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Legal Sidebar

Second Amendment Permits Temporarily Disarming Persons Subject to Domestic Violence Restraining Orders

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In 2023, the U.S. Court of Appeals for the Fifth Circuit issued an opinion holding 18 U.S.C. § 922(g)(8)—which generally prohibits persons subject to certain domestic violence restraining orders from possessing firearms—unconstitutional under the Second Amendment. On June 21, 2024, in *United States v. Rahimi*, the Supreme Court reversed the Fifth Circuit, holding that Section 922(g)(8) is consistent with the Second Amendment and is constitutional as applied to Rahimi.

This Sidebar summarizes the *Rahimi* case. It begins by discussing the factual background and lower court opinions leading up to the Supreme Court decision. It then sketches the arguments made by the parties and outlines the majority, concurring, and dissenting opinions from the Supreme Court. The Sidebar closes with considerations for Congress.

Background

In 2020, a Texas state court entered a civil protective order against Zackey Rahimi after Rahimi allegedly assaulted his ex-girlfriend. The order imposed several restrictions on Rahimi, including not harassing or going within 200 yards of his ex-girlfriend's home or workplace. The order also prohibited Rahimi from possessing a firearm. Rahimi was subsequently suspected of using a firearm in multiple shootings while still being subject to the order. He was indicted for possessing a firearm in violation of 18 U.S.C. § 922(g)(8).

Rahimi moved to dismiss the indictment on the ground that Section 922(g)(8) violates the Second Amendment. Rahimi registered a "facial" challenge to Section 922(g)(8). In general, a facial challenge requires a party to prove that "no set of circumstances exists under which the [law] would be valid"—in other words, that "the law is unconstitutional in all of its applications" and not just in the challenging party's situation. The district court denied the motion, upholding the statute. Rahimi appealed the district court's ruling, and a three-judge panel of the Fifth Circuit initially affirmed.

Shortly thereafter, the Supreme Court issued its ruling in *New York State Rifle & Pistol Association v. Bruen*. In *Bruen*, the Court announced a text-and-history-based test to assess whether a law violates the

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Second Amendment. Under the *Bruen* test, a court must ask if the plain text of the Second Amendment covers the conduct regulated by the law. If so, that conduct is presumptively constitutional, and the government can overcome the presumption only by identifying a historical analogue that is comparable to and consistent with the current regulation.

Rahimi asked the full Fifth Circuit to review the panel opinion and, while the petition for en banc review was pending, the panel withdrew its opinion and requested supplemental briefing on whether Section 922(g)(8) complies with the Second Amendment in light of *Bruen*. The panel reversed, siding this time with Rahimi. Under the first step of the *Bruen* analytical framework, the panel observed that Rahimi himself was covered by the Second Amendment as one of "the people." The federal government argued that Rahimi was excluded from the Second Amendment's protections because *Heller*, an earlier Supreme Court Second Amendment decision, referred to the right as applying to only "law-abiding, responsible citizens." The panel rejected the government's argument, reasoning that the language regarding "law-abiding, responsible citizens" speaks to who the government may show has lost their Second Amendment right at step two of the *Bruen* analysis, not who is categorically excluded from coverage at step one of that process. Even so, in the panel's view, "law-abiding" citizens for purposes of *Heller* excluded felons and the mentally ill, not individuals such as Rahimi who are subject to a civil order and have not been accused or convicted of criminal conduct. The panel accordingly held that Rahimi satisfied the first step in the *Bruen* analysis, and as such the Second Amendment presumptively protected his right to bear arms.

Second, the panel held that the government failed to meet its burden of proving that Section 922(g)(8) was supported by a historical analogue. The government's primary argument was that English and American laws disarmed individuals considered to be "dangerous." The panel deemed these historical analogues to be inapposite, as any such laws that disarmed individuals ultimately did so for broader political or social reasons, not to protect anyone specific from domestic gun violence. The panel also rejected the relevance of two proposals during state deliberations regarding the ratification of the Constitution—one to exempt from Second Amendment protections citizens who posed a "real danger of public injury," and the other to limit the right to bear arms to "peaceable citizens"—as these proposals were not adopted and did not form a part of the Second Amendment as enacted. Without a sufficiently comparable analogue put forward by the government, the panel struck down Section 922(g)(8) as unconstitutional.

Arguments Before the Supreme Court

On June 30, 2023, the Supreme Court granted the federal government's petition for review of the Fifth Circuit decision in *Rahimi*. In its brief to the Court defending Section 922(g)(8), the government referenced language from *Heller* to argue that the Second Amendment right belongs only to "law-abiding, responsible citizens," and that under both English and early American law "dangerous, irresponsible, or otherwise unfit" individuals were barred from possessing firearms. At oral argument, the government clarified that it viewed "irresponsible" individuals as referring to those who pose a risk of a danger to themselves or others. Individuals subject to domestic violence orders pose an "obvious danger" to intimate partners and others, the government added. The government contended that the historical tradition of disarming the dangerous is sufficient for purposes of *Bruen*, as that case does not require an "exact historical match" for an existing law to survive Second Amendment scrutiny.

Rahimi responded by arguing that Section 922(g)(8) precludes him from possessing a firearm in the home for self-defense, without any criminal proceeding, and that there is no direct historical analogue supporting this specific prohibition. Rahimi argued that the government could impose an outright ban only if Rahimi had been convicted of a felony or an offense resulting in "severe punishment." At oral argument, Justice Gorsuch suggested that, because Rahimi raised a facial challenge, the Court could reject that challenge and still leave as-applied challenges open in future cases—for example, cases in which the

disarmament was not temporary, there were due process problems, or the evidence of danger was not clear or sufficient.

Supreme Court Ruling

Majority Opinion

The Court, in an opinion by Chief Justice Roberts, held that Section 922(g)(8) is consistent with the Second Amendment, rejecting the facial challenge mounted by Rahimi and accepted by the Fifth Circuit. The Court emphasized that the scope of the Second Amendment is not limited to those laws that "precisely match its historical precursors" or that are "identical" to laws from 1791, as if the Second Amendment were "trapped in amber." Instead, the Court explained, under *Bruen* a court is required to assess whether a challenged law is "relevantly similar" to laws from the country's regulatory tradition, with "why and how" the challenged law burdens the Second Amendment right as "central" considerations in this inquiry.

In the context of Section 922(g)(8), the Court determined that sufficient historical support existed for the principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed" temporarily. In support, the Court pointed to surety laws, which were designed to prevent firearm violence by requiring an individual who posed a credible threat of violence to another to post a surety, and "going armed" laws, which punished individuals who had menaced others or disturbed the public order with firearms through imprisonment or disarmament. Section 922(g)(8), which disarms individuals found to threaten the physical safety of another, "fits neatly" within the tradition that these two legal regimes represent, particularly as all three involve judicial determinations that the individuals threatened or would threaten others, the Court added.

As Rahimi himself received such a judicial determination and was temporarily disarmed as a consequence, the Court also held that Section 922(g)(8) was constitutional as applied to Rahimi. In its analysis, the Court took note that Section 922(g)(8) is of "limited duration," prohibiting firearm possession only for so long as the individual "is" subject to the restraining order. Finally, the Court addressed the government's argument that Rahimi may be disarmed because he is not "responsible," clarifying that the Court's precedents describe "responsible" individuals as those who enjoy the Second Amendment right, and that these precedents say "nothing" about who is not responsible.

Concurring Opinions

The majority acknowledged that some lower courts have "misunderstood" *Bruen's* methodology, and as such the majority undertook efforts to describe the *Bruen* analytical approach with greater precision. Five Justices from the majority similarly recognized that lower courts have expressly sought additional guidance with respect to *Bruen*, and these Justices penned concurring opinions, at least in part, to provide their sense as to how the Court's text-and-history-based test may best be conceptualized and applied to subsequent Second Amendment challenges. It remains to be seen if any one of their particular approaches might become a consensus view in a future case.

Justice Sotomayor's concurring opinion, joined by Justice Kagan, expressed a preference for applying means-end scrutiny to evaluate laws under the Second Amendment. Between the majority's and dissent's approaches applying *Bruen*, however, she endorsed the majority's methodology as the "right one." Justice Sotomayor observed that this is an "easy case," as Section 922(g)(8) is "wholly consistent" with historical firearms regulations (and also passes a means-end test). By contrast, she criticized the dissenting view as too "rigid," characterizing it as "insist[ing] that the means of addressing that problem cannot be 'materially different' from the means that existed in the 18th century," which would unduly hamstring modern policy efforts.

In his concurring opinion, Justice Gorsuch underscored the difficulty in maintaining a facial challenge to a law, which requires a showing that the law has no constitutional applications. He also defended the history-centric test announced in *Bruen*, writing that focusing on the original meaning of constitutional provisions keeps judges in their lanes and, while "an imperfect guide," is better than unbounded alternatives like an interest-balancing inquiry. Justice Gorsuch also cautioned that the Court only decided a narrow question, namely whether Section 922(g)(3) "has *any* lawful scope."

Justice Kavanaugh concurred to expound his view on the roles of text, history, and precedent in constitutional interpretation. He explained that unambiguous text controls and that history, rather than policy, is a more neutral and principled guide for constitutional decisionmaking when the text is unclear. Within the realm of history, Justice Kavanaugh also illustrated how pre- and post-ratification history may inform the meaning of vague constitutional text. He posited that text and history may help determine how precedent should be read and applied, and when it should be overturned. Next, he argued that balancing tests in constitutional cases are a relatively recent development, generally depart from tests centered on text and history, are inherently subjective, and should not be extended to the Second Amendment arena. Finally, he opined that the majority's opinion was faithful to his perception of the appropriate roles of text, history, and precedent in constitutional adjudication.

Justice Barrett wrote a concurring opinion to explain her understanding of the relationship between *Bruen*'s historical tradition test and originalism as a method of constitutional interpretation. In her view, historical tradition is a means to understand original meaning, and accordingly, historical practice around the time of ratification should be the focus of the legal inquiry. Historical examples are a tool to derive legal principles, and here history demonstrates that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms," in her view. Justice Barrett agreed with the majority that Section 922(g)(8) "fits well within that principle."

Justice Jackson also wrote a concurring opinion, agreeing that the majority fairly applied *Bruen* as precedent. She wrote separately to highlight what she perceived as problems with applying the history-and-tradition standard in a workable manner. She argued that *Rahimi* illustrates the "pitfalls of *Bruen*'s approach" by demonstrating the difficulty of sifting through the historical record and determining whether historical evidence establishes a tradition of sufficiently analogous regulation. The numerous unanswered questions that remain even after *Rahimi*, in her view, result in "the Rule of Law suffer[ing]." Stating that legal standards should "foster stability, facilitate consistency, and promote predictability," Justice Jackson concluded by arguing that "*Bruen*'s history-focused test ticks none of those boxes."

Dissenting Opinion

Justice Thomas, writing only for himself, dissented. In his view, the historical examples cited by the majority were not sufficient to establish a tradition of firearm regulation that justified Section 922(g)(8). According to Justice Thomas, to evaluate whether historical examples of regulation are analogous to modern enactments, courts should look to two metrics: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." In his view, the two categories of historical evidence proffered by the government—laws disarming "dangerous" individuals and legal commentary characterizing the right to bear arms as belonging to "peaceable" citizens—did not impose comparable burdens as Section 922(g)(8). Justice Thomas argued that Section 922(g)(8) was in response to "interpersonal violence," whereas the historical English laws were concerned with insurrection and rebellion. Ultimately, Rahimi could have been disarmed, in Justice Thomas's view, through criminal conviction but not through a restraining order.

Considerations for Congress

Rahimi did not disturb Section 922(g)(8) or the statutory framework that Congress enacted with respect to firearms. The Court clarified the meaning of the Second Amendment and the *Bruen* standard, with the majority and concurring Justices offering additional guidance when courts in Second Amendment cases analyze whether a historical analogue is "relevantly similar" to the modern regulation. The Court also left open the possibility that as-applied challenges may result in determinations that Section 922(g)(8) is unconstitutional in particular circumstances. Any such rulings may alter the existing statutory framework and the permissible bounds for any future federal firearms legislation.

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