

# Courts Disagree as to Whether the Federal Felon-in-Possession Firearm Prohibition Violates the Second Amendment

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There is growing disagreement among the federal appeals courts as to whether the [federal ban](#) on individuals convicted of a felony possessing firearms, found at 18 U.S.C. § 922(g)(1) and commonly known as the “felon-in-possession” prohibition, violates the [Second Amendment](#). A federal appeals court judge recently [predicted](#) that “[o]ne day—likely sooner, rather than later—the Supreme Court will address the constitutionality of Section 922(g)(1) or otherwise provide clearer guidance on whether felons are protected by the Second Amendment.”

Given that possibility, this Sidebar examines the current circuit split regarding Section 922(g)(1). The Sidebar begins by providing an overview of the primary Supreme Court cases interpreting the Second Amendment, including the Court’s 2022 decision in [New York State Rifle & Pistol Association v. Bruen](#) that announced a new analytical methodology for Second Amendment challenges to firearms laws. The Sidebar then summarizes the post-*Bruen* cases in which federal appeals courts have split as to the constitutionality of the felon-in-possession prohibition, including a May 9, 2024, [ruling](#) from the Ninth Circuit that the prohibition was unconstitutional as applied to the defendant in that case. The Sidebar closes with considerations for Congress.

## Select Supreme Court Second Amendment Jurisprudence

### Pre-*Bruen* Cases

The [Second Amendment](#) provides, “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.” For most of American history, the Supreme Court remained largely silent as to the meaning of this provision. In 1939, the Court [suggested](#) in *United States v. Miller* that the right protected by the Second Amendment is tied to the maintenance of the militia. *Miller* gave rise to further opinions in the lower courts regarding whether the

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Second Amendment guarantees an [individual](#) right or a [collective](#), militia-based right. Then, in its 2008 decision in *District of Columbia v. Heller*, the Court adopted the former, individual-right interpretation. The Court held that the Second Amendment permits “[law-abiding, responsible citizens](#)” to possess arms for a “[lawful purpose](#),” particularly [self-defense in the home](#). The Court [added](#) that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,” among other things.

While *Heller* recognized that the Second Amendment guarantees an individual right to possess arms for at least some purposes, *Heller* left unanswered many questions about the scope of the constitutional right. Accordingly, lower courts following *Heller* were [uncertain](#) as to whether, for example, the Second Amendment right extends beyond the home to public places. Also, because *Heller* did not set forth an explicit framework for assessing whether firearms laws are consistent with the Second Amendment, lower courts did not always [apply a](#) uniform standard of review to challenged laws.

## ***Bruen***

In the 2022 case *New York State Rifle & Pistol Association v. Bruen*, the Supreme Court clarified that the Second Amendment right is not restricted to the home, [declaring](#) that “[n]othing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms.” The Court [pointed out](#) that, because the central component of the Second Amendment right is self-defense, the right applies to at least some public places where confrontation may occur and thus where self-defense may be needed.

With respect to the applicable standard for measuring the constitutionality of firearms laws, the Court [announced](#) a test requiring courts to view Second Amendment challenges through the dual lenses of text and history. The Court summarized the test as follows:

[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment[.]

The Court offered some additional details on the history-based aspects of the test, [explaining](#) that historical analysis of modern-day gun laws may call for reasoning by analogy to determine whether historical and modern firearm regulations are “relevantly similar.” The Court identified two primary considerations for this comparative analysis: [first](#), “whether modern and historical regulations impose a comparable burden on the right of armed self-defense,” and [second](#), “whether that regulatory burden is comparably justified.” The Court also [instructed](#) lower courts to examine “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” With respect to the closeness of the relationship between historical and modern regulations, the Court [indicated](#) that the government need only “identify a well-established and representative historical *analogue*, not a historical *twin*.” The Court also [dispelled](#) any notion that a historical focus would limit the scope of the Second Amendment to arms that existed in the past: “even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense.”

Providing an example of how the test could play out, the Court [referenced](#) regulations of firearms in “sensitive places,” such as schools and government buildings. The Court generally [took](#) the historical record to mean that weapons could be prohibited in locations such as “legislative assemblies, polling

places, and courthouses,” and as such the Court [suggested](#) that courts could “use analogies to those historical regulations of ‘sensitive places’ to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.”

The *Bruen* Court characterized its decision as [clarifying](#) whether the Second Amendment right recognized in *Heller* extends beyond the home and [applying](#) “[t]he test that we set forth in *Heller* ... to assess whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.” Other aspects of *Heller*, including the decision’s language regarding the [presumptive constitutionality](#) of certain firearms restrictions such as “longstanding prohibitions on the possession of firearms by felons,” were not before the *Bruen* Court. As a result, lower courts have been asked to address the interplay between *Heller* and *Bruen*, including whether certain firearms restrictions thought to have been permissible under *Heller* are constitutionally invalid post-*Bruen*.

## Circuit Split on the Constitutionality of the “Felon-in-Possession” Prohibition

### Cases Ruling Prohibition Unconstitutional as to Specific Defendants

Under federal law, codified at [18 U.S.C. § 922\(g\)\(1\)](#), individuals who have been convicted of a crime punishable by imprisonment for a term exceeding one year are (with some exceptions) prohibited from possessing firearms. Following *Bruen*, the Third and Ninth Circuits have held that the felon-in-possession ban is unconstitutional as applied to specific parties.

In the Third Circuit case, *Range v. Attorney General*, Bryan Range had a prior [conviction](#) for making false statements to obtain food stamps in violation of Pennsylvania law, an offense that subjected him to the felon-in-possession prohibition. Range [argued](#) that the felon-in-possession prohibition—which he claimed prevented him from purchasing a rifle for deer hunting and self-defense purposes—violated the Second Amendment. A three-judge panel of the Third Circuit [ruled](#) in favor of the government. The full, en banc Third Circuit [reversed](#), agreeing with Range.

Applying *Bruen*, the en banc court first [determined](#) that Range was one of “the people” protected by the Second Amendment. While the government asserted that the amendment covers only “law-abiding, responsible citizens,” the court [responded](#), among other things, that the government’s conception of this phrase was far too restrictive and logically could mean that “every American who gets a traffic ticket is no longer among ‘the people’ protected by the Second Amendment.” The court thus [decided](#) that the plain text of the Second Amendment implicates the felon-in-possession ban, which would preclude Range from possessing a rifle to defend himself in the home. Turning to the felon-in-possession ban’s consistency with a historical tradition of firearm regulation, the court [concluded](#) that the historical analogues offered by the government fell short, as the government did not show that Range belonged to a specific class of historically disarmed individuals; that historical punishments for nonviolent felonies included lifetime disarmament; or that historical laws disarming individuals who used firearms in the commission of their offenses would have applied to Range (who did not use a firearm to commit his fraud offense). The court thus [held](#) that Section 922(g)(1) could not constitutionally be applied to Range, stressing that its decision was a “narrow” one applicable only to the defendant in light of his violation of a particular Pennsylvania law. (For further [details](#) on *Range*, see CRS Legal Sidebar LSB11072, *Third Circuit Holds that Application of Felon-in-Possession Ban Violates the Second Amendment, Creating Circuit Split*, by Matthew D. Trout.)

In the Ninth Circuit case, *United States v. Duarte*, Steven Duarte [had](#) five prior, nonviolent criminal convictions under California law. After law enforcement observed Duarte tossing a handgun out of a

window, he was [convicted](#) of being a felon in possession of a firearm in violation of Section 922(g)(1). Duarte claimed that Section 922(g)(1) was unconstitutional as applied to him, and a Ninth Circuit panel [agreed](#) by a 2-1 vote. The majority first acknowledged that prior circuit precedent had upheld Section 922(g)(1) against a Second Amendment challenge, but the majority [decided](#) that it was no longer bound by that pre-*Bruen* opinion because it did not use or otherwise comply with the analytical approach set forth in *Bruen*. The majority next [explained](#) that Duarte, an American citizen, was not excluded from Second Amendment protection on account of his felony convictions because “all Americans” are among “the people” who possess the Second Amendment right. The majority then held that the government’s proffered historical analogues for the lifetime felon-in-possession ban were inadequate. The majority reasoned that the Founders had [not enacted laws](#) prohibiting individuals convicted of crimes from possessing firearms; [early laws](#) generally were aimed at disarming certain disloyal individuals, insurrectionists, and noncitizens; [state proposals](#) of the time would only have disarmed individuals threatening violence or presenting a risk of public injury; [harsh punishments](#) were reserved for certain felony offenses, not all (violent and nonviolent) felonies; and even then, the historic response to the underlying crime controlled, and [some](#) of Duarte’s offenses either were nonexistent or would have been a misdemeanor at the time of the founding.

## Cases Rejecting Second Amendment Challenges to Prohibition

By contrast, following *Bruen*, the Seventh, Eighth, Tenth, and Eleventh Circuits have rejected constitutional challenges to Section 922(g)(1) either as applied to particular parties or categorically. In the Seventh Circuit case, the panel [pointed to](#) language from *Heller* that the ruling does not alter “longstanding prohibitions on the possession of firearms by felons” and from concurring opinions in *Bruen* that *Bruen* does not modify *Heller*. The court [acknowledged](#) the Third Circuit’s ruling in *Range* and assumed there might be “room” for as-applied challenges to Section 922(g)(1). In the case before the court, however, the Seventh Circuit [held](#) that the defendant was not a “law-abiding, responsible” person protected by the Second Amendment, [recounting](#) the defendant’s convictions for “22 felonies, including aggravated battery of a peace officer and possessing a weapon while in prison.”

In the Eighth Circuit case, the court issued an [opinion](#) four days before *Range* upholding 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* about the felon-in-possession prohibition, and the same concurring [opinions](#) from *Bruen*, as the backdrop for its analysis. The court then [held](#) that historical analogues supported disarming classes presenting a risk of dangerousness, and that individualized determinations of such risk were not historically necessary for purposes of disarmament. In a 2-1 decision in a subsequent case, the Eighth Circuit [confirmed](#) that as-applied challenges to Section 922(g)(1), requiring a court to determine the provision’s constitutionality as applied to a particular felony, were foreclosed in the circuit.

In the Tenth Circuit case, the court [determined](#) that post-*Heller* circuit precedent—affirming the constitutional validity of Section 922(g)(1) because *Heller* “appeared to recognize the constitutionality of longstanding prohibitions on possession of firearms by convicted felons”—remained good law after *Bruen*, as the *Bruen* court “didn’t appear to question the constitutionality” of Section 922(g)(1). The court upheld the categorical ban on felons possessing firearms, [explaining](#) that “we have no basis to draw constitutional distinctions based on the type of felony involved.” In a later case, the Eleventh Circuit also [held](#) that it remained bound, for similar reasons, to its post-*Heller*, pre-*Bruen* circuit precedent rejecting a Second Amendment challenge to the felon-in-possession prohibition.

## Considerations for Congress

The Supreme Court is currently reviewing a case, *United States v. Rahimi*, in which the Fifth Circuit facially invalidated a federal law prohibiting the possession of firearms by persons subject to certain domestic violence restraining orders. A ruling from the Court in *Rahimi* may further clarify the meaning of the Second Amendment and address residual questions regarding how to apply the *Bruen* methodology to laws potentially implicating the right to keep and bear arms.

The United States has also [asked](#) the Supreme Court to review the Third Circuit's opinion in *Range*. Given that the Court is taking up *Rahimi*, the United States has [requested](#) the Court to hold the petition in *Range* pending a ruling in *Rahimi* and, following such a ruling, either vacate the Third Circuit's decision and remand the case back to that court, or fully review *Range* or another case raising the constitutionality of Section 922(g)(1). The government's petition in *Range* is [pending](#).

Congress may assess how the *Rahimi* decision, once issued, informs the meaning of the Second Amendment and the methodology applicable to constitutional challenges to firearms laws. Congress also may monitor how the Supreme Court responds to the government's petition in *Range*, which includes the possibility that the Court will grant the petition and directly answer whether Section 922(g)(1) comports with the Second Amendment, or whether and when as-applied challenges may be successfully mounted against Section 922(g)(1). If the Court does not grant the petition, Congress may leave Section 922(g)(1) as is or amend it to limit its application in a way that could bring the prohibition in closer alignment with the positions taken by the Third and Ninth Circuits.

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