Western New England Law Review

Volume 44 *44*
Issue 3

Article 1

2022

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WESTERN NEW ENGLAND LAW REVIEW

Volume 44 2022 Issue 3

CRIMINAL LAW—UNDER THE GUN OF *REHAIF V. UNITED STATES*: HOW STATE LEGISLATURES AND COURTS MUST BLUNT THE EFFECT OF KNOWLEDGE

Meaghan E. Collins[*]

For well over thirty years, courts across the nation maintained an interpretational unanimity in applying 18 U.S.C. § 922(g) in thousands of cases. This law specifies that a defendant commits a crime if they were previously convicted of a felony and then later possess a firearm in or affecting commerce. Under the original statutory interpretation, the government was only required to prove that a person knew of their possession of a firearm. However, in 2019, the Supreme Court of the United States overturned that traditional understanding. Under the more recent interpretation, the government is required to prove not only that a person knew of their possession of a firearm but also that they knew they were a convicted felon at the time of said possession.

There is significant importance in requiring a culpable mental state where statutory elements criminalize otherwise innocent conduct. However, proving such a high mens rea is inherently difficult and stunts successful prosecutions. Thus, this Note acknowledges the many arguments that challenge the Supreme Court's decision based on its harmful effect on prosecutions and inconsistency with public opinion.

More importantly, however, this Note establishes how state legislatures and courts must respond in light of this new, binding precedent. Both should adopt approaches that would avoid the need

[*] J.D. Candidate, Western New England University School of Law, 2022; B.A., University of North Carolina at Charlotte, 2016. Deepest gratitude to my family, friends, and all others I have encountered along this journey. This experience has been such a blessing and your support has meant the world to me. Additionally, sincerest thanks to the members of the *Western New England Law Review* for everything you have done to help produce this Note, I could never have done it without you.

> *to prosecute altogether under the strenuous impositions of* Rehaif v. United States*. But further, in the event of unavoidable prosecution, both should take measures that enhance the chance to obtain convictions favorable to public safety. Overall, 18 U.S.C. § 922(g) does more to combat gun violence than any other law, and we must act to mitigate the effect of the increased mens rea requirement imposed by* Rehaif*.*

INTRODUCTION

Suppose there are whispers of an Islamic State of Iraq and the Levant (ISIL)[1] supporter in Massachusetts. The supporter, Alexander Ciccolo, plans to carry out an attack on behalf of the organization.[2] The government has been notified by a witness who believes that Ciccolo intends to conduct a mass shooting at a state university.[3] The witness reveals Ciccolo has been building bombs and has secured possession of various guns and rifles.[4] As of now, no one has been hurt, but the government needs to move quickly.[5] To secure a hasty arrest, the government decides to prosecute, among other charges, under 18 U.S.C. § 922(g)(1)—felon in possession of a firearm.[6] The statute applies, as Ciccolo was previously convicted of a felony subsequent to operating under the influence (OUI) of liquor.[7] The OUI is a felony crime in violation of Massachusetts law, subject to thirty months of imprisonment;[8] but upon conviction, Ciccolo was instead sentenced to probation.[9] Regardless of Ciccolo's sentencing, his felony status leaves him susceptible to the federal statute.[10]

Federal statute 18 U.S.C. § 924(a)(2) provides that a person has

1. ISIL is a jihadist militant group predominantly located in the territories of Cyprus, Israel, Jordan, Lebanon, Palestine, Syria, and Turkey. ISIS, the Islamic State of Iraq and Syria, is similar. However, ISIS specifically refers to Iraq and Syria. Jonathan Hogeback, *Is It ISIS or ISIL?*, BRITANNICA, https://www.britannica.com/story/is-it-isis-or-isil [https://perma.cc/DGY2-C3M3].

2. United States v. Ciccolo, No. 15-cr-30018-MGM, 2015 WL 9294206, at *1 (D. Mass. Dec. 21, 2015).

3. *Id.*

4. *Id.* at *2.

5. *See id.*

6. *Id.*

7. *Id.* at *2 n.2.

8. *See* MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West, Westlaw through ch. 29 of the 2021 1st Ann. Sess.).

9. Raya Jalabi, *Massachusetts Man Arrested by FBI in Connection with Alleged Isis Attack Plot*, THE GUARDIAN (July 13, 2015, 4:04 PM), https://www.theguardian.com/world/2015/jul/13/massachusetts-man-arrested-isis-attack-plot [https://perma.cc/DPJ2-ZVK3].

10. *Ciccolo*, 2015 WL 9294206, at *2.

committed a crime if he "knowingly" violates 18 U.S.C. § 922(g).[11] Section 922(g) criminalizes possession of a firearm when four elements are satisfied:

(1) Status element;

(2) Possession element;

(3) Jurisdictional element (in or affecting commerce); and

(4) Firearm element.[12]

Thirty years ago, courts of appeals across the country had held that the mens rea requirement ("knowingly") was only applicable to the possession element.[13] Therefore, under the former interpretation of § 922(g), the only requirement was proof that a person *knew* of their *possession*. The main premise for this holding was that Congress sought to restrict potentially dangerous and irresponsible people from possessing a firearm.[14] Indeed, in May 2018, Alexander Ciccolo was found guilty of his crimes consistent with that understanding.[15]

However, in 2019, the Supreme Court in *Rehaif v. United States* held that the mens rea requirement must apply to both the status and possession elements.[16] As a result, the current requirement would be proof that Ciccolo *knew* of his *possession* of a firearm *and* that he *knew* he was a *felon*. The main rationale for this holding was that Congress would require a culpable mental state where statutory elements criminalize otherwise innocent conduct—in this case, possession of a firearm.[17] Under this present-day interpretation, conviction could hinge on slight details. For example, would Ciccolo have known he was a felon when he was placed on probation instead of serving prison time? Should we allow such a dangerous individual to walk because he did not *know* of his felony status?

11. 18 U.S.C. § 924(a)(2).

12. *See id.* § 922(g). Note that element one contains nine statuses: convicted felons, fugitives from justice, unlawful users or addicts of controlled substances, "mental defectives" or those committed to mental institutions, "illegal aliens" and certain other aliens admitted under nonimmigrant visas, dishonorably discharged servicemen, individuals who have renounced their U.S. citizenship, those subject to a court order related to domestic violence, and persons convicted of a domestic violence misdemeanor. *Id.*

13. *See* Rehaif v. United States, 139 S. Ct. 2191, 2210 (2019) (Alito, J., dissenting).

14. *Id.* at 2208.

15. OFF. OF PUB. AFFS., U.S. DEP'T OF JUST., PRESS RELEASE NO. 18-1144, MASSACHUSETTS MAN INSPIRED BY ISIS SENTENCED FOR PLOTTING TO ENGAGE IN TERRORIST ACTIVITY (2018), https://www.justice.gov/opa/pr/massachusetts-man-inspired-isis-sentenced-plotting-engage-terrorist-activity [https://perma.cc/F3HC-5LAM].

16. *Rehaif*, 139 S. Ct. at 2194.

17. *Id.* at 2195.

Proving such a high mens rea status comes with incredible inherent difficulty.[18] Indeed, the government in *Rehaif* argued that proving a felon "'knew and later remembered' the nature of his conviction and the potential penalties could be a challenge in some cases."[19] For example, in *United States v. Games-Perez*, the judge in the defendant's *previous* criminal case for attempted robbery repeatedly failed to tell the defendant he would become a felon upon conviction.[20] In the defendant's *subsequent* criminal case, brought under § 922(g), proving knowledge of one's status as a convicted felon was not required at the time.[21] Consequently, even though the defendant did not know he was a felon—as a result of the attempted robbery case—he was sentenced to ten years in prison when he was later caught with possession of a firearm—under the § 922(g) case.[22] At first glance, such an outcome seems unfair, and the new knowledge requirement accounts for that injustice. However, in accounting for the injustices done to defendants who are convicted of relatively less serious crimes, by requiring the additional knowledge of one's felony status, the requirement effectively slams the door on the government's ability to prosecute dangerous individuals who plan or carry out more heinous crimes. Had the defendant in *Games-Perez* been guilty of similar grievous acts as evidenced in *Ciccolo*, a favorable conviction would be unattainable under the statute as proving that defendant's knowledge under such circumstances would be impossible. Thus, *Rehaif*'s overhaul of the traditional interpretation of the knowledge requirement inevitably limits successful prosecutions under the statute when they may be needed most.[23]

Section 922(g) has been the most effective federal law in combating

18. United States v. Balint, 258 U.S. 250, 254 (1922) (holding that "difficulty of proof of knowledge" was considered when the Court opted for a strict liability approach to statutory interpretation).

19. MICHAEL A. FOSTER, CONG. RSCH. SERV., LSB10290, WHAT YOU DON'T KNOW CAN'T HURT YOU: SUPREME COURT TO ADDRESS KNOWLEDGE REQUIREMENT FOR FIREARM OFFENSES 4 (2019), https://fas.org/sgp/crs/misc/LSB10290.pdf [https://perma.cc/NU3T-9ZZH].

20. *See* United States v. Games-Perez, 667 F.3d 1136, 1137–40 (10th Cir. 2012), *abrogation recognized by* United States v. Craine, 995 F.3d 1139 (10th Cir. 2021), *petition for cert. filed*, Craine v. United States, No. 21-5827 (U.S. Sept. 30, 2021); *see also* Evan Lee, *Argument Analysis: Court Leaning Toward Requiring the Government to Prove that a Felon in Possession Knew He Was a Felon*, SCOTUSBLOG (Apr. 24, 2019, 11:41 AM), https://www.scotusblog.com/2019/04/argument-analysis-court-leaning-toward-requiring-the-government-to-prove-that-a-felon-in-possession-knew-he-was-a-felon/ [https://perma.cc/TGS4-VH63].

21. *Games-Perez*, 667 F.3d at 1140.

22. Lee, *supra* note 20.

23. Rehaif v. United States, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (recognizing that it will be significantly more difficult to convict individuals falling into § 922(g) categories under a knowledge requirement).

gun violence for years.[24] *Rehaif* not only undermines that success but may further unravel the work that § 922(g) has already done. Lower courts have received numerous applications for relief that may lead to the release of dangerous individuals who were already placed behind bars.[25]

Therefore, in light of *Rehaif*, this Note will address the various ways both state legislatures and courts must respond. State legislatures should adopt legislation, and state courts should adopt procedures, that would avoid the need to prosecute whatsoever under the strenuous impositions of *Rehaif*. Further, in the event of unavoidable prosecution, they should create legislation and design standards, respectively, that enhance our chances of successful convictions.

First, Part I of this Note examines the relevant history of § 922(g). It will describe how legislative intent, textual analysis, and public policy all support the original interpretation of the federal statute. Next, Part I will explain *Rehaif* and how its analysis led to the Court's modern interpretation. Part II focuses on the many arguments that challenge the Supreme Court's decision in *Rehaif*, including an examination of legislative intent and textual analysis. Part III of this Note argues the many ways in which state legislatures and courts must manage the effect of the increased mens rea requirement. Specifically, it will argue what actions are required to avoid the need to prosecute under *Rehaif*'s interpretation and, in the event of unavoidable prosecution, what additional procedures would enhance the chances of obtaining convictions favorable to public safety. Finally, Part IV will conclude by identifying the potential complications that are likely to arise with these new measures and how growing public support for reducing gun violence squelches them.

24. *Id.*; *see also* U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2018) [hereinafter 2018 FACT REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf [https://perma.cc/L89Z-TE9D]; U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2017) [hereinafter 2017 FACT REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY17.pdf [https://perma.cc/YG99-G8YT]; U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2016) [hereinafter 2016 FACT REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_in_Possession_FY16.pdf [https://perma.cc/T25T-YRFB].

25. *See* Taylor v. Barnhart, No. 19-cv-00245, 2020 WL 5084027 (E.D. Ky. Aug. 26, 2020), *appeal filed*, Taylor v. Warden, FCI Manchester, No. 20-6023 (6th Cir. Sept. 8, 2020); Boswell v. United States, No. 5:20-CV-149, 2020 WL 5415252 (N.D.W. Va. Aug. 13, 2020); Jones v. United States, No. 20-22566-CV-MORENO, 2020 WL 5045199 (S.D. Fla. Aug. 7, 2020); Gayle v. United States, No. 19-CV-62904-BLOOM/Reid, 2020 WL 4339359 (S.D. Fla. July 28, 2020); Guerrero v. Quay, No. 20-cv-39, 2020 WL 4226566, at *1 (M.D. Pa. July 23, 2020).

I. THE HISTORY OF § 922(G) AND HOW *REHAIF V. UNITED STATES* SHOT DOWN THE ORIGINAL INTERPRETATION

An abundance of heinous crimes influenced the first promulgation of gun control in the United States.[26] But, like many new laws impacting highly valued constitutional rights, initial enforcement was often unsuccessful.[27] However, years later, gun control laws experienced renewed approval due to momentous national crises,[28] including the murders of some of America's most prominent historical figures. Gun control laws, including § 922(g), have led to myriad prosecutions against dangerous offenders.[29] Before *Rehaif*, the narrow, original interpretation of § 922(g) allowed for many successful convictions.[30] However, since the Supreme Court's more recent, broad interpretation in *Rehaif*, successful convictions are harder to obtain.[31]

This Part begins by detailing the relevant history underlying the enactment of § 922(g). In addition, this Part will explain the language of § 922(g) and how different interpretations have led, and will lead, to different prosecutorial results. Understanding the history and application of § 922(g) over time will help to better clarify what approaches should be taken to avoid the need to prosecute under *Rehaif*'s interpretation and, in the event of unavoidable prosecution, what measures could enhance our chances of convictions favorable to public safety.

A. *The Inception of § 922(g)*

The National Firearms Act of 1934 (NFA)[32] and the Federal Firearms Act of 1938 (FFA)[33] were America's first pieces of national gun control legislation.[34] Congress enacted both statutes in response to a spike in "gangland crimes of that era."[35] The NFA imposed taxes on the

26. Sarah Gray, *Here's a Timeline of the Major Gun Control Laws in America*, TIME (Apr. 30, 2019, 11:13 AM), https://time.com/5169210/us-gun-control-laws-history-timeline/ [https://perma.cc/954L-JYPE].

27. *See generally National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES [hereinafter *National Firearms Act History*], https://www.atf.gov/rules-and-regulations/national-firearms-act [https://perma.cc/5R5D-CG37].

28. *See* United States v. Davis, 139 S. Ct. 2319, 2337 (2019) (Kavanaugh, J., dissenting).

29. Jessica Roth, *Rehaif v. United States: Once Again, a Gun Case Makes Surprising Law*, 32 FED. SENT'G REP. 23, 23 (2019).

30. *Id.*

31. *See* Rehaif v. United States, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (recognizing that it will be significantly more difficult to convict individuals falling into § 922(g) categories under a knowledge requirement).

32. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (amended 1954).

33. Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938) (repealed 1968).

34. Gray, *supra* note 26.

35. *Id.*

manufacturing, selling, and transporting of certain firearms.[36] Additionally, the NFA required any persons transferring certain firearms to register them with the Secretary of the Treasury.[37] On the other hand, the FFA required firearm dealers to obtain licenses and mandated firearm sellers to keep records.[38] State authorities regularly used the Acts' requisite record-keeping and registration information to prosecute persons whose possession violated them.[39]

Unfortunately, it was not long after these statutes were enacted that they began to face resistance. For example, in 1968, the Supreme Court decided *Haynes v. United States*.[40] In *Haynes*, the defendant was charged with knowingly possessing a firearm that had not been registered as required by the NFA.[41] The Court noted that the defendant's charges were brought under one NFA section that, as the government argued, "chiefly punishe[d] possession," while the other section that chiefly punished "failure to register" was left out.[42] However, the Court drew no distinction between the sections, stating each were "equally fundamental ingredients of both offenses."[43] This meant that a "status of unlawful possession" was created in the first section by the registration requirements of the second section.[44] Thus, since the Act creates a status of unlawful possession, one cannot be compelled to provide incriminating information via registration requirements in violation of constitutional protections.[45] Subsequently, the Court held that, in essence, where a defendant possesses an unregistered firearm, a legitimate claim of privilege against self-incrimination would be a "full defense" against the NFA's registration requirements.[46] After the *Haynes* decision, the NFA was essentially rendered useless.[47]

Beginning in the 1960s, gun violence escalated to levels that overwhelmed the nation.[48] Between 1963 and 1968, annual murders

36. *Id.*

37. *National Firearms Act History*, *supra* note 27.

38. Gray, *supra* note 26.

39. *National Firearms Act History*, *supra* note 27.

40. Haynes v. United States, 390 U.S. 85 (1968).

41. *Id.* at 86.

42. *Id.* at 95.

43. *Id.*

44. *Id.* (citing Castellano v. United States, 350 F.2d 852, 854 (10th Cir. 1965)).

45. *See id.* at 95.

46. *Id.* at 100.

47. *National Firearms Act History*, *supra* note 27. To match, there was also little enforcement of the FFA during the same period. *See* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. L. STUD. 133, 142 (1975) (noting that only a total of 275 arrests were reported between 1966 and 1968 under the FFA, and no dealers were ever charged with violations until 1968).

48. United States v. Davis, 139 S. Ct. 2319, 2336 (2019) (Kavanaugh, J., dissenting).

committed with a firearm increased by 87%.[49] Aggravated assaults with firearms surged by more than 230%.[50] In addition, this was the decade in which prominent figures in America's history were assassinated.[51] President John F. Kennedy was assassinated in 1963.[52] Civil rights leader Malcolm X was murdered in 1965.[53] Finally, Martin Luther King Jr., one of history's most famous civil rights leaders, and Senator Robert F. Kennedy, also largely beloved for his civil rights advocacy, were killed in 1968.[54] These events, combined with the lack of current firearms legislation enforcement, had a strong impact on public opinion: "Faced with an onslaught of violent gun crime and its debilitating effects, the American people demanded action."[55]

By the end of 1968, President Lyndon B. Johnson signed the Gun Control Act (GCA),[56] which stands as governing law today.[57] The GCA banned interstate firearms shipments to private persons.[58] The Act also strengthened requirements for gun dealers through reinforced licensing and record-keeping procedures.[59] But most importantly, the GCA barred specific classes of relevant persons from possessing a firearm in or affecting commerce.[60] The GCA's current prohibited categories of individuals include convicted felons, those adjudicated as "mental defectives,"[61] "illegal aliens,"[62] and perpetrators of domestic violence,

49. *Id.*

50. *Id.*

51. Gray, *supra* note 26; *Why Were So Many American Political Figures Assassinated in the 1960s?*, SKY HISTORY, https://www.history.co.uk/article/why-were-so-many-american-political-figures-assassinated-in-the-1960s [https://perma.cc/37SX-62RB].

52. *Why Were So Many American Political Figures Assassinated in the 1960s?*, *supra* note 51.

53. *Id.*

54. *Id.*

55. *Davis*, 139 S. Ct. at 2337 (Kavanaugh, J., dissenting).

56. Gray, *supra* note 26. The GCA significantly altered then-existing legislation, repealing and replacing the FFA while substantially revising the NFA. *Id.*

57. *See generally* Gun Control Act of 1968, § 101, Pub. L. No. 90-618, 82 Stat. 1.

58. Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—and What People Get Wrong About That History*, TIME (Oct. 30, 2018, 11:52 AM), https://time.com/5429002/gun-control-act-history-1968/ [https://perma.cc/72V6-NFND].

59. *Id.*

60. *See supra* text accompanying notes 11–12.

61. Although the term "mental defective" is outdated, it is defined by the following:

> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the mental capacity to contract or manage his own affairs.
>
> The term shall include-
>
> (1) A finding of insanity by a court in a criminal case; and

among others.[63] Congress's intent was "[to prohibit] dangerous individuals from acquiring firearms."[64] As Justice Kavanaugh noted in a related § 922 case, Congress recognized that "[c]rime and firearms form a dangerous mix."[65] The GCA would "keep firearms out of the hands of those not legally entitled to possess them."[66]

In effect, § 922(g) has been a federal prosecutor's workhorse against dangerous offenders.[67] Convictions under § 922(g) accounted for around 9% of all federal sentences.[68] From 2015 to 2018, approximately 5,000–6,000 sentences were imposed under § 922(g).[69] Moreover, the GCA's imposition of steep penalties undeniably contributed to the nation's overall decrease in gun violence.[70] In the last twenty-five years alone,

> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility . . . .

27 C.F.R. § 478.11 (2021).

62. This Note recognizes that the term "illegal alien," like "mental defective," is also not a neutral descriptor. However, this Note uses such terms only to further conform with its purpose of focusing on the specific language of § 922(g). For the purposes of the statute, an "illegal alien" includes any individual:

> (a) Who unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA);
>
> (b) Who is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted;
>
> (c) Paroled under INA section 212(d)(5) whose authorized period of parole has expired or whose parole status has been terminated; or
>
> (d) Under an order of deportation, exclusion, or removal, or under an order to depart the United States voluntarily, whether or not he or she has left the United States.

Id.

63. 18 U.S.C. § 922(g).

64. CONG. RSCH. SERV., 97TH CONG., FEDERAL REGULATION OF FIREARMS 21 (Comm. Print 1982), https://www.ncjrs.gov/pdffiles1/Digitization/89777NCJRS.pdf [https://perma.cc/E6QJ-6PE7]; *see also* Barrett v. United States, 423 U.S. 212, 218 (1976) (reiterating that Congress wished to restrict "potentially irresponsible and dangerous" individuals).

65. United States v. Davis, 139 S. Ct. 2319, 2336 (2019) (Kavanaugh, J., dissenting); *see also* Gun Control Act of 1968, § 101, Pub. L. No. 90-618, 82 Stat. 1. The stated purpose of the GCA is to "provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." *Id.*

66. S. REP. NO. 90-1097, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113.

67. Roth, *supra* note 29, at 23.

68. *Id.* at 23 n.4; *see also* 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

69. Roth, *supra* note 29, at 23 n.4.

70. *Davis*, 139 S. Ct. at 2337 (Kavanaugh, J., dissenting); *see also* 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.").

annual murders committed with a firearm dropped by roughly 50%.[71] The percentage of annual violent crimes, including aggravated assaults, decreased by about 75%.[72] It is important to understand this history and significant impact of § 922(g) to better understand the consequences of the *Rehaif* decision.

B. Rehaif *and the Knowledge Requirement of § 922(g)*

In 1986, Congress passed the Firearm Owners' Protection Act which amended 18 U.S.C. § 924 to add a mens rea element to the prohibition.[73] The Firearm Owners' Protection Act states that only one who "knowingly violates" 18 U.S.C. § 922(g) shall be found criminally liable.[74] This new scienter element required the government to prove that the "defendant's conduct was knowing," not that they knew their actions violated the law.[75] For example, prosecutors would need to prove that the individual knowingly possessed a gun, not that the individual knew their possession of the gun was illegal.[76] Courts uniformly limited the interpretation even further with unanimous holdings that "knowingly" only applied to the possession element, not the status element or any other element.[77] More notably, many of the highest state courts have interpreted their laws that are similar to § 922(g) to be read in the same way.[78]

71. *Davis*, 139 S. Ct. at 2337 (Kavanaugh, J., dissenting).

72. *d.*

73. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); 18 U.S.C. § 924(a)(2) ("Whoever *knowingly* violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 . . . ." (emphasis added)).

74. *d.*

75. H.R. REP. NO. 99-495, at 10 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1327, 1336 (citing United States v. Freed, 401 U.S. 601, 607–610 (1971)).

76. *See id.* at 9–10.

77. *See* United States v. Dancy, 861 F.2d 77, 81 (5th Cir. 1988) (dispelling the notion that "knowingly" was to apply to all elements by citing House Report 495, which stated that "[c]ase law interpreting the criminal provisions of the Gun Control Act have required that the government prove that the defendant's conduct was knowing, but not that the defendant knew that his conduct was in violation of law. . . . It is the Committee's intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results"); *see also* United States v. Fulbright, 348 F. App'x 949, 951 (5th Cir. 2009) (rejecting the idea that *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), overruled *Dancy*, 861 F.2d 77, in stating that "knowingly" should be applied to every element of an offense because that case involved an entirely different statute); Rehaif v. United States, 139 S. Ct. 2191, 2210 (2019) (Alito, J., dissenting) (citing *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States v. Rose*, 587 F.3d 695, 705–06 (5th Cir. 2009); and many others).

78. *See* Brief of Amicus Curiae Everytown for Gun Safety Support Fund in Support of Respondents at 11–19, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280), http://guptawessler.com/wp-content/uploads/2019/08/NYSRPA-v.-NYC-Amicus-8.12-FINAL.pdf [https://perma.cc/H3G6-67UC] (collecting cases to demonstrate that the federalist system permitted such interpretations when it came to public

Recently, in 2019, the original interpretation was expanded by the Court in *Rehaif v. United States*. Petitioner Hamid Mohamed Ahmed Ali Rehaif, a citizen of the United Arab Emirates, came to the United States on a student visa.[79] The visa allowed him to stay in the country if he maintained a full-time student status.[80] Rehaif proceeded to fail all but one of his classes at the Florida Institute of Technology, which led to the termination of his enrollment status.[81] The school notified Rehaif, via e-mail, that his enrollment termination meant that his status as a lawful alien would also be revoked.[82] Subsequently, Rehaif moved from the campus to a hotel, where he frequented a firing range nearby for nearly two months.[83] Rehaif was arrested under § 922(g) for possession of a firearm by an illegal alien when the FBI found him with firearms in his hotel room.[84]

Rehaif argued that, because he did not know of his illegal alien status when he was no longer a student, he could not be convicted.[85] The Court recognized that, historically, the scienter requirement of § 924 only applied to the possession element of § 922(g).[86] However, the Court stated, "[w]e see no basis to interpret 'knowingly' as applying to the second § 922(g) element but not the first."[87] Generally, courts have applied the presumption in favor of scienter to be read into each element that would criminalize otherwise innocent conduct.[88] Meaning, the government must prove that a person knew of their possession *and* knew of their status (e.g., illegal alien, felon, etc.).[89] This conclusion—now binding on lower courts—has not gone without its challenges given the significant number of prosecutions brought under § 922(g) each year. Understanding the relevant objections to this new interpretation under *Rehaif* will help to discern the actions that must be taken in response.

II. CHALLENGES TO *REHAIF*

Judges and scholars have challenged *Rehaif* with numerous arguments.[90] Many of these challenges stem from Justice Alito's lengthy

safety).

79. *Rehaif*, 139 S. Ct. at 2194.

80. *Id.* at 2201 (Alito, J., dissenting).

81. *Id.*

82. *Id.* at 2201–02.

83. *Id.* at 2202.

84. *Id.*

85. *Id.* at 2195 (majority opinion).

86. *Id.*

87. *Id.* at 2196.

88. *Id.* at 2195 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).

89. *Id.*

90. *See generally id.* at 2201–13 (Alito, J., dissenting); Roth, *supra* note 29; Evan Lee, *Opinion Analysis Felons-in-Possession Must Know They Are Felons*, SCOTUSBLOG (June 21,

dissent in *Rehaif*.[91] The primary concern among all critics is that *Rehaif* fails to conform with congressional intent to restrict dangerous individuals from possessing firearms.[92] A second concern is that the knowledge requirement *Rehaif* created is not supported by standard textual interpretations.[93] And finally, the last prevalent concern is that the Court chose to rely on one provision of the Model Penal Code without addressing why other codified portions, of equal weight, were inapplicable.[94] These arguments are but a few of many. Regardless, they do well to highlight the predominant grounds on which different authorities continue to challenge the heightened mens rea requirement.

A. Rehaif *Ignores Congressional Intent*

The main argument of the *Rehaif* majority for reading scienter as applying to one's status was to prevent the criminalization of otherwise innocent conduct.[95] Meaning, that simply being a felon or "illegal alien" is not inherently wrongful unless that person knew that their status belonged to one of the categories of prohibited possessors.[96] On its face, such reasoning appears sound. Yet, for that analysis to hold, *Rehaif* would have us believe that committing a felony or perpetrating domestic violence, for example, is the type of innocent conduct meant to be protected.

That may be, but the congressional intent to "keep firearms out of the hands of those not legally entitled to possess them"[97] would suggest otherwise. Justice Alito articulates this criticism best by looking to other statuses § 922(g) lists.[98] First, he focuses on the fourth status[99]:

> Congress thought that persons who [are adjudicated mental defectives] lack the intellectual capacity to possess firearms safely.

2019, 7:16 PM), https://www.scotusblog.com/2019/06/opinion-analysis-felons-in-possession-must-know-they-are-felons/ [https://perma.cc/6ZRR-PLZT].

91. *See Rehaif*, 139 S. Ct. at 2201–13 (Alito, J., dissenting).

92. *d.* at 2206.

93. *d.*

94. Lee, *supra* note 90; Roth, *supra* note 29, at 24.

95. *Rehaif*, 139 S. Ct. at 2195 (2019) (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994)).

96. *See id.*

97. S. REP. NO. 90-1097, at 2 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113.

98. 18 U.S.C. § 922(g). Note that element one contains nine statuses: convicted felons, fugitives from justice, unlawful users or addicts of controlled substances, those who have been adjudicated as "mental defectives" or have been committed to mental institutions, "illegal aliens" and certain other aliens admitted under nonimmigrant visas, dishonorably discharged servicemen, individuals who have renounced their U.S. citizenship, those subject to a court order related to domestic violence, and persons convicted of a domestic violence misdemeanor. *Id.*

99. *Rehaif*, 139 S. Ct. at 2207 (Alito, J., dissenting); § 922(g)(4).

> Is it likely that Congress wanted § 922(g) to apply only to those individuals who nevertheless have the capacity to know that they fall within the complicated definition set out in the regulation?[100]

To expand on this argument, Justice Alito focuses on the eighth status: a person who is subject to a specific court order that requires them not to harass, stalk, threaten, or cause reasonable fear of bodily injury to an intimate partner or child of an intimate partner.[101] With the new interpretation, prosecutors would need to prove knowledge of many different factual circumstances for a proper conviction under this status.[102] However, "[d]id Congress want a person who terrorized an intimate partner to escape conviction under § 922(g) by convincing a jury that he was so blinded by alcohol, drugs, or sheer rage that he did not actually *know* some of these facts when he acquired a gun?"[103]

Finally, Justice Alito points to the ninth status: persons convicted of a domestic violence misdemeanor.[104] Justice Alito recognizes that courts, including the U.S. Supreme Court, have never agreed on the meaning of a crime of domestic violence.[105] Yet the Supreme Court in *Rehaif* would now require the defendant himself to know.[106] For these reasons, challenges to *Rehaif* imply that one cannot honestly argue Congress intended to protect these "otherwise innocent" statuses when it explicitly sought to restrict these dangerous persons.[107]

B. Rehaif's *Ambiguous Textual Interpretation*

As secondary support, *Rehaif* stated that basic textual

100. *Rehaif*, 139 S. Ct. at 2207 (Alito, J., dissenting).

101. *d.*; § 922(g)(8).

102. *See* § 922(g)(8) (requiring the individual *knew* they received notice of a court order, *knew* that the order addressed harassing, stalking, or threatening, and *knew* that their conduct was directed towards an "intimate" partner, etc.); *see also Rehaif*, 139 S. Ct. at 2207 (Alito, J., dissenting).

103. *Rehaif*, 139 S. Ct. at 2208.

104. *d.*; § 922(g)(9).

105. *Rehaif*, 139 S. Ct. at 2208 (Alito, J., dissenting).

106. *Id.*; *see also* Jake Charles, *"A Rogue's Gallery of Offenses," Implications of Rehaif and Davis for Prosecuting Gun Crimes*, DUKE CTR. FOR FIREARMS L. (June 25, 2019), https://sites.law.duke.edu/secondthoughts/2019/06/25/a-rogues-gallery-of-offenses-implications-of-rehaif-and-davis-for-prosecuting-gun-crimes/ [https://perma.cc/PJ4S-TASP] ("The [Supreme] Court left Justice Alito's worries about other statuses for another day . . . .").

107. Alito's argument in support of congressional intent is further supported by *United States v. Balint*, 258 U.S. 250 (1922). There, the Court also considered whether scienter was a necessary element of offense when a man was indicted for selling narcotic substances. *Id.* at 251. In that case, the defendant stated he was unaware of the nature of the drugs he was selling and thus could not be convicted. *Id.* However, the Court stated that "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 254.

interpretations, commonly utilized in criminal law, support a reading that scienter applies to the status element of § 922(g).[108] Generally, scienter is naturally read to apply to all subsequently listed elements of a crime.[109] Thus, if "knowingly" introduces a criminal statute, then the word is treated almost like an adverb or adjective that travels through the sentence, modifying each subsequent element of the offense.[110] The petitioner argued, and the majority agreed, that it would be "to commit [a] sin" to read "knowingly" as conveniently leaping over the first element, applying only to the second.[111]

Again, taken at face value, this argument would seem persuasive. And, while what that argument maintains is generally true, it does not apply here because the scienter element is not present at the beginning of the statutory section.[112] In fact, the scienter element is not present in § 922(g) at all.[113] The element was added later in § 924 as part of the previously mentioned Firearm Owners' Protection Act amendment.[114] Accordingly, Justice Alito argues in his dissent that the petitioner's argument—and thus the majority of the Court that accepts that argument—is guilty of the exact same "leaping" argument it criticizes: "[The Court] has 'knowingly' performed a jump of Olympian proportions, taking off from § 924(a)(2), sailing backward over more than 9,000 words in the U.S. Code, and then landing—conveniently—at the beginning of the enumeration of the elements of the § 922(g) offense."[115]

Overall, the *Rehaif* majority stated that there was no reason to read the mens rea requirement as applying to the second element, but not the first.[116] But it should be noted that Justice Alito's textual argument described above, concluding otherwise, was the first of many that Alito brought to attention in his dissent.[117] More significantly, Justice Alito's arguments are bolstered by the "practical unanimity" of appellate courts interpreting their own analogous laws in the same manner for well over thirty years.[118] Indeed, considering both congressional intent and textual

108. *See Rehaif*, 139 S. Ct. at 2195–96.

109. *Id.* at 2196 (citing Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009)).

110. *See id.*

111. *Id.* at 2203 (Alito, J., dissenting).

112. *See* 18 U.S.C. § 922(g).

113. *See* § 922(g).

114. *See* § 924(a)(2). *Compare* 18 U.S.C. § 924(a)(2), *with* 18 U.S.C. § 922(g).

115. *Rehaif*, 139 S. Ct. at 2203 (Alito, J., dissenting).

116. *Id.* at 2196 (majority opinion).

117. *See id.* at 2203 (Alito, J., dissenting) (identifying more than four different interpretational possibilities).

118. *Id.* at 2210 (citing *United States v. Smith*, 940 F.2d 710, 713 (1st Cir. 1991); *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012); *United States v. Rose*, 587 F.3d 695, 705–06 (5th Cir. 2009); and many others).

interpretation, there were many reasons to keep the mens rea requirement from being read into the first element of § 922(g).

C. Rehaif's *Reliance on the Model Penal Code*

Finally, the *Rehaif* majority reached for Model Penal Code section 2.02(4) to bolster its argument that the scienter requirement applies to the status element of § 922(g).[119] The Code prescribes that where scienter is a requirement for the offense, the condition must apply to all material elements of the offense.[120] But critics point out that Congress has never adopted any portion of the Code.[121] Further, critics argue that the Supreme Court has never relied on this particular Code provision.[122] Justice Alito recognized that there is no reason to believe Congress meant to impose the highest mens rea degree in this way, especially when the Supreme Court has previously held that "different elements of the same offense can require different mental states."[123] Justice Alito posed the following question: "Why not require reason to know or recklessness or negligence?"[124]

A few critics attempt to answer this question. One legal scholar, Evan Lee, an emeritus professor of law at the University of California Hastings College of Law in San Francisco,[125] addressed potential culpability based on a "reason to know."[126] Model Penal Code section 2.02(7) states that a requirement of knowledge is satisfied if one is aware of the high probability a particular fact exists.[127] Lee indicated that the Court could have easily accepted culpability based on section 2.02(7) due to its "open reliance" on section 2.02(4).[128] For example, Lee considered Justice Alito's hypothetical case, similar to *Rehaif*, where a student's immigration visa expired when the student failed out of school.[129] When the student's grades were sent to him at the end of the semester, he deliberately declined to look at them.[130] Lee opined that the student was aware of the high probability that his immigration status expired, making him an "illegal alien": "[H]is refusal to confirm that fact

119. *See id.* at 2195 (majority opinion).

120. MODEL PENAL CODE § 2.02(4) (AM. L. INST., Proposed Official Draft 1962). 121. Roth, *supra* note 29, at 24.

122. *Id.*

123. *Rehaif*, 139 S. Ct. at 2212 (Alito, J., dissenting) (quoting Staples v. United States, 511 U.S. 600, 609 (1994)).

124. *Id.*

125. *Evan Lee*, UC HASTINGS L., https://www.uchastings.edu/people/evan-lee/ [https://perma.cc/6TLQ-THFZ].

126. *See* Lee, *supra* note 90.

127. MODEL PENAL CODE § 2.02(7) (AM. L. INST., Proposed Official Draft 1962).

128. Lee, *supra* note 90.

129. *Id.*

130. *Id.*

will not prevent a conclusion that he knew it."[131] Thus, section 2.02(7) was just as eligible for the majority to use.

Additionally, Jessica Roth, a professor of law at the Benjamin N. Cardozo School of Law in New York,[132] addressed culpability based on recklessness.[133] In essence, Model Penal Code section 2.02(1)(c) defines recklessness as a conscious disregard of a material element that exists.[134] Professor Roth argued that the Court could have been open to recklessness as the presumptive scienter floor simply because it neglected to address whether recklessness would suffice in the face of statutory silence.[135] Professor Roth cites Justice Alito's dissent in *Rehaif* where he noted that neither the petitioner nor the majority had any answer as to whether recklessness could be required.[136] She then looked to Supreme Court case *Elonis v. United States*, where again, the Court did not address recklessness because "the issue had not been adequately briefed."[137] Overall, Professor Roth identified a trend where Justices are open to considering recklessness for culpability, which therefore could have been used by the *Rehaif* Court.

Altogether, the aforementioned arguments based on congressional intent, textual interpretation, and reliance on the Model Penal Code represent only a few of the contentions with *Rehaif*. Unfortunately, as compelling as these arguments may be, *Rehaif* still stands and is binding on the courts. This Note includes these arguments merely to observe the relevant objections that aid in determining the actions that must be taken in response. Hence, the question is no longer about what the *Rehaif* majority did incorrectly but rather what we are to do next in light of its decision.

III. A TWO-TIER SOLUTION FOR § 922(G) PROSECUTION

In response to *Rehaif*, state legislatures and courts now have two options. They should adopt measures that aid in precluding prosecution under § 922(g) altogether and they should implement procedures that ensure successful convictions favorable to public safety when prosecution is unavoidable.

Section A will first address how state legislatures should adopt stricter gun laws regarding background checks, record keeping, and gun

131. *Id.*

132. *Jessica Roth*, CARDOZO L., https://cardozo.yu.edu/directory/jessica-roth [https://perma.cc/UU8B-7DQU].

133. Roth, *supra* note 29, at 25.

134. MODEL PENAL CODE § 2.02(1)(c) (AM. L. INST., Proposed Official Draft 1962).

135. Roth, *supra* note 29, at 25.

136. *Id.* (citing Rehaif v. United States, 139 S. Ct. 2191, 2212 (2019) (Alito, J., dissenting)).

137. *Id.* (citing Elonis v. United States, 575 U.S. 723, 740–42 (2015)).

relinquishment to meet these goals. Section B then details how state courts could adopt procedures that satisfy both goals. First, courts could require proof that newly convicted felons relinquished possession of their firearms. Second, courts could adopt colloquy standards that explicitly communicate the consequences and restrictions newly convicted felons face.

All approaches meet the first goal of avoiding § 922(g) prosecutions entirely by preventing prohibited possession in the first place. Some measures have the direct effect of deterring possession by putting felons themselves on notice of their inability to possess a firearm due to their prohibited possessor status. Other measures have an indirect effect of deterring possession by putting third parties on notice of that status. Either way, prohibited possession by ineligible persons is precluded, and § 922(g) prosecutions are avoided.

Almost all approaches also meet the second goal of ensuring successful convictions when prosecution is unavoidable. If the measure taken has the direct effect of prohibiting firearm possession by making individuals aware of their felony status, then they now know they are a felon. This satisfies the new scienter requirement necessary for successful conviction. Altogether, state legislatures and courts can construct a two-tier approach dedicated to navigating the aftermath of *Rehaif*.

A. *States Should Enact Stricter Gun Laws*

State adoption of new firearm legislation could reduce the number of individuals charged with § 922(g) violations and possibly ensure favorable prosecutions depending on the new law enacted.[138] Over the last few years, § 922(g) convictions have totaled roughly ten percent of the overall convictions reported to the U.S. Sentencing Commission.[139] Of that ten percent, there is a relationship between those states with higher § 922(g) convictions and those states with less restrictive gun legislation.[140] For example, within the last four years, the Eastern District of Missouri has ranked in the top five districts with the highest proportion of § 922(g) cases.[141] The Northern District of Alabama

138. *See Annual Gun Law Scorecard*, GIFFORDS L. CTR., https://giffords.org/lawcenter/resources/scorecard/#AL [https://perma.cc/E4VV-HDMZ].

139. *See* U.S. SENT'G COMM'N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2019) [hereinafter 2019 FACT REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY19.pdf [https://perma.cc/K7CP-UGJD]; *see also* 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

140. *See* 2018 FACT REPORT, *supra* note 24; *see also Annual Gun Law Scorecard*, *supra* note 138.

141. 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

accompanied Missouri on that list in the same four years.[142] The Western District of Tennessee was on the list for three out of the four years.[143] Every year, the Giffords Law Center evaluates these states based on the strength of their gun laws in relationship to their firearm violence rates.[144] After evaluation, their Annual Gun Law Scorecard gave the above states grades of F, F, and D-, respectively.[145] Alternatively, states like California and Connecticut—which have not been included in the top rankings for § 922(g) convictions[146]—received grades of A and A-, respectively, from Giffords Law Center.[147]

Recognizing the statutory discrepancies, Giffords concluded that "[t]o bring an end to our country's gun violence epidemic . . . we must take action to remedy America's inconsistent patchwork of state laws."[148] There can be no doubt that if low-grading states adopted stricter gun laws regarding background checks, record keeping, and gun relinquishment, such laws would prevent prohibited firearm possession by ineligible persons to begin with. In turn, precluding prohibited possession altogether likely decreases a state's overall number of § 922(g) charges and possibly ensures successful convictions when prosecution is unavoidable depending on the law adopted.

142. 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

143. 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

144. *See Annual Gun Law Scorecard*, *supra* note 138.

145. GIFFORDS L. CTR., THE STATE OF GUN VIOLENCE IN MISSOURI (2020) [hereinafter THE STATE OF GUN VIOLENCE IN MISSOURI], https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-State-of-Gun-Violence-in-Missouri-2020.pdf [https://perma.cc/S8YN-U22P]; GIFFORDS L. CTR., THE STATE OF GUN VIOLENCE IN ALABAMA (2020) [hereinafter THE STATE OF GUN VIOLENCE IN ALABAMA], https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-State-of-Gun-Violence-in-Alabama-2020.pdf [https://perma.cc/E895-JLPA]; GIFFORDS L. CTR., THE STATE OF GUN VIOLENCE IN TENNESSEE (2020) [hereinafter THE STATE OF GUN VIOLENCE IN TENNESSEE], https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-State-of-Gun-Violence-in-Tennessee-2020.pdf [https://perma.cc/W2LT-G2ZS].

146. *See* 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

147. GIFFORDS L. CTR., THE STATE OF GUN VIOLENCE IN CALIFORNIA (2020) [hereinafter THE STATE OF GUN VIOLENCE IN CALIFORNIA], https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-State-of-Gun-Violence-in-California-2020.pdf [https://perma.cc/9U75-WH7X]; GIFFORDS L. CTR., THE STATE OF GUN VIOLENCE IN CONNECTICUT (2020) [hereinafter THE STATE OF GUN VIOLENCE IN CONNECTICUT], https://giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-State-of-Gun-Violence-in-Connecticut-2020.pdf [https://perma.cc/JCN9-A5G8].

148. Leigh Paterson, *Gun Law Scorecard Shows Some Firearm-Friendly States Passing New Regulations*, WAMU (Feb. 7, 2020), https://wamu.org/story/20/02/07/giffords-gun-law-scorecard/ [https://perma.cc/8AHF-V252] (citing language previously located on the Giffords main page).

1. Background Check Legislation

Laws requiring background checks are likely the biggest potential combatants for satisfying the first goal of reducing § 922(g) violations. Put simply, "[b]ackground checks identify individuals who are ineligible to purchase firearms and prevent those persons from obtaining them."[149] Meaning, when background checks identify felons as ineligible to purchase firearms, they are precluded from possession altogether and avoid § 922(g) prosecutions entirely.

Such laws are strongly backed by nationwide public support. Sources report anywhere from eighty-three to ninety-seven percent of the population wants legislation requiring background checks.[150] Public opinion supports the overall purpose of background checks in identifying, and preventing, ineligible persons from obtaining guns, "making them a key element in preventing tragic and unnecessary gun deaths."[151] For this reason, even states with less restrictive gun legislation are likely to adopt background-check laws to better reflect local values.[152]

Currently, the federal government requires background checks under the Brady Act for some, but not all, firearm sales.[153] The House of Representatives introduced the Bipartisan Background Checks Act of 2019 to further this agenda.[154] The bill proposes a universal background check that would make "nearly all intrastate, private-party firearms transactions subject to . . . background check requirements of the

149. *See Background Check Procedures*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/background-check-procedures/ [https://perma.cc/KJR4-SGWR].

150. *See* Laura Santhanam, *Most Americans Support These 4 Types of Gun Legislation, Poll Says*, PBS NEWSHOUR (Sept. 10, 2019, 2:02 PM), https://www.pbs.org/newshour/politics/most-americans-support-stricter-gun-laws-new-poll-says [https://perma.cc/M2PG-9R2S]; *see also* Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW RSCH. CTR. (Oct. 16, 2019), https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/ [https://perma.cc/NQ5U-D6J9]; QUINNIPIAC UNIV. POLL, U.S. SUPPORT FOR GUN CONTROL TOPS 2-1, HIGHEST EVER, QUINNIPIAC UNIVERSITY NATIONAL POLL FINDS; LET DREAMERS STAY, 80 PERCENT OF VOTERS SAY (2018), https://poll.qu.edu/images/polling/us/us02202018_ugbw51.pdf [https://perma.cc/X9KT-FJKN].

151. *Background Check Procedures*, *supra* note 149.

152. *See* Santhanam, *supra* note 150; *see also* Schaeffer, *supra* note 150; QUINNIPIAC UNIV. POLL, *supra* note 150.

153. Mark B. Melter, Note, *The Kids Are Alright: It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZ. J. INT'L L. 33, 55 (2012); *see also* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C. & 34 U.S.C.).

154. WILLIAM J. KROUSE, CONG. RSCH. SERV., R45970, GUN CONTROL: NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS AND RELATED LEGISLATION 28 (2019), https://crsreports.congress.gov/product/pdf/R/R45970 [https://perma.cc/4RZQ-GHDX].

[GCA]."[155] However, absent formal introduction of this federal act into law, the current federal regime leaves a loophole because it does not require unlicensed, private sellers to perform background checks.[156] Meaning, without state law requiring background checks, this loophole stays open, allowing felons, domestic abusers, and other ineligible persons to legally buy firearms.[157] About eighty percent of firearms bought for criminal purposes were purchased from unlicensed sellers.[158] Around "[ninety-six percent] of inmates convicted of gun offenses who were already prohibited from possessing a firearm at the time of the offense obtained their firearm from an unlicensed seller."[159]

Neither Missouri nor Alabama, both with F-graded laws,[160] have laws requiring private sellers to conduct background checks.[161] Considering this in combination with the statistics above, it may not be surprising that both were included in the top five districts with the highest proportion of § 922(g) cases.[162] However, unlike Missouri and Alabama, Tennessee enacted a law to close the loophole gap in 2019.[163] The law prohibits a seller from knowingly selling a firearm to a person who is ineligible to receive firearms.[164] This may be why Giffords Law Center gave Tennessee's firearm laws a D- as opposed to an F.[165] Even further, this may be why Tennessee was not included in the top five districts with the highest proportion of § 922(g) cases for 2019.[166] Therefore, it is possible that if Missouri and Alabama adopted a similar law, they could decrease gun violence and further prevent § 922(g) prosecutions.

155. *Id.* at Summary.

156. Lisa Dunn, *Do Universal Background Checks Prevent Gun Violence?*, WAMU 88.5 (June 25, 2020), https://wamu.org/story/20/06/25/do-universal-background-checks-prevent-gun-violence/ [https://perma.cc/CPT9-BXX7].

157. *See* Richard A. Oppel Jr. & Adeel Hassan, *How Online Gun Sales Can Exploit a Major Loophole in Background Checks*, N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/us/guns-background-checks.html [https://perma.cc/5LQL-W7W7] (noting that about one in five firearm sales is still conducted without a background check).

158. *Universal Background Checks*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/ [https://perma.cc/9K7W-G44J].

159. *Id.*

160. THE STATE OF GUN VIOLENCE IN MISSOURI, *supra* note 145; THE STATE OF GUN VIOLENCE IN ALABAMA, *supra* note 145.

161. *See generally* MO. ANN. STAT. § 571.014 (West, Westlaw through 2021 Sess.); ALA. CODE § 41-9-649 (West, Westlaw through 2021 Sess.).

162. *See* 2019 FACT REPORT *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

163. TENN. CODE ANN. § 39-17-1316 (LexisNexis through 2021 Sess.).

164. *Id.* § 39-17-1316(a)(1).

165. THE STATE OF GUN VIOLENCE IN TENNESSEE, *supra* note 145.

166. 2019 FACT REPORT, *supra* note 139.

While the new Tennessee law was a valiant effort, its language still does not require a background check for unlicensed, private sellers.[167] Thus, it does not close the loophole completely. All three states—and others with less restrictive gun laws—could adopt more effective legislation to help avoid § 922(g) prosecutions.

This legislation could attempt to mimic the laws of California or Connecticut which received an A and A-, respectively, from Giffords Law Center.[168] For instance, both states require background checks at the point of *sale* for "all classes of firearms, whether they are purchased from a licensed dealer or an unlicensed seller."[169] In addition, both states require background checks at the point of *transfer* as a second safeguard to ensure the check was conducted before handing them to the individual.[170] Even more, California implemented a waiting period that prohibits the sale or transfer before a background check clears.[171] This may be why California received an A from Giffords Law Center, while Connecticut got an A-.[172] Regardless, both states are great examples to emulate due to the strength of their gun laws and absence on the list of top five districts with the highest proportion of § 922(g) cases.[173] Therefore, requiring backgrounds checks could decrease the number of prohibited persons from possessing guns and would help to avoid § 922(g) prosecutions altogether.

It should be noted that background check legislation, even in the exemplary states, does not necessarily meet this Note's second-stated goal of ensuring favorable prosecutions when they are unavoidable. To meet this goal, as mentioned, the type of legislation adopted must have the direct effect of prohibiting firearm possession by making individuals aware of their felony status. This direct effect satisfies the new scienter requirement under *Rehaif*, making prosecution easier. But unfortunately, even if state laws require background checks, and ineligible persons then fail those checks, those individuals may not be informed as to why they failed. This means, for example, that people may be unaware they failed because their criminal records evidence a felony conviction. Therefore,

167. *See* § 39-17-1316.

168. THE STATE OF GUN VIOLENCE IN CALIFORNIA, *supra* note 147; THE STATE OF GUN VIOLENCE IN CONNECTICUT, *supra* note 147.

169. *Universal Background Checks*, *supra* note 158; *see also* CONN. GEN. STAT. § 29-36l(f) (2021); CAL. PENAL CODE § 28050 (West, Westlaw through ch. 362 of 2021 Reg. Sess.) (amended 2021).

170. § 29-36l(f); § 28050.

171. CAL. PENAL CODE § 28220(d) (West, Westlaw through ch. 362 of 2021 Reg. Sess.).

172. THE STATE OF GUN VIOLENCE IN CALIFORNIA, *supra* note 147; THE STATE OF GUN VIOLENCE IN CONNECTICUT, *supra* note 147.

173. *See* 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT *supra*, note 24.

if defendants do not know they are felons, then the *Rehaif* scienter requirement goes unsatisfied, and convictions are impossible.

Background screenings are regulated by the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Federal Fair Credit Reporting Act.[174] These organizations entitle individuals to certain rights, including notification of reasons for failing a check.[175] However, these organizations generally regulate checks for "employment, volunteer or tenant screening purposes" through credit reporting agencies.[176] Checks conducted for firearm purchases are done by sellers and dealers through the National Instant Criminal Background Check System—organized and managed by the Federal Bureau of Investigations.[177] Thus, no federal laws regulate background screenings, including notification of reasons for failure thereof, in this factual context.

This Note recognizes that it is likely that, more often than not, dealers and sellers notify potential buyers when they are otherwise ineligible to possess a firearm upon a failed check. In turn, it is likely that, more often than not, individuals who fail a background check will then inquire as to why. In those expected instances, we need not worry that people become aware of their felony status. However, for those uncommon situations involving people who slip through these cracks and remain unaware, state legislatures should consider easily curing this shortfall within their background check legislation. Like the aforementioned federal regulations surrounding notification procedures, states need only require dealers and sellers to disclose that individuals failed a background check because they belong to a category of prohibited possessors—e.g., felons.[178] Thus, state background check legislation would then satisfy both goals of avoiding § 922(g) prosecutions altogether, while also ensuring successful convictions where prosecution is unavoidable.

2. Record-keeping Legislation

Enacting new record-keeping laws would also help to reduce § 922(g) convictions. Law enforcement officers use sale records to detect dishonest dealers and to identify "straw purchases."[179]

174. *Background Check Facts*, ESSENTIAL SCREENS (Feb. 14, 2015), https://essentialscreens.com/blog/background-check-facts/ [https://perma.cc/BE2M-DMLE].

175. *See id.*

176. *Id.*

177. KROUSE, *supra* note 154.

178. *See Background Check Facts*, *supra* note 174.

179. *Gun Owners' Privacy*, EPIC.ORG, https://epic.org/privacy/firearms/ [https://perma.cc/P3DU-WY8D]. Dishonest dealers are ones who, among committing other infractions, sell to ineligible buyers. U.S. ATTY'S OFF., U.S. DEP'T OF JUST., FEDERAL FIREARMS DEALER AND HER EMPLOYEE SENTENCED FOR SELLING GUNS TO FELONS (2018), https://www.justice

Additionally, record keeping can help officers identify the purchaser of a firearm that was used in a crime, "which can lead to the identification and prosecution of violent criminals."[180] Thus, record-keeping laws aid in avoiding § 922(g) prosecutions by deterring sellers and buyers from putting firearms in the hands of ineligible persons from the start. Or alternatively, if that has already occurred, record keeping may help law enforcement track down those prohibited persons.

Like background checks, the federal government requires the maintenance of all sales records for twenty years for some, but not all, dealers.[181] The pending Bipartisan Background Checks Act would close the gap for record keeping, like background checks, by subjecting nearly all intrastate, private party transactions to GCA record-keeping requirements.[182] But, until the bill is passed into law, the federal regime is inadequate because it does not require unlicensed, private dealers to maintain sale records.[183] As a result, the system encounters a similar problem with record keeping as we did with background checks where, absent state legislation, the loophole for unlicensed dealers remains open.[184]

Both Alabama and Tennessee, two of the states mentioned earlier with grades F and D-, respectively, have laws that contradict the purpose of closing the loophole.[185] They instead require all records from completed background checks for firearm sales to be destroyed after the application is approved.[186] Such laws limit record access to government officials for use as gun trace data or data in legal proceedings involving firearm dealer license revocation.[187] Thus, these states, and others retaining similar laws, must dispose of such regulations if they are to help law enforcement identify persons ineligible of gun possession and prevent § 922(g) prosecutions.

.gov/usao-ndga/pr/federal-firearms-dealer-and-her-employee-sentenced-selling-guns-felons [https://perma.cc/U42M-TXMY]. Straw persons are individuals who buy firearms for persons not legally allowed to possess them. *See id*.

180. *Maintaining Records of Gun Sales*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/gun-sales/maintaining-records/ [https://perma.cc/C8NB-Y5Q9].

181. *Firearms-Guides-Importation & Verification of Firearms, Ammunition and Implements of War-Record Keeping Requirements*, ATF (Apr. 9, 2020) [hereinafter *Record-Keeping Requirements*], https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-and-implements-war-record [https://perma.cc/DK3J-ZFHB].

182. KROUSE, *supra* note 154.

183. *See id.*

184. *Maintaining Records of Gun Sales*, *supra* note 180.

185. *See* ALA. CODE § 13A-11-79(b) (West, Westlaw through 2021 Sess.); TENN. CODE ANN. § 39-17-1316(j) (LexisNexis through 2021 Sess.).

186. § 13A-11-79(b); § 39-17-1316(j).

187. *See* Daniel W. Webster et al., *Temporal Association Between Federal Gun Laws and the Diversion of Guns to Criminals in Milwaukee*, 89 J. URB. HEALTH 87, 95–96 (2012).

In their place, these states could adopt laws similar to those of California and Connecticut, again, with grades A and A-, respectively.[188] Both states require the maintenance and retention of all firearm sale records for both licensed and unlicensed sellers.[189] To improve this endeavor, both states also require all firearm sales to be reported.[190] Even more, California is the only state that took its gun legislation a step further when it created California's Armed Prohibited Persons System (APPS).[191] The APPS is "a database dedicated to tracking firearm owners who have lost their right to possess a gun, either because of a new criminal conviction or something else."[192] California uses its record-keeping laws to collect names for the APPS from court records, medical facilities, etc., and cross-reference them against their background check records for ineligible firearm buyers.[193] The APPS was designed and implemented in 2006, but it took time for the program to gain traction.[194] By 2012, around 2,000 guns were seized from

188. *See supra* text accompanying note 168.

189. CAL. PENAL CODE § 11106(a)(1)–(b)(1) (West, Westlaw through ch. 362 of 2021 Reg. Sess.) (requiring permanent maintenance of any information relating to the sale or transfer of a firearm); *Maintaining Records of Gun Sales in California*, GIFFORDS L. CTR., https://giffords.org/lawcenter/state-laws/maintaining-records-of-gun-sales-in-california/#footnote_7_16026 [https://perma.cc/JD8W-QQAW]; *see also* CONN. GEN. STAT. § 29-31 (2021); CONN. GEN. STAT. § 29-33(e) (2021) (requiring record retention for no less than five years for pistols and revolvers); CONN. GEN. STAT. § 29-37a(d) (2021) (requiring record retention for no less than five years for long guns); *Maintaining Records of Gun Sales in Connecticut*, GIFFORDS L. CTR., https://giffords.org/lawcenter/state-laws/maintaining-records-of-gun-sales-in-connecticut/ [https://perma.cc/4NHF-ZBKY].

190. § 11106(a)(1)–(b)(1); § 29-31.

191. OFF. OF THE ATT'Y GEN., CAL. DEP'T OF JUST., ARMED AND PROHIBITED PERSONS SYSTEM (APPS) 2020 2 (2020) [hereinafter CALIFORNIA APPS 2020], https://oag.ca.gov/system/files/attachments/press-docs/2020-apps-report.pdf [https://perma.cc/LL94-M7LJ]; *see also* Richard A. Oppel Jr., *How So Many Violent Felons Are Allowed to Keep Their Illegal Guns*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/us/gun-seizures-felons-abusers.html [https://perma.cc/9L4C-2ATV].

192. Oppel, *supra* note 191.

193. Richard Gonzales, *One by One, California Agents Track Down Illegally Owned Guns*, NPR (Aug. 20, 2013, 2:56 AM), https://www.npr.org/2013/08/20/213546439/one-by-one-california-agents-track-down-illegally-owned-guns [https://perma.cc/73L4-53B2].

194. *See* CALIFORNIA APPS 2020, *supra* note 191. Once the APPS was introduced in 2006, reporting increased as the number of firearms and firearm owners became known. OFF. OF THE ATT'Y GEN., CAL. DEP'T OF JUST., APPS 2018 ANNUAL REPORT TO THE LEGISLATURE 2 (2018) [hereinafter CALIFORNIA APPS 2018], https://oag.ca.gov/system/files/attachments/press-docs/2020-apps-report.pdf [https://perma.cc/LL94-M7J]. But as that number increased, the program began to experience complications—running into a backlog of known persons that had accumulated in the system by 2013. *See* S.B. 140, 2013–2014 Reg. Sess. (Cal. 2013) (appropriating $24,000,000 in funds to remedy the backlog). The program "is tedious, expensive and time-consuming work, requiring hours of background checks and cross-referencing even before the agents hit the streets." Gonzales, *supra* note 193. Up until 2013, California only had thirty-three agents employed to enforce the program. *Id.* As a result of the funds provided by the 2013 California Senate Bill 140, thirty-six more agents

ineligible persons under the program.[195] However, that number increased as the program grew, with nearly 4,000 guns seized from ineligible persons in 2017.[196] For these reasons, it is clear that California's system is the best method for avoiding § 922(g) prosecutions.

However, for states to create a program like California's, it would require significant resources.[197] But States like Missouri, Alabama, and Tennessee can begin to close the loophole and avert § 922(g) convictions by implementing the previously mentioned laws California and Connecticut have enacted. As noted, both California and Connecticut are great examples based on the strength of their gun laws and absence from the list of the top five districts with the highest proportion of § 922(g) cases.[198]

3. Gun Relinquishment Legislation

Finally, enacting a statutory process for firearm relinquishment would help to reduce § 922(g) convictions and ensure favorable prosecution when it is unavoidable. These laws require individuals newly convicted of firearm-prohibited crimes to relinquish their firearms.[199] But unlike background checks and record keeping, there is no federal procedure for removing firearms from prohibited possessors.[200] Consequently, Giffords Law Center found that, in California alone, "more than 20,000 [people] have failed to surrender firearms, despite becoming prohibited possessors."[201] In response, seven states enacted laws to disarm ineligible individuals.[202] Of these, only

were brought on board. *Id.* Overall, this history likely explains the gaps between 2006 (when the program was implemented), 2012/2013 (when the program began report significant numbers of gun seizures but also began encounter hardships), and 2017 (when reporting numbers increased again and the program began to run more smoothly—likely thanks to California Senate Bill 140).

195. Gonzales, *supra* note 193.

196. Oppel, *supra* note 191.

197. *See supra* notes 193–95 and accompanying text.

198. *See* 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

199. *See The Effects of Surrender of Firearms by Prohibited Possessors*, RAND (Apr. 22, 2020), https://www.rand.org/research/gun-policy/analysis/prohibited-possessors.html [https://perma.cc/6625-JNTD]; *see also* Oppel, *supra* note 191.

200. *The Effects of Surrender of Firearms by Prohibited Possessors*, *supra* note 199.

201. *Firearm Relinquishment*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/firearm-relinquishment/ [https://perma.cc/ZYP8-B9FD].

202. CAL. PENAL CODE § 29810(a) (West, Westlaw through ch. 362 of 2021 Reg. Sess.); CONN. GEN. STAT. § 29-36k(a) (2021); HAW. REV. STAT. ANN. § 134-7.3(b) (Michie's, LEXIS through 2021 Legis. Sess.); MASS. GEN. LAWS ANN. ch. 140, §§ 129B, 129D (West, Westlaw through ch. 29 of the 2021 1st Ann. Sess.); NEV. REV. STAT. § 202.361 (2020); N.Y. CRIM. PROC. LAW § 370.25 (LexisNexis through 2021 released chs. 1–429); 18

California, Connecticut, and Nevada require that proof of compliance with these laws be sent to a court or local law enforcement agency for verification.[203]

There is no doubt that these laws directly prevent prohibited persons from possession.[204] As a result, only a small inferential step is required to conclude that these laws would subsequently reduce § 922(g) prosecutions and, in the event of unavoidable prosecution, ensure favorable convictions. States like Missouri, Alabama, and Tennessee should enact similar laws to remove their names from the list of top five districts with the highest proportion of § 922(g) cases.[205]

B. *Court Requirements and Standards*

In addition to state legislative action, state courts should implement firearm relinquishment procedures and standard court colloquies. Both measures could avoid possession and § 922(g) charges from the start while also confirming defendants know they are a felon for inevitable § 922(g) convictions. First, even absent legislation, courts should require proof that newly convicted felons relinquished possession of their firearms to ensure defendants are aware of their inability to possess a gun and their prohibited possessor status. Second, to further reinforce defendants' understanding, courts should adopt colloquy standards that explicitly communicate the consequences and restrictions that defendants—newly convicted felons—face. Both measures help to ensure defendants know they are restricted from possessing firearms post-felony conviction, but more notably, that they know they are felons for § 922(g) prosecution purposes. Thus, these measures could help prevent felony possession and avoid § 922(g) convictions altogether or, in the event of unavoidable prosecution, help ensure successful prosecutions favorable to public opinion.

1. Proof of Relinquishment

Courts could require proof of firearm relinquishment to reinforce defendants' understanding of their inability to possess a gun due to their prohibited possessor status.[206] As mentioned, there is no federal procedure that requires newly convicted felons to relinquish their guns.[207] In response, only seven states have created a statutory process

PA. CONS. STAT. § 6105(a)(2) (2021).

203. *See* § 29810(a)(2); § 29-36k(a); § 202.361.

204. *See Firearm Relinquishment*, *supra* note 201.

205. *See* 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.

206. *See Firearm Relinquishment*, *supra* note 201; Oppel, *supra* note 191.

207. *The Effects of Surrender of Firearms by Prohibited Possessors*, *supra* note 199.

for firearm relinquishment.[208] Of these seven, only California, Connecticut, and Nevada expressly require prohibited persons to provide proof of relinquishment to courts or law enforcement.[209] Absent state legislation, more courts could simply require that newly convicted felons provide proof that they have turned over their guns after conviction. This would further emphasize that felons understand, not only their restriction from firearm possession, but also their status as a felon. Thus, these requirements could avoid § 922(g) prosecutions, or in the alternative, help prosecutors prove defendants know they are felons in the event of unavoidable prosecution.

2. Colloquy Standards

Judges who enforce and adhere to standard plea colloquies could dramatically affect the number of § 922(g) prosecutions by informing defendants of their inability to possess a firearm due to their prohibited possessor status. This, also, would thus avert § 922(g) charges altogether and ensure successful conviction if prosecution was unavoidable.

A plea colloquy is a conversation between the judge and defendant where the judge ensures that the defendant's guilty plea is made intelligently, knowingly, and voluntarily.[210] Within this colloquy, judges have a duty to advise the defendant about the nature of the charge, potential resulting penalties,[211] and a few other important effects.[212] However, while this duty requires communication about the above information, other repercussions stemming from a guilty plea need not be mentioned[213]: "For example, you can get in a fight, and plead guilty to being in a fight, and wind up having a statutory prohibition on

208. CAL. PENAL CODE § 29810(a) (West, Westlaw through ch. 362 of 2021 Reg. Sess.); CONN. GEN. STAT. § 29-36k(a) (2021); HAW. REV. STAT. ANN. § 134-7.3(b) (Michie's, LEXIS through 2021 Legis. Sess.); MASS. GEN. LAWS ANN. ch. 140, §§ 129B, 129D (West, Westlaw through ch. 29 of the 2021 1st Ann. Sess.); NEV. REV. STAT. § 202.361 (2020); N.Y. CRIM. PROC. LAW § 370.25 (LexisNexis through 2021 released chs. 1–429); 18 PA. CONS. STAT. § 6105(a)(2) (2021).

209. *See* § 29810(a)(2); § 29-36k(a); § 202.361.

210. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

211. FED. R. CRIM. P. 11(b)(1)(G)–(I) (requiring communication of a defendant's minimum and maximum sentencing on a federal level); *see also* MICH. CT. R. 6.302; SEC'Y OF STATE OF THE STATE OF CONN., 2021 CONNECTICUT PRACTICE BOOK 381 (The Comm'n on Off. Legal Publ'ns 2021), https://www.jud.ct.gov/publications/PracticeBook/PB.pdf [https://perma.cc/ZFV8-9UKE] (requiring communication of a defendant's minimum and maximum sentencing on a state level).

212. *See generally Plea Colloquy*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/plea_colloquy [https://perma.cc/TP38-8JX2]; *Arraignment: Nature and Consequences of Various Pleas Entered at Arraignment*, JRANK, https://law.jrank.org/pages/525/Arraignment-Nature-consequences-various-pleas-entered-at-arraignment.html [https://perma.cc/7WNT-9FC8].

213. *See Plea Colloquy*, *supra* note 212; *see also* Gonzales, *supra* note 193.

possessing firearms get triggered for a 10-year period. But the courts haven't told them that."[214] Meaning, the main problem leading to § 922(g) prosecutions is that the judge does not tell newly convicted felons they are prohibited from owning a firearm.[215] For this reason, individuals often violate the possession prohibition of § 922(g) without realizing they had no right to firearm possession.[216]

The reason judges frequently omit the loss of one's firearm possession right in court colloquies is because of the difference between direct and collateral consequences.[217] *Brady v. United States* ruled that defendants need only be made aware of direct consequences to give an intelligent and voluntary guilty plea.[218] Direct consequences are criminal punishments that a trial judge may impose, including fines and jail or prison terms.[219] Basically all other consequences are collateral consequences of which a defendant has no constitutional right to be made aware before pleading guilty.[220] Thus, "[i]t has [only] been *suggested* that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty."[221] Felons' loss of their right to possess a firearm under the Second Amendment is considered a collateral consequence.[222]

Because collateral consequences can be equally important,[223] many have acknowledged that it is time to revisit this rule.[224] Some critics argue that the firearm prohibition cannot be easily categorized as a direct or collateral consequence and subsequently blurs the distinguishing line.[225] Those agreeing with this argument contend that any implication of a constitutional right—the Second Amendment in this case—should

214. Gonzales, *supra* note 193.

215. *Id.*

216. *See id.*

217. *See* Brady v. United States, 397 U.S. 742, 755 (1970).

218. *Id.*

219. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 672 (2008).

220. *Id.*; *see also* Vivian Chang, Note, *Where Do We Go from Here: Plea Colloquy Warnings and Immigration Consequences Post-Padilla*, 45 U. MICH. J.L. REFORM 189, 190 (2011).

221. FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment (emphasis added).

222. U.S. DEP'T OF JUST., FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 15 (2000), https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf [https://perma.cc/JQ6M-GE27].

223. Chang, *supra* note 220.

224. Roberts, *supra* note 219, at 674.

225. Steve Colella, Comment, *"Guilty, Your Honor": The Direct and Collateral Consequences of Guilty Pleas and the Courts That Inconsistently Interpret Them*, 26 WHITTIER L. REV. 305, 310 (2004).

be categorized as a direct consequence.[226] Others critics argue for a reasonableness standard that determines the duty to inform defendants where the consequence is a "significant factor" in their decision to plead guilty.[227]

Some judges (mainly federal judges), possibly in agreement with these arguments, have taken it upon themselves to include certain collateral consequences in their colloquies.[228] But unfortunately, the dividing line between direct and collateral consequences remains unchanged.[229] Therefore, while some judges include collateral consequence communication in their colloquies, doing so is still not required and occurs only on an inconsistent basis.[230] This may be because some recognize that to include a list of all the potential collateral consequences a defendant may face would place a significant burden on the courts.[231] In addition, trying to categorize particular consequences,[232] or using a test to classify their importance,[233] may be ideal in theory, but difficult and unrealistic in practice.

A simpler, more effective argument may be made: courts should create a standard colloquy that communicates consequences any time a defendant is stripped of a constitutional right.[234] Any attempt at the categorization of firearm possession as a direct or indirect collateral consequence is unnecessary. For decades, courts have recognized that waiver of constitutional rights involves "an intentional relinquishment or abandonment of a known right or privilege."[235] Therefore, judges are required to provide notice to defendants of such constitutional rights, including the right to trial by jury and the right to confront one's

226. *Id*. at 311–13.

227. Roberts, *supra* note 219, at 674.

228. *See, e.g.*, JAMES P. JONES, GUILTY PLEA COLLOQUY 3 (2017), http://www.vawd.uscourts.gov/media/1966/guiltypleacolloquy.pdf [https://perma.cc/9XK7-FAB4].

229. *See generally* Brady v. United States, 397 U.S. 742 (1970).

230. *Compare* JAMES P. JONES, GUILTY PLEA COLLOQUY 3 (2017), http://www.vawd.uscourts.gov/media/1966/guiltypleacolloquy.pdf [https://perma.cc/9XK7-FAB4] (showcasing a federal court colloquy mentioning the collateral consequences a defendant potentially faces), *with* CT. OF COMMON PLEAS OF CRAWFORD CNTY., PA, DIRECTIONS CONCERNING THE ENTERING OF A GUILTY PLEA OR PLEA OF NOLO CONTENDERE (NO CONTEST) (2018), https://www.crawfordcountypa.net/Courts/Documents/Written%20Plea%20Colloquy.PDF [https://perma.cc/4ZP3-NXVZ] (showcasing a state court colloquy making no mention of any collateral consequences a defendant could encounter).

231. Padilla v. Kentucky, 559 U.S. 356, 390–91 (2010) (Scalia, J., dissenting) (noting that criminal convictions can carry a wide variety of consequences and lead to a subsequent inability to know what area of advice would be relevant).

232. Colella, *supra* note 225, at 310–13.

233. Roberts, *supra* note 219, at 672.

234. No consequence categorization or testing standard need be utilized.

235. Mary Kay Wheeler, Comment, *Guilty Plea Colloquies: Let the Record Show . . .*, 45 MONT. L. REV. 295, 296 (1984) (citing Johnson v. Zerbst, 304 U.S 458, 464 (1938)).

accusers.[236] Granted, notification of waiver regarding these two examples is for fair-trial purposes, but the underlying premise of notice before abandonment or relinquishment of a constitutional right is the same. Why should notice of waiver of these constitutional rights not then also be extended to other constitutional rights?

In further support of established standard colloquies is that they "would assist the court in making an on-the-record assessment that meets the constitutional requirements for a valid guilty plea."[237] Even more, this set standard would help keep judicial colloquies simple. Judges would not need to consider if the constitutional right was indeed a direct consequence. They would not need to conduct ambiguous, and possibly inconsistent, unreasonable tests.[238] Simply, if a defendant's constitutional right would be seized, a standard court colloquy would state that such an implication needs to be communicated. Subsequently, felons would agree within their plea colloquies that they understand they are restricted from possessing firearms post-conviction and know of their prohibited possessor status. Thus, they could avoid felony possession and § 922(g) convictions altogether, or help prosecutors prove defendants know they are felons in the event of unavoidable prosecution.

IV. COUNTERARGUMENTS

Historically, the introduction of firearm legislation and additional court procedures have been challenged with Second Amendment claims[239] and on procedural efficiency grounds, respectively.[240] However, each argument is of no consequence here.

First, the Second Amendment does not prohibit the enforcement of gun laws and procedures.[241] The Second Amendment does state that it is a person's right to keep and bear arms.[242] But, "[the Second Amendment] is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[243] Thus, laws that impose certain conditions and qualifications on the sale of firearms are constitutional.[244] For instance, state laws that require background checks

236. Boykin v. Alabama, 395 U.S 238, 243 (1969).

237. Wheeler, *supra* note 235, at 295.

238. Roberts, *supra* note 219, at 672.

239. *See generally* Todd Barnet, *Gun "Control" Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 MO. L. REV. 155 (1998); *Should More Gun Control Laws Be Enacted?*, BRITANNICA PROCON.ORG, https://gun-control.procon.org [https://perma.cc/5NE2-WVSM].

240. Roberts, *supra* note 219, at 736; *Should More Gun Control Laws Be Enacted?*, *supra* note 240.

241. *See* District of Columbia. v. Heller, 554 U.S. 570, 626 (2008).

242. U.S. CONST. amend. II.

243. *Heller*, 554 U.S. at 626.

244. *See id.* at 626–28.

are constitutional.[245] Courts have not hesitated to note that background checks serve a multitude of government interests, including, but not limited to, preventing convicted felons from obtaining firearms[246] and ensuring a secure workplace comprised of competent and reliable employees.[247] Because requirements serving clearly sound governmental interests are acceptable, very few have challenged them.[248] The few that have challenged them on Second Amendment grounds have never succeeded.[249] Therefore, states legislatures that choose to adopt statutes like California's and Connecticut's, or state courts that choose to enforce relinquishment procedures, would likely prevail if faced with constitutional challenges. These measures merely impose a few conditions and qualifications on the sale of firearms to prevent future § 922(g) charges and aid in ensuring successful convictions where prosecution is unavoidable.

Second, some states may resist enacting strict gun procedures for efficacy reasons.[250] However, *all* measures this Note proposes help avoid § 922(g) prosecutions altogether. Thus, considering the significant costs and time generally dedicated to litigation, these measures actually aid efficiency. And, in the event of inevitable prosecution, almost all procedures this Note recommends, except for record-keeping legislation, actually make litigation easier. Meaning, if enforced properly, these measures ensure that defendants know of their prohibited possessor status, thus easily satisfying one element of a § 922(g) offense at trial. But most importantly, and above all, procedural efficiency is no match against ensuring defendants understand their constitutional rights in criminal cases.

In response to both of these arguments critics make, sometimes the national public push can be overwhelming.[251] "When more and more

245. Everytown Law, *Requiring Background Checks for All Gun Sales: Critical for Public Safety and Clearly Constitutional*, MEDIUM (Sept. 9, 2019), https://medium.com/everytown-law/background-checks-for-all-gun-sales-critical-for-public-safety-and-clearly-constitutional-1ba9f8c24a52 [https://perma.cc/VJF4-HAZY].

246. *See id.*

247. NASA v. Nelson, 562 U.S. 134, 150 (2011).

248. *See* Everytown Law, *supra* note 246.

249. *See, e.g.*, Colo. Outfitters Ass'n v. Hickenlooper, 823 F.3d 537, 554 (10th Cir. 2016) (stating that petitioners lacked constitutional standing to even challenge background checks as a violation of the Second Amendment); Rocky Mountain Gun Owners v. Hickenlooper, 371 P.3d 768, 777 (Colo. App. 2016) (explicitly remarking that a bill imposing mandatory background checks does not infringe on one's constitutional right to bear arms), *decision reached on appeal*, 472 P.3d 10 (Colo. App. 2018), *aff'd sub nom.* Rocky Mountain Gun Owners v. Polis, 467 P.3d 314 (Colo. 2020).

250. Roberts, *supra* note 219; *Should More Gun Control Laws Be Enacted?*, *supra* note 240.

251. *See* Sheryl Gay Stolberg, *Background Check Bill Marks Gun Control as a Priority for House Democrats*, N.Y. TIMES (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/us/

people recognize that [gun violence] is a national issue that can affect all of us . . . then cultural change happens, and that's what we're seeing now."[252] For example, the Las Vegas Route 91 Concert shooting, the Sutherland Springs Church shooting, and the Parkland School shooting caused most states to quickly enact some legislation in their wake.[253] States inevitably enforce these changes, in part, due to public pressure.[254] Roughly 60% of Americans supported gun control just days after the Vegas shooting.[255] After the Parkland School shooting, the number of Americans who wanted stricter gun legislation shot up from 7% to 67% in five months.[256] As a result, many individuals support gun control that keeps firearms out of the hands of ineligible persons.[257] Therefore, government resistance against stricter gun measures often bends when pitted against public fury in an effort to better reflect national demands.

CONCLUSION

Overall, *Rehaif v. United States* was right to require a culpable mental state where statutory elements criminalize otherwise innocent conduct. But as a result, *Rehaif* inevitably limited the number of successful prosecutions possible under 18 U.S.C. § 922(g).[258] The Court upended an interpretational standard in applying § 922(g) that had been established precedent for well over thirty years.[259] Originally, courts had interpreted that statute to mean the government need only prove a person knew they possessed a firearm.[260] Since *Rehaif*, however, the government must now prove a person knew they possessed a firearm and that they were part of a category of persons prohibited from such possession.[261]

Justice Alito and other critics identified the many challenges that can be made against *Rehaif*.[262] They include, but are not limited to, the majority's disregard of congressional intent and its use of ambiguous

politics/house-democrats-gun-control.html [https://perma.cc/D7JV-MAKA].

252. *Id.*

253. *See* Megan B. Mavis & Matthew D. Shapiro, *Second Amendment Interpretation and a Critique of the Resistance to Common-Sense Gun Regulation in the Face of Gun Violence: This Is America*, 46 W. STATE L. REV. 85, 112–13 (2019).

254. *See id.* at 105.

255. *Id.* at 103.

256. *Id.* at 105.

257. *See* Santhanam, *supra* note 150.

258. Rehaif v. United States, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (recognizing that it will be significantly more difficult to convict individuals falling into § 922(g) categories under a knowledge requirement).

259. *Id.* at 2210.

260. *Id.*

261. *Id.* at 2194 (majority opinion).

262. *See id.* at 2201 (Alito, J., dissenting).

textual interpretations.[263] Such arguments are notable and helped to determine how to best bear the brunt of the increased mens rea requirement.

Therefore, because this statute does more to combat gun violence than any other law,[264] state legislatures and courts must adjust accordingly under *Rehaif*'s binding precedent. They could adopt approaches that would avoid the need to even prosecute under the strenuous impositions of *Rehaif*. But further, in the event of unavoidable prosecution, they could then take measures that enhance our chances of successful prosecutions favorable to public opinion.

First, state legislatures could adopt stricter laws in line with public support for reducing gun violence. For example, they could enact laws managing firearm background checks, record keeping, and gun relinquishment upon recent felony convictions. Such legislation would attempt to control dangerous individuals—preventing prohibited possession to begin with—and sidestep likely unsuccessful § 922(g) prosecutions.

Second, state courts could implement requirements and standards that would also preclude § 922(g) prosecutions altogether, but that would also result in easier convictions under the statute where prosecution is unavoidable. For instance, courts could require proof when gun relinquishment is required by state statutes. They could also create explicit, standard plea colloquies to ensure defendants understand how their conviction consequently affects their constitutional rights as a felon. Implementation of both requisite measures would notify defendants of their inability to possess a gun due to their prohibited possessor status. Thus, both measures could aid in preventing possession in the first place while also, in the alternative, help to confirm defendants know they are felons for unavoidable § 922(g) prosecutions.

Overall, even though *Rehaif* has been challenged on many grounds, it stands as binding precedent. Regardless, state legislatures and courts can still navigate the new scienter requirement without being burdened by *Rehaif*'s limitation on § 922(g) prosecutions. But, they must be willing to take up that mantle.

263. *See id.*

264. *See* 2019 FACT REPORT, *supra* note 139; 2018 FACT REPORT, *supra* note 24; 2017 FACT REPORT, *supra* note 24; 2016 FACT REPORT, *supra* note 24.