Range v. Lombardo

United States District Court for the Eastern District of Pennsylvania

August 30, 2021, Decided; August 31, 2021, Filed

CIVIL ACTION No. 20-3488

Reporter
557 F. Supp. 3d 609 *; 2021 U.S. Dist. LEXIS 165031 **; 2021 WL 3887686

BRYAN DAVID RANGE, Plaintiff v. REGINA LOMBARDO et al., Defendants

Subsequent History: Affirmed by *Range v. AG United States, 2022 U.S. App. LEXIS 31614 (3d Cir. Pa., Nov. 16, 2022)*

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine if there is a sufficient evidentiary basis on which a reasonable jury could return a verdict for the non-moving party. A factual dispute is material if it might affect the outcome of the case under governing law.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN2[] **Entitlement as Matter of Law, Appropriateness**

On a motion for summary judgment, the Court views the evidence presented in the light most favorable to the non-moving party. However, unsupported assertions, conclusory allegations, or mere suspicions are insufficient to overcome a motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN3[] **Entitlement as Matter of Law, Appropriateness**

The movant is initially responsible for informing the Court of the basis for the motion for summary judgment and identifying those portions of the record that demonstrate the absence of any genuine issue of material fact. Where the non-moving party bears the burden of proof on a particular issue, the moving party's initial burden can be met simply by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. After the moving party has met the initial burden, the non-moving party must set forth specific facts showing that there is a genuinely disputed factual issue for trial by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations admissions, interrogatory answers, or other materials, or by showing that the materials cited do not establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

HN4[] **Fundamental Rights, Right to Bear Arms**

At the first step of the two-step approach to determining whether a crime was serious, a court considers whether the Second Amendment is implicated. If the claimant has committed a serious offense, rendering that person an unvirtuous citizen who was historically barred from possessing a firearm, that person is judged to have lost his or her Second Amendment rights. If the challenger succeeds at step one, the burden shifts to the Government to determine that the regulation satisfied some form of heightened scrutiny.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

HN5[] **Fundamental Rights, Right to Bear Arms**

In the context of being barred from possessing a firearm, Binderup set forth a nonexclusive four-factor test for determining whether a crime is serious: (1) whether the conviction was classified

as a misdemeanor or a felony, (2) whether the criminal offense involves violence or attempted violence as an element, (3) the sentence imposed, and (4) whether there is a cross-jurisdictional consensus as to the seriousness of the crime. Holloway itself added one more factor: (5) the potential for physical harm to others.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN6[] **Constitutionality of Legislation, Inferences & Presumptions**

Challengers do face an uphill battle because statutes are presumptively constitutional. The burden rests with the challenger to demonstrate that 18 U.S.C.S. § 922(g) is unconstitutional as applied. Courts should presume in favor of a statute's validity, until its violation of the Constitution is proved beyond a reasonable doubt.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

HN7[] **Fundamental Rights, Right to Bear Arms**

In the context of being barred from possessing a firearm, the cross jurisdictional consensus factor—like the subject law's classification as a felony, and the likelihood of physical harm—is generally conclusive that a crime is serious.

Counsel: **[**1]** For Bryan David Range, Plaintiff: MICHAEL P. GOTTLIEB, LEAD ATTORNEY, VANGROSSI & RECCHUITI, NORRISTOWN, PA; ALAN GURA, GURA PLLC, ALEXANDRIA, VA.

For WILLIAM BARR, Attorney General of the United States, REGINA LOMBARDO, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, Defendants: PAUL J. KOOB, LEAD ATTORNEY, ERIC D. GILL, U.S. ATTORNEY'S OFFICE, PHILADELPHIA, PA.

Judges: GENE E.K. PRATTER, UNITED STATES DISTRICT JUDGE.

Opinion by: GENE E.K. PRATTER

Opinion

[*610] MEMORANDUM

PRATTER, J.

Bryan Range pled guilty to making a false statement to obtain food stamps assistance **[*611]** more than 25 years ago, which was then a misdemeanor offense. While Mr. Range served no time in prison because of this conviction, the crime to which he pled guilty was punishable by up to five years' imprisonment. As a result, *18 U.S.C. § 922(g)* prohibits him from owning a weapon.

Mr. Range seeks the Court's declaratory judgment that *§ 922(g)* as applied to him violates the *Second Amendment*. Because the Court concludes that Mr. Range's conduct is sufficiently "serious," as that term is defined by Third Circuit precedent, *§ 922(g)* is constitutional as applied. The Court will grant the Government's motion for summary judgment, and deny Mr. Range's motion for summary judgment.

BACKGROUND

Mr. **[**2]** Range pled guilty, in August 1995, to

one count of making a false statement to obtain food stamps assistance, in violation of 62 P.S. § 481(a). At that time, Mr. Range mowed lawns for a living, earning between $9 and $9.50 an hour, or approximately $300 per week. He and his wife struggled to make ends meet caring for their three children—a three-year-old and twin two-year-olds. Mrs. Range prepared an application for food stamps, which she and Mr. Range both signed. The application omitted Mr. Range's income. Mr. Range alleges that he did not review the application, but accepted responsibility for it and acknowledged that it was wrong to not fully disclose his income. Mr. Range was sentenced to three years' probation, which he satisfactorily completed, $2,458 in restitution, $288.29 in costs, and a $100 fine. He served no time in jail. But as will become relevant later, Mrs. Range—who allegedly prepared the application and also signed it was not charged with a crime.

Violations of 62 P.S. § 481(a) were at the time classified as first-degree misdemeanors,[1] punishable by up to five years' imprisonment. Mr. Range alleges that when he pled guilty, neither the prosecution nor the judge informed him of the maximum potential **[**3]** sentence, or of the fact that by pleading guilty, he thereafter would be barred from possessing firearms.

Since 1995, Mr. Range's only other "criminal" history includes minor traffic and parking infractions, as well as a fishing offense in 2011. He testified that he thought he had renewed his fishing license, and that after paying the fine, he renewed the license.

At one time, Mr. Range attempted to purchase a firearm, but was rejected by the background check system. The employee at the gun store Mr. Range visited reviewed a list of prohibiting offenses with Mr. Range, and Mr. Range verified that he had not committed any of them. The employee told Mr. Range that the rejection was likely due to a computer error (a common refrain of modern life), and that he should retry his purchase at a later time. But because Mrs. Range had not been convicted of falsifying the application (or any other crime), she was able to pass **[*612]** a background check. She purchased a hunting rifle and gifted it to Mr. Range. When that gun later was destroyed in a house fire, she gifted him a different rifle.

Years later, Mr. Range again tried to purchase a gun and was again rejected. Once more, **[**4]** the store employee told him that the rejection was a mistake. But when Mr. Range researched the matter further, he learned that he was barred from possessing firearms because of his public assistance application conviction. Mr. Range sold his only firearm so that he would be compliant with the law, and then he brought this lawsuit.

LEGAL STANDARD

HN1[↑] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable jury could return a verdict for the non-moving party. Kaucher v. Cty. of Bucks, 455 F.3d 418, 423 (3d Cir. 2006) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). A factual dispute is "material" if it might affect the outcome of the case under governing law.

[1] Mr. Range's conduct was classified as a first-degree misdemeanor at the time, but in 2018 the Pennsylvania legislature amended 62 P.S. § 481 so that fraudulently obtained assistance of $1,000 or more is now classified as a felony of the third degree. However, the parties agree as does the Court—that the classification of Mr. Range's conduct at the time of his conviction governs. *See* Binderup v. AG of United States, 836 F.3d 336, 351 (3d Cir. 2016) (en banc) ("[T]he category of serious crimes changes over time as legislative judgments regarding virtue evolve."); United States v. Irving, 316 F. Supp. 3d 879, 890 (E.D. Pa. 2018), *aff'd sub nom.* United Stales v. Mills, No. 18-3736, 858 Fed. Appx. 463, 2021 U.S. App. LEXIS 17140, 2021 WL 2351114 (3d Cir. June 9, 2021) (applying *Binderup* and noting that "having the Court rule on the constitutionality of an [indictment] based on a jury's verdict some two months later" would "require some form of judicial time travel").

Id.

HN2[↑] On a motion for summary judgment, the Court views the evidence presented in the light most favorable to the non-moving party. *See Anderson, 477 U.S. at 255*. However, "[u]nsupported assertions, conclusory allegations, or mere suspicions are insufficient to overcome a motion for summary judgment." *Betts v. New Castle Youth Dev. CM, 621 F.3d 249, 252 (3d Cir. 2010)*.

HN3[↑] The movant is initially responsible for **[**5]** informing the Court of the basis for the motion for summary judgment and identifying those portions of the record that demonstrate the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Where the non-moving party bears the burden of proof on a particular issue, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id. at 325*. After the moving party has met the initial burden, the non-moving party must set forth specific facts showing that there is a genuinely disputed factual issue for trial by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." *Fed. R. Civ. P. 56(c)*. Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex, 477 U.S. at 322*.

DISCUSSION [6]**

The controlling issue in this case is what limits the *Second Amendment* puts on the ability of governments to limit access to firearms because of a citizen's non-violent misdemeanor conviction. This debate asks how to interpret language in the Supreme Court's watershed *Second Amendment* case, *District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*. After concluding that the *Second Amendment* protects an individual's right to possess firearms, the Supreme Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms **[*613]** by felons and the mentally ill," and that such laws are "presumptively lawful." *Heller, 554 U.S. at 626-27 & n,26*. However, courts have grappled with whether a challenger could rebut *Heller's* "presumption" that such laws are lawful, at least as applied to them, and whether laws that prohibit the possession of firearms by misdemeanants are also consistent with the *Second Amendment*.

Our Third Circuit Court of Appeals very recently addressed and tackled one of the "uncharted frontiers" remaining after *Heller*. *See Drummond v. Robinson Twp., No. 20-1722, 9 F.4th 217, 2021 U.S. App. LEXIS 24511, 2021 WL 3627106 (3d Cir. Aug. 17, 2021)*. While analyzing the issue of the possible interference of zoning rules with citizens' *Second Amendment* right to bear arms, the appellate panel underscored lessons from *Heller* that demand the delicate balancing of the right to bear arms with the not unlimited nature **[**7]** of that right that leaves room for lawful restrictions, subject to heightened judicial scrutiny on it. *2021 U.S. App. LEXIS 24511, [WL] at *11-12*.

Turning to the specific *Heller* frontier presented by Mr. Range, the Third Circuit Court of Appeals first considered this question en bane in *Binderup v. Attorney General of the United States of America, 836 F.3d 336 (3d Cir. 2016)* ((en bane). *Binderup* itself shows the challenging topography of the topic. Three opinions were issued in *Binderup*, none of which represented a majority. Judge Ambro, joined by two other judges, wrote for the court. Judge Hardiman was joined by four other judges, concurring in the judgment. Judge Fuentes

was joined by six other judges in an opinion concurring in part and dissenting in part. The Third Circuit Court of Appeals has since treated Judge Ambro's opinion as controlling based on an analysis under *Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)*, because it represented the median position between the dissenting and concurring opinions. *See Beers v. AG United States, 927 F.3d 150, 155-56 (3d Cir. 2019), judgment vacated on other grounds, Beers v. Barr, 140 S. Ct. 2758, 206 L. Ed. 2d 933 (mem.) (2020)*.

Binderup adopted, with some modifications, *United States v. Marzzarella's* two-step approach to determining whether a crime was "serious." *Binderup, 836 F.3d at 345* (citing *United States v. Marzzarella, 614 F.3d 85, 89 (3d Cir. 2010)*). ***HN4***[⬆] At the first step, a court considers whether the *Second Amendment* is implicated. *See Drummond, 2021 U.S. App. LEXIS 24511, 2021 WL 3627106, at *3* (citing *Marzzarella, 614 F.3d at 89*). If the claimant has committed a "serious" offense, rendering that person an "unvirtuous **[**8]** citizen" who was historically barred from possessing a firearm, that person is judged to have lost his or her *Second Amendment* rights. *Holloway v. Attorney General United States, 948 F.3d 164, 171 (3d Cir. 2020)* (quoting *Binderup, 836 F.3d at 348-49*). "[I]f the challenger succeeds at step one, the burden shifts to the Government to determine that the regulation satisfied some form of heightened scrutiny." *Binderup, 836 F.3d at 347*. *See also Drummond, 2021 U.S. App. LEXIS 24511, 2021 WL 3627106, at *3*.

Accordingly, the Court will first consider whether Mr. Range's conduct is sufficiently "serious" for Mr. Range to lose his *Second Amendment* rights. Then, if it finds that the *Second Amendment* is implicated, it will consider whether the Government has carried its burden of demonstrating that the regulation satisfies heightened scrutiny.

A. *Marzzarella* Step One: Whether the *Second Amendment* is Implicated

Binderup ***HN5***[⬆] set forth a nonexclusive four-factor test for determining whether a crime is "serious": "(1) whether the conviction was classified as a misdemeanor or a felony, (2) whether the criminal offense involves violence or attempted violence as an element, (3) the sentence imposed, and **[*614]** (4) whether there is a cross-jurisdictional consensus as to the seriousness of the crime." *Holloway, 948 F.3d at 172 n.10* (citing *Binderup, 836 F.3d at 351-52*). *Holloway* itself added one more factor: (5) the potential for physical harm to others. *See id. at 173*.

The Government concedes that Mr. Range satisfies four out of **[**9]** the five factors. His conviction was classified as a misdemeanor, the criminal offense does not involve violence or attempted violence as an element, he was not sentenced to any jail time, and the crime involved no potential for physical harm to others. But the parties dispute whether there is a "cross-jurisdictional consensus" as to the seriousness of his crime.

The parties agree that between 39 and 41 jurisdictions in the United States would have classified Mr. Range's conduct as a felony.[2] Mr. Range concedes that 39 jurisdictions would likely constitute a consensus, and the Court agrees—for at least two reasons. First, the word "consensus" implies something short of total unanimity, but rather the acknowledged existence of a "general agreement." *See* Consensus, Black's Law Dictionary (11th ed. 2019) ("A general agreement; collective opinion."); Consensus, Shorter Oxford English Dictionary (6th ed. 2007) ("Agreement or unity of opinion, testimony, etc.; the majority view, a collective opinion . . . ."). Second, as the challenger, the burden rests with Mr. Range to

[2] *See* Doc. Nos. 17 at 18; 18 at 6. Because the parties agree that the difference between 39 and 41 jurisdictions should make no difference to the Court's analysis, the Court will not discuss the details of the parties' dispute over the classification of the remaining two jurisdictions.

make a 'strong' showing that . . . he has not committed a 'serious' crime." *Holloway, 948 F.3d at 172* (quoting *Binderup, 836 F.3d at 347*). Therefore, even if this particular **[**10]** case falls close to the line, it is Mr. Range's burden to prove that there is *not* a consensus.

But Mr. Range argues that the proper point of reference is not all 50 states, but rather only those states that criminalize the making of a false statement regarding food stamps specifically. He argues that the Court should disregard the 15 states that punish conduct like Mr. Range's as a felony under a general theft or falsification statute.

The Court disagrees. Every time that the Third Circuit Court of Appeals has applied the *Binderup* balancing test, it has considered the laws of all 50 states. Mr. Range cites no authority for his argument that the Court should only consider laws that define the elements of a crime in the same way as the state in which the challenger was convicted. Instead, he argues that the law should recognize that "there is a difference between a poor parent who applies for too many food stamps, and a sophisticated fraudster who schemes to systematically bilk Medicare of millions." Perhaps, like compassionate human nature, or a personal gauge of morality, the law should make such a distinction. Indeed, it can certainly be said that the law should be written in a way **[**11]** to recognize many finer or closer distinctions than it does. No doubt there are even finer gradations of guilt between the two extremes Mr. Range proposes.[3] But under our system of government it is within the prerogative of every state to choose between having a more complex criminal code that defines its statutes narrowly, and more general criminal statutes that are accompanied by a greater range of possible punishments. **[*615]** Nothing in *Binderup*, or any opinion applying its multifactor test, provides that a state's choice to classify conduct like Mr. Range's as a felony is irrelevant merely because the drafters of the laws in any given state choose to define crimes with more general language.

Because the Court has concluded that there is a cross-jurisdictional consensus that making a false statement regarding food stamps is serious, the question is whether this one factor is sufficiently important for the Government to prevail here. Mr. Range argues that it is not, for several reasons. First, he argues that the law's classification as a misdemeanor or a felony is the most important factor. In support of this argument, he notes that the Third Circuit Court of Appeals has described the **[**12]** law's classification as "generally conclusive." *Folajtar v. Att'y Gen. of the United Stales, 980 F.3d 897, 900 (3d Cir. 2020)*, *cert. denied sub nom. Folajtar v. Garland, 141 S. Ct. 2511, 209 L. Ed. 2d 546, 2021 WL 1520793 (U.S. 2021)*. The Third Circuit Court of Appeals has also held that the underlying conduct's "potential for danger and risk of harm to self and others" was sufficiently important that the Government prevailed even though the other four factors weighed in favor of the challenger. *See Holloway, 948 F.3d at 164*. Mr. Range reasons that because *Binderup* endorsed a balancing test, he need not prevail on every factor, especially where, as here, both of the factors that the Third Circuit Court of Appeals has treated as most important support his claim.

Mr. Range's position is not without merit. The plurality opinion in *Binderup* described the factor test as a balancing test, not a set of elements that all petitioners must meet. *See Binderup, 836 F.3d at 351*. And Judge Fuentes's opinion dissenting in part likewise viewed the plurality's holding as endorsing a balancing test of factors. *See Id. at 411* ("Judge Ambro's approach would require district court judges to consider a variety of factors in order to assess a crime's 'seriousness' . . ") (Fuentes, J., dissenting). One could reason that had *Binderup* intended future challengers to "run the gauntlet,"

[3] Indeed, the compelling tug on the human heart such as Mr. Range appears to present has stood the test of time and modalities in literature. *See* Victor Hugo, Les Miserables (Norman Denny trans., Penguin Books 1982) (1862).

satisfying every factor, it would have **[**13]** said so.

However, that is not how subsequent opinions interpreting *Binderup* have used the multifactor test. Both times that it has applied *Binderup*, the Third Circuit Court of Appeals has held for the Government even though only one factor weighed in its favor. The Government prevailed in *Holloway* even though only the (newly-minted) "likelihood of physical harm" factor weighed in its favor. *Holloway, 948 F.3d at 173*. The Government also prevailed in *Folajtar* even though the only factor in its favor was the law's classification as a felony rather than a misdemeanor. *Folajtar, 980 F.3d at 900*. Indeed, the fact that the dissents in *Folajtar* and *Holloway* both argued that the majorities had improperly treated one factor as dispositive only confirms this interpretation of those opinions. Even more important is language in *Binderup* itself. While no court has held that the cross-jurisdictional factor is similarly important, dicta in *Binderup* suggests that its absence would have been dispositive. *See Binderup, 836 F.3d at 353* ("Were the Challengers unable to show that so many states consider their• crimes to be non-serious, it would be difficult for them to carry their burden at step one.").

Mr. Range next argues that the Government's proposed approach improperly renders **[**14]** the law's classification as a "one-way rachet, employed only in felony cases to assist the government's defense but relegated to a lower status when considering misdemeanors." Doc. No. 13-1 at 16. But a one-way rachet is exactly what the Third Circuit Court of Appeals has twice imposed, once in *Folajtar* where it treated a crime's classification as dispositive, and **[*616]** once in *Holloway* where it relied solely on the likelihood of physical harm. While Mr. Range argues that *Folajtar* stands for the proposition that a law's classification as a felony or a misdemeanor is "generally conclusive," that is not what *Folajtar* said. Rather, it said that "the legislature's designation of an offense as a felony is generally conclusive in determining whether that offense is serious." *Folajtar, 980 F.3d at 900*. It simply did not speak to the relative importance of a law's classification as a misdemeanor. Thus, this Court cannot adopt Mr. Range's view that a law's classification as a misdemeanor is generally conclusive that a law is not serious, because this would be inconsistent with *Holloway*, which held for the Government even though the offense was a misdemeanor. *See Holloway, 948 F.3d at 174* ("While 'generally the misdemeanor label ... in the *Second Amendment* context **[**15]** is ... important' and is a 'powerful expression' of the state legislature's view, it is not dispositive." (alterations in original) (quoting *Binderup, 836 F.3d at 352*)).

While Mr. Range argues that this approach is inconsistent with *Binderup's* description of the standard as a "balancing test," the Court is bound to follow *Folajtar* and *Holloway*. Moreover, this route makes sense when considered against the wider context of as applied challenges to *§ 922(g)(1)*. ***HN6***[↑] Challengers like Mr. Range do face an uphill battle because statutes are presumptively constitutional. *See, e.g.*, *Holloway, 948 F.3d at 172* (noting that the burden rests with the challenger to demonstrate that *§ 922(g)* is unconstitutional as applied); *Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270, 6 L. Ed. 606 (1827)* (noting that courts should "presume in favor of [a statute's] validity, until its violation of the Constitution is proved beyond a reasonable doubt"). And it is not merely each state's determination of a statute's seriousness that the Court is considering. Congress has also determined that the conduct in question was sufficiently serious to justify disarmament. This fact operates as a powerful "sixth factor" present in every case, weighing in favor of the Government.

HN7[↑] While the Court acknowledges that this can be considered a matter of first impression, **[**16]** it concludes that the cross jurisdictional consensus factor—like the subject law's classification as a felony, and the likelihood of physical harm—is generally conclusive that a

crime is serious.[4] *See* *Binderup, 836 F.3d at 353*.

CONCLUSION

For the foregoing reasons, the Court will grant the Government's Motion for Summary Judgment, and deny Mr. Range's Motion for Summary Judgment. An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] ORDER

AND NOW, this 30th day of August, 2021, upon consideration of the Government's Motion for Summary Judgment (Doc. No. 12), Mr. Range's Motion for Summary Judgment (Doc. No. 13), the Government's Statement of Undisputed Facts (Doc. No. 14), the Government's Response in Opposition to Mr. Range's Motion for Summary Judgment (Doc. No. 15), the Government's Response in Opposition to Mr. Range's Statement of Undisputed Material Facts (Doc. No. 16), Mr. Range's Response in Opposition to the Government's Motion for Summary Judgment (Doc. No. 17), and the Government's Reply in Support of its Motion for Summary Judgment (Doc. No. 18), it is **ORDERED** that:

1. The Government's Motion for Summary Judgment (Doc. No. 12) is **GRANTED [**17]** .

2. Mr. Range's Motion for Summary Judgment (Doc. No. 13) is **DENIED**.

3. Mr. Range's Complaint (Doc. No. 1) is **DISMISSED** with prejudice.

4. The Clerk of Court shall mark this case **CLOSED** for all purposes, including statistics.

BY THE COURT:

/s/ Gene E.K. Pratter

GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

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[4] Because the Government prevails at *Marzarella* step one, the Court will not proceed to step two to consider whether the Government has produced sufficient evidence to withstand heightened scrutiny.