



Third Circuit Holds that Application of Felon-in-Possession Ban Violates the Second Amendment, Creating Circuit Split

November 3, 2023

In *Range v. Attorney General*, the U.S. Court of Appeals for the Third Circuit (Third Circuit), sitting en banc, struck down an application of a federal statutory provision—commonly referred to as the *felon-in-possession ban*—that prohibits individuals convicted of certain crimes from possessing firearms. The ruling follows the Supreme Court’s landmark decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, in which the Court announced a new historical tradition standard to assess laws and regulations challenged under the Second Amendment. Although courts have upheld many existing firearm regulations under this standard, the Third Circuit joined a growing number of courts in striking down firearm regulations and became the first circuit court to find the felon-in-possession ban unconstitutional. The Third Circuit’s decision not only broke new ground but also created a circuit split, as the U.S. Court of Appeals for the Eighth Circuit upheld the felon-in-possession ban under the *Bruen* standard in *United States v. Jackson*, issued just four days before *Range*.

This Legal Sidebar first provides an overview of the current Second Amendment legal framework under *Bruen*. It then contrasts the Third Circuit’s reasoning in *Range* with the Eighth Circuit’s *Jackson* decision. The Sidebar concludes with several considerations for Congress based on the implications of the circuit split on felon-in-possession bans and other firearm regulations more generally.

Legal Context: The Second Amendment and *Bruen*

The [Second Amendment](#) to the Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Supreme Court first interpreted the Second Amendment as creating an individual right to possess some types of firearms for the purpose of self-defense in the 2008 case of *District of Columbia v. Heller*. The Court further held in the 2010 case of *McDonald v. City of Chicago* that the Fourteenth Amendment incorporated this individual right against the states, making it enforceable against both the federal and state governments. In *Heller*, the Court emphasized that the individual right was not unlimited and that the government could still regulate firearms in many ways. Writing for the majority in *Heller*, Justice

Congressional Research Service

<https://crsreports.congress.gov>

LSB11072

Antonin Scalia [explained](#) that the decision did not affect the “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”

Heller and *McDonald* left unresolved a number of questions, including (1) whether the Second Amendment protected conduct beyond using handguns in the home for self-defense and (2) the constitutional standard courts should use to analyze firearm regulations implicating the Second Amendment. In the wake of these decisions, lower courts coalesced around a two-step approach for analyzing the constitutionality of firearm regulations. First, [courts analyzed](#) whether the regulated activity fell within the scope of the Second Amendment’s protection. If not, the regulation posed no Second Amendment problem. If so, courts generally applied a *means–end scrutiny*, balancing the public interest in the regulation with the burdens of the restriction. Courts disagreed on whether to apply *strict* or *intermediate scrutiny*—two [legal tests courts use](#) when analyzing other constitutional challenges—at this step.

In *Bruen*, the Supreme Court refined and clarified *Heller* and *McDonald*. The *Bruen* Court [held](#) that an individual’s right to possess a handgun for self-defense extended outside the home and rejected the lower courts’ two-step approach as “one step too many.” Instead, [the Court explained](#), once a court determines that a regulation implicates the Second Amendment’s protection, the law is presumptively unconstitutional unless the government establishes that it is “consistent with the Nation’s historical tradition of firearm regulation.” The Court [added](#) that this standard “requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*.”

Applying this standard to the New York law at issue, the Court [identified](#) no historical analogue to New York’s requirement that a person seeking a license to carry a concealed pistol or revolver demonstrate “good moral character” and “proper cause.” Accordingly, the Court struck down the New York law as violating the Second Amendment.

Range: Factual and Procedural History

The Gun Control Act of 1968, as amended, makes it unlawful in connection with interstate or foreign commerce for [nine categories of individuals](#) to ship, transport, possess, or receive any firearm or ammunition. One of these groups comprises individuals convicted in any court of a crime punishable by imprisonment for a term exceeding one year. Although often called the felon-in-possession ban, this provision of federal law defines “[crime punishable by imprisonment for a term exceeding one year](#)” to exclude certain felonies related to business practices and to include certain crimes classified as misdemeanors if they are punishable by imprisonment exceeding two years. The colloquial term *felon in possession* is thus both under- and overinclusive.

Plaintiff Bryan Range [had a prior conviction from 1995](#), when he pleaded guilty to one count of making a false statement to obtain food stamps in violation of Pennsylvania law. The [state classified the violation as a misdemeanor](#), but it was punishable by up to five years in prison. The conviction barred the plaintiff from owning a firearm [under the Gun Control Act](#).

Despite this conviction, Range wanted to purchase a deer-hunting rifle. [Range filed suit](#), seeking a declaratory judgment that the Gun Control Act, as applied, unconstitutionally barred him from owning a firearm because of his prior conviction. The government [prevailed at the district court](#), successfully arguing that Range was not entitled to protection under the Second Amendment because, as an “unvirtuous citizen,” he was not one of “the people” to whom the amendment applied. (Although the District Court issued its decision before *Bruen* was decided, [its analysis ended at step one](#)—whether the

Second Amendment protected the relevant conduct—so *Bruen* likely would not have changed the analysis). Range then appealed.

While Range’s appeal was pending, the Supreme Court decided *Bruen*. Applying this new precedent, a three-judge panel of the Third Circuit [initially upheld the ban](#) on Range purchasing a firearm, holding that the prohibition aligned with historical tradition. The court then reheard the case en banc and [reversed the district court’s decision](#), producing several concurring and dissenting opinions. In total, eleven judges found a Second Amendment violation, three judges found no Second Amendment violation, and one judge would have dismissed the case for lack of standing without deciding the merits.

The *Range* Opinions

Majority Opinion and Concurrences

The *Range* majority held that a conviction for food-stamp fraud could not constitutionally support a ban on Range possessing a firearm. [First](#), the court considered whether Range was protected by the Second Amendment—that is, whether he was one of “the people” to whom the amendment applied. The government [had argued](#) that the amendment protected only “law-abiding, responsible citizens,” and therefore individuals with prior convictions fell outside the amendment’s scope. The majority disagreed, [concluding](#) that “the people” refers to all Americans rather than a particular subset, consistent with other constitutional provisions that refer to “the people.”

Applying *Bruen*, the court then shifted the burden to the government to prove the ban was consistent with historical tradition. [The majority held](#) that the government failed to show the felon-in-possession ban, at least as applied to the plaintiff, was analogous to historical restrictions on firearm possession. The court observed that, although the statute at issue dated to the 1960s, [it was too recent](#) to satisfy *Bruen*, and older precursors of the statute applied only to violent criminals. The court [considered founding-era restrictions on felons](#), including the fact that “felons were exposed to far more severe consequences than disarmament,” but ultimately determined that there was no founding-era analogue to the punishment of lifetime disarmament for individuals like Range. [Finding no historical comparator](#), the court held the felon-in-possession ban violated the Second Amendment under *Bruen*.

The court only considered an “as applied” challenge to the felon-in-possession ban, meaning the court only decided whether the ban violated the Second Amendment under the plaintiff’s particular factual circumstances. The majority [concluded its opinion](#) by stating its decision was “a narrow one” based only on application of the felon-in-possession ban to this particular prior conviction under Pennsylvania law. The court did not consider or decide whether the ban was unconstitutional generally ([also called “facially” unconstitutional](#)), nor did it consider or decide whether the felon-in-possession ban would be upheld based on a different prior conviction.

Underscoring the limited nature of the court’s ruling, Judge Thomas Ambro, joined by two others, [wrote a separate concurrence](#) to emphasize that the felon-in-possession ban remains “presumptively lawful.” In [Judge Ambro’s view](#), the ban generally fits within the nation’s history and tradition of disarming persons who “pose a threat to the orderly functioning of society.” Because Range posed no such threat, Judge Ambro reasoned, he could not constitutionally be disarmed.

Finally, Judge David Porter, writing only for himself, [concurred](#) to note that in his view, the lack of founding-era analogues to the felon-in-possession ban was attributable to a historical understanding that Congress lacked the power to enact such regulations.

Dissenting Opinions

Judge Cheryl Ann Krause dissented from the majority, reasoning that the felon-in-possession ban was longstanding and part of the nation's historical tradition, thus satisfying the *Bruen* standard. In her view, "'longstanding' can mean decades, not centuries," but she opined that, in any event, there were sufficient examples of laws disarming groups viewed dangerous both in pre-American English law and founding-era law to satisfy the historical-analogue standard. Judge Krause also argued that the level of similarity in historical analogue the majority required was closer to a "historical twin" approach that the Supreme Court rejected.

Judge Krause also highlighted what she considered to be practical concerns with the majority's approach. First, under Supreme Court precedent, to convict an individual of the crime of possessing a firearm while a felon, the government must prove the defendant knew of his status as a felon. In Judge Krause's view, *Range* would now require the government to prove the defendant knew a prior felony was of the type that would give rise to disarmament (rather than a felony like *Range*'s that could not). Second, she noted that the government enforces the felon-in-possession ban in part through the FBI's National Instant Criminal Background Check System (NICS) by requiring background checks before certain firearm transactions. NICS includes records, among others, of felony convictions. Under *Range*, Judge Krause asserted that some portion of those convictions would no longer be a valid basis for disarmament, rendering NICS unreliable in its current form.

Judge Patty Schwartz, joined by Judge Felipe Restrepo, wrote separately in dissent "to emphasize both that the history supports banning felons from possessing firearms and that the Majority opinion is far from narrow."

Finally, Judge Jane Richards Roth dissented because, in her view, *Range* lacked standing to bring this challenge.

Comparison to *United States v. Jackson*

The Eighth Circuit, in a comparatively brief opinion issued just four days before *Range*, upheld the felon-in-possession ban as constitutional. That case involved an individual's criminal conviction for possessing a firearm while having prior felony convictions for selling a controlled substance. The panel relied on the Supreme Court's language in *Heller* that nothing in the decision "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" and concluded that "there is no need for felony-by-felony litigation regarding constitutionality" of the ban. The *Jackson* court upheld the defendant's conviction, finding no Second Amendment violation.

Considerations for Congress

Second Amendment law has developed rapidly since the Supreme Court decided *Bruen*. That decision has led to a number of court opinions, including *Range*, on the constitutionality of various federal and state gun regulations. The Supreme Court has agreed to review a decision on a separate ban—applicable to individuals subject to certain domestic violence restraining orders—in *United States v. Rahimi*, set for argument on November 7, 2023. The Court's ruling in *Rahimi* could broadly clarify how the Second Amendment applies to common firearm regulations. Conversely, the Court might narrowly resolve the case on the specific prohibition at issue, without needing to provide guidance on how the *Bruen* test applies to other regulations, such as the felon-in-possession ban. The Department of Justice has also asked the Supreme Court to review the *Range* decision, but only after it decides *Rahimi*.

Given the new historical analogue test announced in *Bruen* and the changing state of Second Amendment case law, Congress may wish to review existing firearm regulations and prohibitions, including the

felon-in-possession ban. For example, Congress could revise the ban to cover a narrower range of felonies, such as specified violent crimes. On the other hand, Congress may not wish to make any changes, relying on the Supreme Court's prior assurances that felon-in-possession bans are presumptively lawful.

If *Range* continues to be good law, either because it is upheld by the Supreme Court or if the Supreme Court declines to hear the appeal, Congress may want to consider changes to NICS. The database currently contains [more than five million felony conviction records](#), which are [the most common reason](#) an individual fails the background check. Under *Range*, some portion of these convictions would not be a valid basis for disarming individuals.

Regardless of whether Congress revisits the felon-in-possession ban specifically, the historical tradition test announced in *Bruen* will likely influence future congressional consideration of firearm regulations. The Third Circuit's decision in *Range* may also provide a guidepost to help in that endeavor.

Author Information

Matthew D. Trout
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.