (2007) (describing several competing theories of strict scrutiny analysis); *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (arguing that "At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to" constitutional rights under strict scrutiny analysis); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (stating that the governmental goals of "maintaining security, discipline, and good order" in a prison can satisfy strict scrutiny analysis).

As Justice Thomas has argued, another way to say "compelling governmental interest" is "pressing public necessity." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2423 n.1 (2013) (Thomas, J., concurring). This "pressing public necessity" consists "only [of] those measures the State must take to provide a bulwark against anarchy, or to prevent violence." *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part).

I have already suggested that free speech doctrines should not be applied to Second Amendment restrictions that are based on the status of the individual. *See supra*, Part II.b. More analogous to status-based restrictions on the right to keep and bear arms would be restrictions on the freedom of association. Freedom of association cases often involve governmental action that restricts association based on the status or conduct of the individuals, just as § 922(g)(9)

restricts the right to keep and bear arms for particular persons based on their status and previous conduct. In both cases, moreover, this governmental action is often directed towards preventing violence and preserving public safety.

Federal courts apply strict scrutiny to freedom of association cases. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms."). Despite applying strict scrutiny, however, federal courts still often uphold statutes affecting freedom of association; in particular, federal courts uphold freedom of association regulations under a strict scrutiny analysis "when the asserted justification for the laws was public safety or effective law enforcement." Winkler, *supra*, at 868; *see, e.g.*, *Tabbaa v. Chertoff*, 509 F.3d 89, 92 (2d Cir. 2007) (finding under strict scrutiny analysis that customs officials did not violate plaintiffs' freedom of association rights by detaining and searching plaintiffs at the border when they returned from an Islamic conference in Canada because "given the intelligence [the officials] received, the inspection policy was narrowly tailored to achieve the compelling governmental interest in preventing potential terrorists from entering the United States"); *Grider v. Abramson*, 180 F.3d 739, 749, 752 (6th Cir. 1999) (finding under strict scrutiny analysis that municipal officials did not violate plaintiffs' freedom of association rights with their crowd control plan during a KKK rally because the plan "constituted a necessary constraint narrowly fashioned to further a compelling governmental interest in public safety and order" to prevent "disorderly conduct, breaches of the peace, and serious injuries to persons and property").

In our case, too, based on the data the majority discuss in detail, the government's interest in public safety and preventing gun violence is sufficiently compelling and narrowly tailored to satisfy those prongs of strict scrutiny analysis. *See* Maj. Op. at 23–27; *cf. United States v. Armstrong*, 706 F.3d 1, 8 (1st Cir. 2013) (finding that § 922(g)(9) satisfies constitutional scrutiny "under any standard").

Section 922(g)(9) frames the governmental interest: to prevent life-threatening harm to a predictable group of victims, i.e. those who have suffered domestic violence, from a predictably violent set of convicted criminals, i.e. those who have been convicted of a domestic violence misdemeanor. As the majority note, there is a sufficient body of penalogical knowledge regarding recidivism in domestic violence cases to satisfy the compelling interest element required in strict scrutiny analysis. Maj. Op. at 25–26; *see also Skoien*, 614 F.3d at 642–44 (discussing these studies in detail). Moreover, as the Supreme Court has stated, § 922(g)(9) targeted a particular deficiency in the felon-in-possession statute.

> Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg). By extending the federal firearm prohibition to persons convicted of "misdemeanor crime[s] of domestic violence," proponents of

> § 922(g)(9) sought to "close this dangerous loophole." *Id.*[] at 22986.

United States v. Hayes, 555 U.S. 415, 426 (2009).

As to "narrow tailoring," the second element of the strict scrutiny test, it is important to note that § 922(g)(9) applies only to those domestic violence convicts who remain convicted. Misdemeanants hold in their own hands the power to remove the taint of conviction and rejoin the protected class of those who may possess firearms. They can seek pardon, expungement, set-aside of their conviction, or restoration of civil rights. 18 U.S.C. § 921(a)(21)(B).[6] The frequency of such expungements, moreover, seem to have risen in many states since the enactment of § 922(g)(9). *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1463–64 & nn. 187–88 (2005).

In answer to Chovan's as-applied challenge, California, where Chovan was convicted, makes expungement of misdemeanor convictions a right. Under § 1203.4a(a) of the California Penal Code, all misdemeanants can have their

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[6] The statute 18 U.S.C. § 921(a)(21)(B) states:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

convictions expunged after completion of their sentences if they have not been charged with or convicted of a further crime and have "lived an honest and upright life." Moreover, defendants must be informed of this right to expungement "either orally or in writing, at the time he or she is sentenced." *Id.* at § 1203.4a(c)(1). Prosecuting attorneys have fifteen days from the filing of the petition for dismissal with the court to object. *Id.* at § 1203.4a(f). This participation of the district attorneys in the process allows California to maintain some adversarial integrity in the expungement proceedings, as the district attorney can oppose the motion if the convict's rehabilitation is doubtful. This system places the evaluation of the convict's rehabilitation, *vel non*, in the state. Indeed, California courts have interpreted § 1203.4a(a) to *mandate* expungement when misdemeanants have complied with its terms. *See, e.g.*, *People v. Chandler*, 250 Cal. Rptr. 730, 734 (Cal. Ct. App. 1988) ("[A] defendant moving under Penal Code section 1203.4a is entitled as a matter of right to its benefits upon a showing that he has fulfilled the conditions of probation for the entire period of probation. It was apparently intended that when a defendant has satisfied the terms of probation, the trial court should have no discretion but to carry out its part of the bargain with the defendant.") (citations and quotation marks omitted).

Section 922 is in part a federalism-based statute. It looks to state law, passing restrictions on certain convicts based on decisions made by state legislatures and courts. Section 922 also ceases to apply if convicts have satisfied the state procedures for expungement. This helps the statute satisfy the narrow tailoring prong of strict scrutiny. It allows those who no longer pose a threat to society to demonstrate their rehabilitation and reclaim their Second Amendment rights.

It is not a blunt instrument. Rather, it targets only those whom the states continue to deem not rehabilitated. It is therefore narrowly tailored to the goal of preventing only those who pose the greatest risk to potential domestic violence victims from possessing guns.

With the aforementioned considerations in mind, I conclude that § 922(g)(9) advances a compelling governmental interest, and does so in a narrowly tailored manner. Therefore, the statute satisfies strict scrutiny analysis.

IV.

The *Heller* opinion did not provide lower courts with explicit guidance on how to analyze challenges to statutes under the Second Amendment. If we are to apply the familiar tiers of scrutiny analysis in Second Amendment cases, instead of a pure textual, historical, and structural analysis, however, history and precedent still dictate a more stringent examination of these issues than the majority allow. Strict scrutiny has become an integral aspect of much of our constitutional jurisprudence. *See* Fallon, *supra*, at 1268 (ranking strict scrutiny "among the most important doctrinal elements in constitutional law"). After applying strict scrutiny to § 922(g)(9), I come to the same conclusion as do the majority, and uphold the law. The close look afforded by strict scrutiny, however, ensures that the law truly is narrowly tailored to further a compelling governmental interest, and ensures that the Second Amendment's contours are drawn by the Constitution, and not by Congress.