STRATEGIES
The Prosecutors' Newsletter

AEQUITAS

Issue #24 • August 2023

Keep Calm and Understand *United States v. Rahimi*

Jonathan Kurland, Brooke Swann, and Jennifer Newman*

Introduction

On February 2, 2023, the United States Court of Appeals for the Fifth Circuit (covering Texas, Louisiana, and Mississippi) issued its decision in *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023). The Court ruled that 18 U.S.C. § 922(g)(8), which prohibits gun possession by people who are subject to domestic violence restraining orders, is unconstitutional under the Second Amendment.[1] On June 30, 2023, the U.S. Supreme Court granted the government's petition for a writ of certiorari in the case. If upheld, *Rahimi* will have a significant impact on the assignment and enforcement of domestic violence protection orders across the country.

This *Strategies Newsletter* unpacks the Fifth Circuit's decision in *Rahimi*, as well as the Second Amendment jurisprudence that preceded it. It provides strategies for Texas, Louisiana, and Mississippi prosecutors currently facing the fallout of the *Rahimi* decision in the courtroom. It also provides prosecutors from other jurisdictions with ways to rebut defense attorneys' *Rahimi*-based arguments. While this decision may seem to be a catastrophic development for victims of domestic violence, a careful review of the Supreme Court precedent on which the *Rahimi* decision was based will allow prosecutors to better anticipate defense arguments and implement strategies to ensure the continued protection of victims.

Facts of the *Rahimi* Case[2]

On February 5, 2020, a local court in Texas issued a Civil Protection Order ("CPO") against Zackey Rahimi. This order prohibited Rahimi from harassing, stalking, or threatening his ex-girlfriend and also from possessing a firearm. He was later found to have violated that order by possessing a firearm, and was charged in

federal district court under 18 U.S.C. § 922(g)(8).

The incidents in which Rahimi possessed a firearm in violation of the protection order were detailed in the Court's decision. Following the entry of the CPO, between December 2020 and January 2021, Rahimi was involved in multiple shootings in and around Arlington, Texas. On December 1, 2020, after selling narcotics to an individual, he fired multiple shots into that individual's residence. The following day, Rahimi was involved in a car accident. He exited his vehicle, shot at the other driver, and fled the scene. He returned to the scene in a different vehicle and shot at the other driver's car. On December 22, Rahimi shot at a constable's vehicle. On January 7, Rahimi fired multiple shots in the air after his friend's credit card was declined at a Whataburger restaurant. Rahimi was ultimately identified by law enforcement as a potential suspect in all six of these shootings, and his home was searched pursuant to a warrant. Police found a rifle and pistol. Rahimi admitted to possessing these firearms, and he also acknowledged that he was subject to a CPO based upon an alleged assault of his ex-girlfriend.

Rahimi was subsequently indicted for a violation of 18 U.S.C. § 922(g)(8) (in addition to several state charges for the conduct alleged, *supra)*. After the court denied a motion to dismiss the indictment in the federal case as unconstitutional, Rahimi pleaded guilty. Rahimi later filed an appeal, renewing his constitutional challenge to 18 U.S.C. § 922(g)(8) in light of the Supreme Court's decision in *N.Y. State rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

Preliminary Overview of Case Law: From *Emerson* to *Bruen*

The *Rahimi* decision follows an evolution in the jurisprudence surrounding the Second Amendment that was planted in the Fifth Circuit with *United States v. Emerson;*[3] flowered in the Supreme Court in *District of Columbia v. Heller;*[4] fully bloomed in *McDonald v. City of Chicago;*[5] *United States v. McGinnis;*[6] and (according to the Fifth Circuit) was then rewritten in *N.Y. State Pistol and Rifle Ass'n, Inc. v. Bruen.*[7]

Since the Fifth Circuit has handed down its ruling in the *Rahimi* case, jurisdictions across the country have been faced with litigation surrounding not only 18 U.S.C. § 922(g)(8), but other subsections, including prohibitions for felons,[8] users of unlawful controlled substances,[9] those possessing firearms in furtherance of a drug trafficking offense,[10] and those with misdemeanor domestic violence convictions.[11] Many of these rulings have widened the circuit split on firearms regulation, with some directly contradicting the holding in *Rahimi*, while others have used it as the basis to overturn more sections of the statute under which *Rahimi* was charged.[12] This flurry of litigation warrants a deep look at the precedent that has shaped modern litigation regarding the Second Amendment, and the impact recent Supreme Court cases have had on that precedent. This section seeks to outline the evolution of the logic used by various courts to analyze restrictions on firearm possession.

Emerson (2001): The Historical Precedent for 18 U.S.C. § 922(g)(8)

Some two decades before deciding *Rahimi*, the Fifth Circuit deemed 18 U.S.C. 922(g)(8) constitutional, both on its face and as applied to the facts presented by defendant Timothy Emerson. During divorce proceedings between Emerson and his wife, a Texas judge issued a temporary order that enjoined Mr. Emerson from threatening his wife or causing bodily injury to her or their child. Notably though, it did not include an express finding that Mr. Emerson posed a future danger to anyone. Later, Mr. Emerson was indicted for violating 18 U.S.C. § 922(g)(8). Mr. Emerson appealed his conviction on Second Amendment and Due Process grounds.

The Court first considered the scope of the Second Amendment right "as historically understood," examining the gun restrictions that existed at the time the Second Amendment was adopted as well as the understanding of the Second Amendment's scope at that time.[13] In doing so, the Court embarked on a comprehensive analysis of political discourse, ratification documents, legislative history, notes from the Congressional Congress, and other historical documents prior

to and surrounding the adoption of the Second Amendment. The Court held that while the Second Amendment conferred an individual right to bear arms, that right was still subject to reasonable regulation.

> Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.[14]

However, the Fifth Circuit did not prescribe any sort of test or framework to evaluate whether specific restrictions were appropriately tailored, stating only that § 922(g) was constitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights."[15] The Court went on to note historical precedent in support of regulations relating to public safety, including, for example, prohibitions on the possession of firearms by felons, infants, and the mentally ill.

In addition to finding § 922(g)(8) constitutional on its face, the Court further found the provision constitutional as applied to Mr. Emerson. Despite Mr. Emerson's arguments that the order made no specific finding that he represented a credible threat to his ex-wife's safety, the Fifth Circuit held that this temporary order could not have been properly issued unless the issuing court concluded that, based on adequate evidence at a hearing, the restrained party would have posed a realistic threat of imminent physical injury to the protected party. In this case, the Court concluded that the nexus between firearm possession by Emerson and the threat of lawless violence was sufficient to support the deprivation while the order remained in effect. Such an order was therefore well within the kinds of specific and narrowly tailored regulations that existed at the time of the Second Amendment's drafting, and there was no infringement on Mr. Emerson's liberty.[16]

Heller (2009): Broad Regulations on Firearm Possession Unconstitutional

Seven years after the Fifth Circuit's decision in *Emerson*, the U.S. Supreme Court decided *District of Columbia* v. *Heller*.[17]

Heller challenged a District of Columbia law prohibiting the possession of handguns with very limited exceptions – a significantly broader regulation than the one at issue in *Emerson*. In support of the prohibition, the District argued that the Second Amendment right to bear arms applied exclusively to the context of arming a militia. Heller argued that the Second Amendment conferred an individual right to bear arms, unconnected to service in a militia, as well as the right to use firearms for traditionally lawful purposes, such as self-defense within the home. In analyzing the plain language of the Second Amendment, which states, in part, "the right of the people to keep and bear arms, shall not be infringed," the Court found that the words "the people" were intended by the framers to confer an individual right to all people rather than a subset of people, such as a militia.[18] The Court also rejected the notion that the Second Amendment should apply only to weapons that existed at the time of the Second Amendment's drafting. Analogizing to First Amendment jurisprudence that protects modern electronic communications that could not have been imagined in the 18th century, the Supreme Court held that any weapon considered a "bearable arm" was covered by the Second Amendment.[19]

However, the Court found that the rights secured by the Second Amendment are not unlimited, stating "[w]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."[20] The Court held that the government could, for example, enact reasonable regulations limiting types of weapons and requiring specific types of weapon storage. For example, while even a historical reading of the Second Amendment might provide the right for average citizens to carry weapons of war like submachine guns, "... the Second Amendment does not protect those weap-

ons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."[21] The Court further cautioned that:

> [Its] opinion should not be taken to cast doubt on 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.[22]

Despite not engaging in an "exhaustive" analysis of historical gun regulation, the Supreme Court reviewed concurrent state constitutional language and legislative history, political discourse following the ratification of the Second Amendment, case law, and documents from the time of the founding. It concluded there was a sufficient basis in the country's early regulatory schemes to justify the constitutionality of some limits on the Second Amendment. The Supreme Court held that what the government cannot do is bar the general population from possessing firearms used commonly for self-defense. The Court struck down the trigger lock requirement, finding that citizens are allowed to keep functional firearms in their homes, but did not reach a conclusion about the District's licensing requirement, as the issue was conceded by the defendant at trial. The *Heller* Court's ruling is distinguishable from the prohibition on firearms for those subject to domestic violence restraining orders, at issue in *Emerson*, which was narrowly tailored and did not bar an entire population from exercising their Second Amendment rights.

McDonald (2010): 14th Amendment Incorporates All Restrictions on the Federal Government to the States

In 2010, the Supreme Court was once again asked to address the issue of firearms regulations. The regulations at issue in *McDonald v. City of Chicago,* much like the regulation at issue in *Heller,* were city ordinances aimed at limiting the possession of firearms. In Chicago, the City had an ordinance requiring any private citizen who wanted to possess a firearm to have a valid registration license for the firearm.[23] The City's code also contained a provision prohibiting the registration of most handguns,[24] effectively preventing all private citizens from legally owning handguns. Similarly, Oak Park, Illinois had a regulation making it unlawful for any person to possess any firearm, a term that included pistols, revolvers, guns, and small arms, commonly and collectively known as handguns.[25] The petitioners argued that such provisions were overbroad and functionally infringed on their Second Amendment right to bear arms.

Having held in *Heller* that a similar regulation was unconstitutional, the Supreme Court was faced with a new question: whether the Second Amendment's protection applied only to federal regulatory powers or whether its protections extended to state laws and regulations as well. The petitioners argued that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment right to bear arms. The Supreme Court agreed, holding that the Second Amendment is fully applicable to the states, as it is the federal government.

McGinnis (2020): The Rise of Means-End Scrutiny in Second Amendment Jurisprudence

In *McGinnis*, the Fifth Circuit was presented with a nearly identical challenge to 18 U.S.C. § 922(g)(8) as was evaluated in *Emerson*.[26] In 2017, Eric McGinnis was found in possession of an AR-15 rifle and five 30-round magazines. Officers learned that McGinnis was subject to an active domestic violence protective order, issued two years prior. The order specifically found that family violence had occurred and was likely to occur in the future, and it prohibited McGinnis from possessing a firearm and included notice that such possession would violate federal law. McGinnis was charged with a violation of 18 U.S.C. § 922(g)(8) and convicted. He appealed his conviction, arguing in part, as Emerson had done some twenty years earlier, that § 922(g)(8) was facially unconstitutional. The Fifth Circuit noted that much had changed in Second Amendment jurisprudence since it decided *Emerson* and conducted a new examination of the statute in light of the decisions discussed above. The court ultimately reaffirmed its holding from *Emerson*, that § 922(g)(8) is not unconstitutional on its face.

Because *Heller* declined to provide an analytical framework with which to evaluate firearms regulations under the Second Amendment, the court utilized a two-part test adopted by several other circuit courts. The first step asked whether the conduct being regulated falls within the scope of the Second Amendment right to bear arms. To make that determination, the Court must ask "whether the law harmonizes with the historical traditions associated with the Second Amendment guarantee."[27]

If the restricted conduct is not within the scope of the Second Amendment, the inquiry is over, and the statute is deemed constitutional. Otherwise, the court will then proceed to the second step to determine and "apply the appropriate level of means-end scrutiny"—strict versus intermediate.[28] The level of scrutiny will depend on the nature of the conduct being regulated and the degree to which the regulation burdens a constitutional right.[29]

> Under this framework, a "regulation that threatens a right at the core of the Second Amendment"—*i.e.*, the right to possess a firearm for self-defense in the home—triggers strict scrutiny, while "a regulation that does not encroach on the core of the Second Amendment" is evaluated under intermediate scrutiny. *(*quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)). Strict scrutiny "requires that the challenged statute be narrowly drawn to provide the least restrictive means of furthering a compelling state interest." (quoting *Dart v. Brown*, 717 F.2d 1491, 1498 (5th Cir. 1983)). Intermediate scrutiny requires the lesser showing of a reasonable fit between the challenged regulation and an important government objective.[30]

For the first step of this framework, the government argued that the conduct being regulated by § 922(g)(8) harmonizes with the historical regulations on public safety grounds and therefore falls beyond the scope of the Second Amendment. McGinnis argued that the conduct at issue was his right to keep and possess firearms at home for self-defense and therefore falls within the scope of the Second Amendment. The Court declined to make a finding on this first step, noting that even assuming the conduct burdened by § 922(g)(8) falls within the scope of the Second Amendment, McGinnis's facial challenge to the statute's constitutionality nonetheless fails.

Moving to step two of the analysis, the Court was not convinced by McGinnis's argument that strict scrutiny should be applied to the regulation at issue:

> While § 922(g)(8) is broad in that it prohibits possession of all firearms, even those kept in the home for self-defense, it is nevertheless narrow in that it applies only to a discrete class of individuals for limited periods of time. Critically, the discrete class affected by § 922(g)(8) is comprised of individuals who, after an actual hearing with prior notice and an opportunity to participate, have been found by a state court to pose a real threat or danger of injury to the protected party.[31]

The Court agreed that individuals subject to such findings are *not* the "law-abiding, responsible citizens" whose rights *Heller* sought to protect.[32] Given the nature of the conduct being regulated (*i.e.,* individuals who are not responsible or law-abiding having access to firearms), the *McGinnis* Court applied intermediate scrutiny to the regulation—in this case, § 922(g).

In applying intermediate scrutiny, the Court then looked to whether there was a reasonable nexus between the governmental objective and the regulation, finding that: "…reducing domestic gun abuse is not just an important government interest, but a compelling one."[33] The only question remaining was whether 18 U.S.C. § 922(g) was reasonably adapted to this compelling interest, and here too, the Fifth Circuit found that it was. The statute's procedural requirements, as discussed above, ensure that any predicate protective order was issued only after an adversarial hearing where the respondent was entitled to present his own account of the alleged abuse. And the regulation is only temporary in nature. These features assured the Court that § 922(g)(8) is "reasonably adapted" to the goal of reducing domestic gun abuse, "whether or not it is the least restrictive means for doing so."[34]

Bruen (2022): The Death of Means-End Scrutiny in Second Amendment Jurisprudence

Most recently, the Supreme Court again addressed a state licensing regulation in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*.[35] The State of New York prohibited possession of a firearm without a license, whether inside or outside of the home. To obtain a license, the regulation required the applicant to demonstrate a special need for self-protection.[36] The Court held in *Bruen* that law abiding citizens could not be required to affirmatively demonstrate a special need for self-defense to obtain a firearm license, as such a requirement was in violation of the Second and Fourteenth Amendments.

In doing so, the Supreme Court rejected the two-part means-end test relied upon by appeals courts post *Heller*. The Supreme Court noted that their decisions in *Heller* and *McDonald* were exclusively centered on constitutional text and history:

> Historical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field.[37]

Thus, the role of the Supreme Court was not to second guess the intentions and interests of governmental restrictions on firearms; rather, its role is simply to evaluate whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In doing so, the Court relied on two metrics developed from the *Heller* and *McDonald* cases: (1) whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and (2) whether the regulatory burden is comparably justified. However, they did not require that modern regulations precisely match their historical precedents:

> To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to "long-standing" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" to determine whether modern regulations are constitutionally permissible.[38]

If the regulation is "analogous enough", it is constitutional; if the analogy is insufficient, it is unconstitutional.

Turning to New York's regulation, the Supreme Court questioned whether the regulation at issue was consistent with the nation's historical tradition of firearms regulation, based upon the scope they were understood to have at the time the constitutional right was enshrined. While recognizing that there were prohibitions on "dangerous and unusual" weapons, as well as statutes intending to prevent people from carrying weapons to provoke "fear" or "terror" among the people, the Court found that in today's context, a handgun is hardly a weapon that most would describe as dangerous or unusual, and that the purpose for which the respondents were seeking weapons was ostensibly self-defense.[39] The Court also noted that restrictions on public carry cited by the government as potential analogues, writ large, only proliferated after the ratification of the Second Amendment, and none posed the same kind of comprehensive restrictions that the New York law imposed. Ultimately, the pattern of statutes that dealt with open carry generally evidenced a network of reasonable gun control that did not burden law-abiding citizens with ordinary self-defense needs, which is what they found the New York statute was doing in requiring an affirmative showing for the need for self-defense before being eligible for a firearms license.

Despite the fact that they were not moved by the arguments regarding the government's example of surety laws[40] as an analogue to the broad restriction at issue for them, the dicta in *Bruen* would seem to already have the language to distinguish *Rahimi* perfectly:

> While New York presumes that individuals have no public carry right without a showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific

> showing of "reasonable cause to fear an injury, or breach of the peace."[41]

Indeed, Justice Alito's concurrence was written explicitly to reassure those dissenting that *Bruen, Heller,* and *McDonald* stand only for the provision that the Second Amendment applies to the population as a whole, not simply militias, and that ordinary citizens can possess ordinary self-defense weapons.

> The Court's exhaustive historical survey establishes that point very clearly, and today's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose. That is all we decide. Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* about restrictions that may be imposed on the possession or carrying of guns.[42]

Justice Kavanaugh, joined by Chief Justice Roberts, also concurred separately to note that he believed their opinion would have no impact on the existing licensing regimes — known as "shall-issue" regimes — existing in forty-three states, only the extremely overbroad "may-issue" licensing scheme of New York, which provided vast discretion to licensing officials.[43] Justice Kavanaugh expressly wrote that he felt that the former "shall-issue" licensing regimes could constitutionally fingerprint, perform background and mental health checks, and require training before issuing permits.[44] He emphasized that the Second Amendment allows a "variety" of regulations, and that it was not intended to be a "regulatory straitjacket."[45]

The Fifth Circuit's Opinion in *Rahimi*[46]

Short Summation

In summary, the *Rahimi* opinion began by outlining the prior cases, including *Bruen*. It stated that, despite the Fifth Circuit finding 18 U.S.C. § 922(g) to be constitutional in *Emerson, Bruen's* requirement for historical analogues of modern firearm restrictions abrogated that decision, functionally overturning it. The Government presented three potential categories of analogues to justify the regulations codified in § 922(g)(8), but the Fifth Circuit found them all to be lacking as sufficiently similar analogues. Thus, the Fifth Circuit ruled that § 922(g)(8) was unconstitutional because the statutory restrictions did not fit within the nation's historical tradition of firearms regulation. The Court subsequently overturned Rahimi's conviction.

Detailed Analysis

Against the backdrop of historical precedent discussed *supra,* the Fifth Circuit agreed to review *Rahimi*.[47] It stated, under existing precedent, the question becomes whether the government can prove that the regulation is part of "the historical tradition that delimits the outer bounds of the right to keep and bear arms."[48] Put simply, the Court was tasked with determining whether, following the Supreme Court's holding in *Bruen*, 18 U.S.C. § 922(g)(8) remains a constitutionally valid limit on the Second Amendment.[49]

Judge Wilson, who penned the *Rahimi* opinion, began his reasoning by discussing the rule of orderliness and explaining why the *Rahimi* case was back before the Court. This rule dictates that one Fifth Circuit panel may not overturn another panel's decision, absent an intervening change of law, such as a decision made by the Supreme Court. This is what allowed the Fifth Circuit to revisit its decision in *Rahimi*, and it was not a point of contention, as the Government conceded that *Bruen* fundamentally changed the focus of the relevant analysis.

The analysis then turned to the preceding cases, starting with *Emerson*. Judge Wilson noted *Emerson's* holding that the Second Amendment guarantees an individual right to keep and bear arms. He then referenced *McGinnis,* stating, "*Emerson* first considered the scope of the Second Amendment right 'as historically understood,' and then determined—presumably by applying some form of means-end scrutiny *sub silentio*—that §922(g)(8) [wa]s 'narrowly tailored' to the goal of minimizing 'the threat of lawless violence.'"[50] Judge Wilson then turned to *Heller*, noting that the Supreme Court's

opinion "coalesced around a similar 'two step-inquiry for analyzing laws that might impact the Second Amendment'" and detailing the two-step test as applied in *McGinnis* and the prior *Rahimi* decision.[51]

Finally, Judge Wilson explained how *Bruen* changed the legal framework for Second Amendment analysis. He highlighted the Supreme Court's holding with the quote, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."[52] Thus, Judge Wilson continued, the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[53] He cited the Court's opinion in *Bruen*, stating, "[P]ut another way, the Government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[54] Judge Wilson stated that the Supreme Court "expressly repudiated the circuit courts' means-end scrutiny" which was the second step of the two-step process embodied in *Emerson* and applied in *McGinnis*.[55] Judge Wilson did not contend that *Bruen* necessarily overruled *Emerson* and *McGinnis*, but rather rendered them obsolete due to the "fundamental[] change[]" in the analysis of laws that implicate the Second Amendment.[56]

After connecting the dots for how the analysis has changed following *Bruen*, Judge Wilson turned to issues in *Rahimi*. First, he very briefly dealt with the government's argument that Mr. Rahimi is not among those citizens entitled to the Second Amendment's protections. Judge Wilson concluded that he is, primarily because he is part of the general public.

Additionally, there is a footnote that briefly addresses "shall-issue" licensing schemes, which Texas and *Bruen* arguably endorsed.[57] Texas's shall-issue licensing scheme requires that an applicant not be under a domestic violence restraining order, and, the government argued, that this means there is an inference that § 922(g)(8) is constitutional. Judge Wilson stated that the *Bruen* Court did not rule on the constitutionality of state licensing regimes because that was not the issue before the Court. He also added that he disagrees with the Government's assertion that *Bruen* endorsed shall-issue licensing schemes and instead stated that they "merely blessed the general concept of shall-issue regimes."[58]

Returning to *Rahimi*, the Government argued that *Heller* and *Bruen* restricted the applicability of the Second Amendment so that it only applies to "law-abiding, responsible citizens."[59] Judge Wilson acknowledged that there is debate and disagreement on this issue. There are two popular approaches: "one [approach] uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away."[60] While the Government's argument favored the former approach, Judge Wilson explained that *Heller* and *Bruen* espouse the second approach, and therefore the Court must look to history and tradition to identify the scope of the legislature's power to restrict Second Amendment rights.[61] Judge Wilson went further to state that the government's argument that the Second Amendment applies only to law-abiding citizens fails for three reasons: it is inconsistent with *Heller*, *Bruen*, and the text of the Second Amendment; it inexplicably treats Second Amendment rights differently than other individually held rights; and it has no limiting principles.[62] Judge Wilson then individually examined each of these three reasons.

First, according to the *Heller* Court, the words "the people" in the Second Amendment have been interpreted to "unambiguously refer[] to all members of the political community, not an unspecified subset,"[63] as well as "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[64] The *Heller* Court stated clearly that there is a "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans."[65] Based on *Heller* and its definition of "the people", Judge Wilson reasoned that Rahimi is included in the Second Amendment's "the people" and he therefore falls within its scope.[66] The Government argued that *Heller* and *Bruen* limited the Second Amendment's reach to "law-abiding, responsible citizens," but Judge Wilson stated that that language was merely utilized

as shorthand in explaining that these decisions should not cast doubt on prohibitions of firearm possession by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.[67] Judge Wilson asserted that these groups have historically been stripped of their Second Amendment right, and the Supreme Court only wanted to remove those categories from its discussion, not add any more groups of individuals which may be considered to not be law abiding or responsible.

Further, Judge Wilson expressed concern about the potential fluidity resulting from the creation of a group distinguished as "law-abiding [] [and] responsible."[68] Pulling from now Justice Barrett's dissenting opinion in *Kanter v. Barr*, Judge Wilson contended that one day a person might be considered a member of the group and granted Second Amendment rights, but the next those rights could be stripped away as a "self-executing consequence of his new status."[69] Additional language from Justice Barrett's dissent in *Kanter* elaborates:

> This is an unusual way of thinking about rights because in other contexts that involve the loss of a right, the deprivation occurs because of state action, and state action determines the scope of the loss... Felon voting rights are a good example: a state can disenfranchise felons, but if it refrains from doing so, their voting rights remain constitutionally protected.[70]

Judge Wilson, in agreeance with Justice Barrett, contended that the Second Amendment right should be treated no differently than other rights.

Finally, Judge Wilson was hesitant to rule that *Heller* and *Bruen* limit Second Amendment rights to "law abiding, responsible" people because that phrase and interpretation has no limiting principle.[71] Judge Wilson expressed concern that a variety of people could be unfairly cast in that group. After all, he reasoned, someone who speeds is not law-abiding. He argued that a state could utilize this logic to strip speeders of their Second Amendment rights because they have been designated as non-law-abiding and irresponsible individuals.[72]

Judge Wilson then turned to address § 922(g)(8) and its constitutionality as applied to Rahimi. He began by reiterating the *Bruen* approach, which requires courts to employ a historical analysis and assess whether a modern firearms regulation is consistent with the Second Amendment's text and historical understanding.[73] There should be no means-end scrutiny as part of the analysis. Thus, according to Judge Wilson, if a statute is inconsistent with the Second Amendment's text and historical understanding, then it cannot be considered to be constitutional.[74] This means that the text must explicitly allow the restriction, or there must be a similar restriction in our Founding-era history which shows a congruency with the modern restriction.

Based on this analysis, Judge Wilson contends that the Government must find a historical precedent that is similar to the modern restriction being discussed. Further, it is the Government's burden alone to "sift the historical materials for evidence to sustain § 922(g)(8)."[75] It is not required that the historical example be identical to the modern restriction. Rather, the Government needs "a well-established and representative historical analogue."[76] Judge Wilson further discussed the degree of similarity required by quoting *Bruen* and clarifying:

> [A]nalogical reasoning under the Second Amendment is neither a regulatory straitjacket nor a regulatory blank check. Courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted. On the other hand, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.[77]

Judge Wilson stated that Rahimi's possession of a pistol and rifle easily falls within the purview of the Second Amendment. The Second Amendment grants him the right to "keep" or "possess" firearms, and rifles and pistols are "in common use" such that they fall within the scope of the Second Amendment.[78] Therefore, the analysis turns to whether there is a historical analogue for § 922(g)(8) to criminalize possession of a firearm after a civil proceeding in which a court enters a pro-

tective order based on a finding of a "credible threat" to another specific person.[79] The Government offered three potential historical analogues to § 922(g)(8): (1) English[80] and American laws (and various unadopted proposals to modify the Second Amendment) providing for the disarmament of dangerous people; (2) English and American "going armed" laws; and (3) colonial and early state surety laws. Judge Wilson discussed each of these three and why they fail as "relevantly similar" precursors to § 922(g)(8).

First, Judge Wilson addressed English and American laws that provided for the disarmament of dangerous people. He cites a colonial-era statute (the English Militia Act of 1662), under which the Crown could "seize all arms in the custody or possession of any person" whom they "judged dangerous to the Peace of the Kingdom."[81] The Government contended that even before American independence, England had established a well-practiced tradition of disarming dangerous persons. Judge Wilson disagreed with that assertion, however, and outlined that throughout English history, the militia has been used to disarm political opponents.[82] The later 1689 English Bill of Rights qualified the Militia Act by guaranteeing "[t]hat the subjects which are Protestants may have arms for their defense suitable to their Conditions and as allowed by Law."[83] That section, or right, has long been considered the predecessor to our Second Amendment, and it limited the Militia Act's reach in order to prevent politically motivated disarmaments. Thus, Judge Wilson concluded that this example is not an appropriate analogue because it was ultimately utilized as a method to disarm political opponents rather than those the Government construed as dangerous.

There are other examples of laws to disarm people considered to be dangerous within the colonies and states. These included those unwilling to take an oath of allegiance, as well as slaves and Native Americans. These laws disarmed people by class or group, rather than requiring an individual finding of "credible threats" to identified potential victims.[84] Additionally, these groups were disarmed to preserve political and social order, not for the protection of identified individuals. Judge Wilson, therefore, stated that these laws also did not reach the threshold of similarity required.[85]

The other sub-category of "dangerous" restrictions emerged in state ratification conventions considering the U.S. Constitution. A minority of Pennsylvania's convention authored a report in which they contended that citizens have a right to bear arms, while the Massachusetts convention proposed a qualifier to the Second Amendment that limited the scope of the right to "peaceable citizens."[86] Judge Wilson states that these were influential proposals, but they are not reflective of the nation's early understanding of the scope of the Second Amendment. Neither were ratified nor enacted, and they could not be used to counter the Second Amendment or serve as an analogue for § 922(g)(8).

Second, the Government presented as a possible analogue the ancient criminal offense of "going armed to terrify the King's subjects."[87] This common law offense persisted in America and was codified in the Massachusetts Bay Colony, the state of Virginia, and the colonies of New Hampshire and North Carolina. These laws allowed justices of the peace to seize "armor or weapons" from those who were "breakers of the peace."[88] Judge Wilson stated that these examples fall short for several reasons. First, he stated that it is "dubious" that these "going armed" laws are reflective of our nation's historical tradition of firearm regulation, at least as to the forfeiture of firearms.[89] He reasoned that these colonial regulations do not suffice to show a tradition of public carry regulation. Additionally, each of these laws eventually dropped forfeiture (government seizure of firearms) as a penalty. Massachusetts removed its forfeiture provision in 1795, four years after the ratification of the Second Amendment; Virginia did so by 1847; and North Carolina's law actually never provided for forfeiture.[90] It is unclear how long New Hampshire's law preserved its forfeiture provision, but even if it persisted longer than the others, Judge Wilson contended that a single outlier is not enough to "show a tradition of public carry regulation" as required by *Bruen*.[91]

Judge Wilson further dissected these "going armed" laws as being not relevantly similar to § 922(g)(8) as a matter of substance. The historic laws only disarmed an offender after criminal proceedings and conviction.

§ 922(g)(8) on the other hand disarms people who have merely been civilly adjudicated to be a threat to another person. Additionally, these laws, like the "dangerousness" ones previously discussed, also appear to have been aimed at curbing terroristic or riotous behavior. This means they were intended to disarm those who were a threat to society generally rather than to identified individuals. Thus, Judge Wilson concluded that these "going armed" laws are also not viable analogues to § 922(g)(8).[92]

Finally, the Government presented its third possible analogue to the Court: historical surety laws. At common law, an individual who could show that he had "just cause to fear" that another would injure him or destroy his property could "demand surety of the peace against such person."[93] The surety was intended as a means of prevention of injury. The commission of a criminal offense was not required, but there could be probable suspicion that some crime was intended or likely to happen. Thus, "[i]f the party of whom surety was demanded refused to post surety, he would be forbidden from carrying a weapon in public absent special need. Many jurisdictions codified this tradition, either before ratification of the Bill of Rights or in the early decades thereafter."[94]

Judge Wilson acknowledged that the surety laws come the closest to being 'relevantly similar' to § 922(g)(8).[95] He stated that they are more clearly a part of our tradition of firearm regulation, and they were comparably justified in that they were meant to protect an identified person (who sought surety) from the risk of harm imposed by another identified individual (who had to post surety to carry arms).[96] Additionally, surety laws only required a civil proceeding and not a criminal conviction. Judge Wilson concluded, however, that the similarities break down there.[97] Surety laws did not prohibit public carry, and certainly not the possession of weapons, so long as the offender posted surety. Additionally, Judge Wilson referenced a source that noted that there is little evidence that authorities ever enforced surety laws. He stated that while surety laws imposed a conditional, partial restriction on the Second Amendment right, § 922(g)(8) works as an absolute deprivation of the right.[98] This means that those subjected to it are not only forbidden to publicly carry, but they are also forbidden to even merely possess a firearm so long as there is entry of a sufficient protection order. Thus, Judge Wilson ruled that this potential analogue also fails because these laws did not impose a "comparable burden on the right of armed self-defense."[99]

Because none of these examples proffered by the Government provided a sufficiently similar historical analogue to § 922(g)(8), Judge Wilson concluded that § 922(g)(8) falls outside the class of firearm regulations countenanced by the Second Amendment.[100]

To wrap up his analysis, Judge Wilson acknowledged that § 922(g)(8) "embodies salutary policy goals meant to protect vulnerable people in our society."[101] He stated that when those policy goals' merits were evaluated with means-end scrutiny in prior precedent, it was concluded that the societal benefits of § 922(g)(8) outweighed its burden on an individual's Second Amendment rights.[102] He reiterated that *Bruen* forecloses any such analysis in favor of the historical analogical inquiry, which § 922(g)(8) does not have.[103] With no historical analogue, Judge Wilson stated that § 922(g)(8) places a ban on the possession of firearms that our ancestors would never have accepted; therefore, the statute is facially unconstitutional.[104]

Concurring Opinion

The Fifth Circuit's opinion in *Rahimi* was initially issued on February 2, 2023. On March 2, 2023, the opinion was withdrawn and a new opinion was published. The greatest difference between the two was the expansion of Judge James C. Ho's concurrence. The concurrence in the initial opinion was very brief and served mainly to emphasize that the Founders "firmly believed in the fundamental role of government in protecting citizens against violence, as well as the individual right to keep and bear arms—and that these two principles are not inconsistent but entirely compatible with one another."[105] The subsequent concurrence now spans several pages and concludes, "We must protect citizens against domestic violence. And we can do so without offending the Second Amendment framework set forth in *Bruen*."[106]

In the updated concurrence, Judge Ho started by emphasizing that the Second Amendment protects a fundamental civil right. In his opinion, he noted that lower courts have routinely treated it as a "second-class right,"[107] thus the Supreme Court in *Bruen* "commanded lower courts to be more forceful guardians of the right to keep and bear arms, by establishing a new framework for lower courts to apply under the Second Amendment."[108] Judge Ho stated that the Fifth Circuit's *Rahimi* decision "dutifully applies *Bruen*,"[109] but that he writes a separate concurrence to "explain how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from violent criminals."[110] Furthermore, he argued that "our Founders firmly believed in both the fundamental right to keep and bear arms and the fundamental role of government in combating violent crime."[111]

In the first section of his concurrence, Judge Ho focused on the conundrum of balancing constitutional provisions and public safety. He stated, "A framework that under-protects a right unduly deprives citizens of liberty. But a framework that over-protects a right unduly deprives citizens of competing interests like public safety."[112] He referenced both the exclusionary rule and *Miranda* warnings as common examples for which criticisms have been levied for the over-protection of constitutional rights and the resulting harm to public safety.[113] Judge Ho affirmed that judges must interpret the Constitution based on its text and original understanding rather than on public policy considerations or fear of public or political criticism. He stated that the Second Amendment should not be limited for anyone for which there is not a historical analogue as required by *Bruen*, and we should not require disarmament and limitation of the Second Amendment to protect American citizens.[114]

As he continued into the second section of his concurrence, Judge Ho suggested an alternative to limiting Second Amendment rights: "Those who commit violence, including domestic violence, shouldn't just be disarmed—they should be detained, prosecuted, convicted, and incarcerated. And that's exactly why we have a criminal justice system—to punish criminals and disable them from engaging in further crimes."[115] In other words, the societal problem that 18 U.S.C. § 922(g)(8) seeks to remedy should instead be addressed by the criminal justice system.

Judge Ho's third section emphasized that incarceration is constitutionally permissible and imperative to protecting victims. He pointed out that there is a tradition of detaining and disarming convicted criminals as well as those in pre-trial detention.[116] He continued that the government can not only detain and disarm criminals who commit acts of violence, but also those who merely speak threats of violence. He acknowledged that threats are life-threatening in their own way to victims, and they can often lead to violence in the future.

In the final section of his concurrence, Judge Ho highlighted what he views as problematic issues with civil protection orders. First, he pointed out that divorce attorneys often routinely recommend these protection orders for their clients who are in the midst of divorce proceedings. They create tactical leverage for those who obtain them. Judge Ho expressed concern that these orders are subject to abuse by parties wishing to exploit that tactical advantage. Second, he noted that family court judges "face enormous pressure to grant civil protective orders—and no incentive to deny them."[117] Judge Ho expressed concern that too many individuals are unjustifiably subjected to these civil protective orders, and it is unfair to force disarmament as a consequence of one being entered against an individual. Finally, he denounced the reliability of mutual restraining orders, stating that judicial assessments have often led to the issuance of "unmerited mutual restraining orders."[118] He is concerned that such orders, and subsequently 18 U.S.C. § 922(g)(8), disarms victims of domestic violence, and disarming them may put them in greater danger than before.[119]

Judge Ho concluded plainly:

> We must protect citizens against domestic violence. And we can do so without offending the Second Amendment framework set forth in *Bruen*. Those who commit or criminally threaten domestic violence have already demonstrated an utter

lack of respect for the rights of others and the rule of law. So merely enacting laws that tell them to disarm is a woefully inadequate solution. Abusers must be detained, prosecuted, and incarcerated. And that's what the criminal justice system is for.[120]

Strategies for Handling the Impact of *Rahimi*

The immediate impact of *Rahimi* is on federal prosecutions in the Fifth Circuit for violations of 18 U.S.C. § 922(g)(8). However, a collateral consequence of the decision within the jurisdictions in the Fifth Circuit (Texas, Louisiana, and Mississippi) is the implicit suggestion that the Second Amendment does not permit domestic violence protection orders to prohibit the possession of firearms. The rationale that *Rahimi* applied to the scope of authority under the Second Amendment for domestic violence protection orders could conceivably be extended to Extreme Risk Protection Orders, pre-trial bail/bond conditions, and a variety of firearm-related violations. Beyond the borders of the Fifth Circuit, the reasoning of *Rahimi* may also be offered for persuasive value in state and federal matters; however, in those jurisdictions where *Rahimi* is not controlling, its holding can be distinguished by reference to the scope of the holdings in *Heller*, *McDonald*, and *Bruen,* as well as a thorough reference to the historical analogues for targeted restrictions on the possession of firearms. The following arguments are offered to assist in that effort.

Distinguishing Domestic Violence Offenders from Law-Abiding, Responsible Citizens

Heller identified the class ultimately protected by the Second Amendment as that of "law-abiding, responsible citizens" to use arms in self-defense.[121] The *Bruen* Court opened its decision by reiterating that *Heller* and *McDonald* hold "the Second and Fourteenth Amendments protect the right of an *ordinary, law-abiding citizen* to possess a handgun in the home for self-defense."[122] *Rahimi* concedes that *Heller* and *Bruen* articulated that the Second Amendment's protections extend to "law-abiding, responsible citizens;" however, rather than considering this language as foundational for analysis of a firearm regulation, the *Rahimi* Court characterized it as shorthand in explaining the holdings in *Heller* and *Bruen* and, thus, not controlling on the facts in *Rahimi*.[123] This parsing by a lower court does not appear to be licensed by the decisions in *Heller*, *McDonald*, and *Bruen*. In fact, the *Bruen* Court articulated that the central inquiry is whether historical or modern firearm regulations impose comparable burdens on self-defense and whether the burden is justified.[124]

Accordingly, the justification for prohibiting the possession of firearms by those subject to protection orders is that they are, by definition, not "law-abiding, responsible" people. An abuser's access to a gun is the single greatest risk factor for intimate partner homicide: a woman is five times more likely to be murdered when her abuser has access to a firearm.[125] Approximately 4.5 million women in the U.S. have been threatened with a gun, and nearly one million have been shot or shot at by an intimate partner.[126] For pregnant women, one of the leading causes of death in the United States is murder; between 2009 and 2019, 68% of those deaths involved a firearm.[127] Further, gun violence has a markedly disparate impact on historically marginalized communities. Intimate partner violence ("IPV") survivors who are Black or African American, Latin@, Asian, or Alaska Native/American Indian; immigrants; LGBTQ+ persons; persons with cognitive or physical disabilities; and ethnic minority group members are particularly vulnerable to IPV-related firearm threats, injury, or death but least likely to receive justice.[128] Black adults, for instance, are ten times more likely — and Black children and teens 14 times more likely — to be killed with a firearm than their White counterparts.[129]

The *Rahimi* Court and others have argued that because protection orders lack the procedural protections that accompany criminal conviction, those subject to protection orders should not be excluded from the umbrella of "law-abiding, responsible" people protected by the Second Amendment.[130] However, people subject to protection orders are afforded a variety of procedural protections, such as the right to an adversarial hearing, the right to choice of counsel, and the right to confrontation.

Furthermore, unlike criminal convictions, the terms and conditions of a protective order can be subject to modification upon the request of the person subject to them. Further, there is no right to guaranteed counsel in a protection order proceeding; rather, that right only attaches in a criminal case if there is a risk of incarceration.[131]

With the spectrum of rights that are afforded in protection order proceedings, in addition to Second Amendment rights, a Court has authority to curtail:

- Property rights, in the context of evicting or limiting access to a residence or a geographic area where the person subject to protection is present;
- Speech rights, in so far as a protection order can limit a person having any kind of direct or indirect contact with the person subject to protection as well as prohibiting non-protected forms of speech such as threats and harassment; and
- Custodial rights to children

In this context, the limitation of Second Amendment rights pursuant to a valid protection order is not unusual or arbitrary.

The process of obtaining a domestic violence restraining order is not perfunctory or "self-executing."[132] While the specifics may vary between jurisdictions, judges are held to procedural standards before entering a domestic violence protection order. A full order of protection generally requires a court hearing in which both the victim and offender have a chance to present evidence, testimony, and witnesses to show why the order should or should not be issued. The judge must make a finding on the record that the respondent poses a danger to the petitioner. In order to obtain such an order, generally a victim must come to court to file, draft a complaint that forms the basis of their request for an order, speak to a judge, obtain a temporary order, serve the order on the respondent with notice of the date for a formal hearing, appear at the hearing (generally thirty days later, though again, that may vary by jurisdiction), and convince the judge that the petitioner still has a need of the court's protection. While data on how many orders (of those where the petitioner appears) are dismissed is not easily obtained, it is not a given that a petitioner who seeks an order will receive one. For example, in Texas, a judge must decide by a preponderance of the evidence that the respondent committed family violence[133] against the petitioner and that they will likely commit another act of family violence in the future.[134]

While the *Rahimi* court, especially in its concurrence, voices concerns about how easily someone may obtain an order, such as during divorce proceedings, its concerns are not borne out by data; petitioners rarely seek protection orders until violence has already taken place; according to one study, 37% of women who applied for a protection order had been threatened or injured with a weapon; more than half had been beaten or strangled; and 99% had been intimidated through threats, stalking, and harassment.[135] That same study found that more than 40% experienced severe physical abuse at least every few months, and nearly one-quarter had suffered abusive behavior for more than five years.[136] To say that such orders are easily obtained as tools during divorce or other proceedings greatly minimizes how difficult it is to obtain such an order.

Rahimi also argues that giving primacy to whether a person is "law abiding [or] responsible" to determine whether they are entitled to Second Amendment protections would lead to absurd results such as prohibiting people convicted of speeding from possessing firearms. Other courts have argued that such a formulation would leave people unlawfully using controlled substances as ineligible to possess a firearm.[137] This analysis and the concern for speeders and illicit drug users does not appreciate that the "law abiding, responsible" is a conjunctive formulation which means that while one may not be law abiding, they may still be deemed responsible enough to possess a firearm. Accordingly, speeders and illicit drug users are an apples-to-apples comparison to persons subject to protection orders, who are not law abiding insofar as they engaged in conduct that made them the subject of a court order, or responsible, at least as that term is commonly understood.

Bruen's Impact on Existing Precedent and the Rule of Orderliness

The *Rahimi* Court recognized in its amended opinion that they were not abrogating the decision of the Fifth Circuit in *Emerson;* rather, they were recognizing an abrogation from the Supreme Court. They found that because the Supreme Court's decision in *Bruen* abrogated *Emerson*, they were no longer bound by the prior Fifth Circuit ruling. According to the Fifth Circuit's own Rule of Orderliness, the *Rahimi* court cannot abrogate standing Fifth Circuit precedent without finding a clear abrogation by a higher court of that precedent.[138]

Even in the Fifth Circuit, a compelling argument can be made that *Bruen* never abrogated *Emerson*. *Bruen* held that a sweeping gun regulation that functionally prevented almost all citizens from possessing a firearm was unconstitutional (much as they did in *Heller* and *McDonald*), and that the means-end scrutiny test used by the circuits post *Heller* was not the constitutional framework for assessing regulations on firearms. The ruling in *Emerson* predates the use of the means-end scrutiny test used in *McGinnis* and overturned in *Bruen*; instead, the *Emerson* court relied primarily on the comparison to historical analogues to hold that 18 U.S.C. § 922(g)(8) does not violate the Second Amendment. The logic of the *Emerson* court therefore mirrors the logic of the Supreme Court in *Bruen* and considered whether the regulation at issue had an analogue in historical statutes. While the *Emerson* court did use "narrowly tailored" language, which *Rahimi* might argue implies a means-end scrutiny test, they used this language to emphasize that the Second Amendment is not an unfettered right and can be subject to some limitations.

Bruen also never spoke to the type of narrowly tailored regulations that prevent discrete individuals from owning guns. Given that the Supreme Court tacitly approved of the Fifth Circuit's ruling in *Emerson* by declining Certiorari (*Emerson v. U.S.*, 536 U.S. 907 (2002)), it would be logical to assume that the Supreme Court intended to abrogate all cases, no matter how or when they were decided, pertaining to Second Amendment regulations. In fact, *Bruen,* both in its majority and concurring opinions, was clear to say that they did *not* intend for their holding to apply to other firearm regulations that were not at issue in the case.

The Impact of Existing Protective Orders on the Issuance of a License to Carry a Concealed Firearm

In his concurrence to *Bruen*, Justice Kavanaugh wrote, "[T]he Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense. In particular, the Court's decision does not affect the existing licensing regimes—known as "shall-issue" regimes—that are employed in 43 States."[139]

In the event of any challenge to a "shall-issue" regime, it is implicit that the three dissents in *Bruen* would join any rejection to that challenge. It appears to follow that the three concurrences in *Bruen* would also reject such a challenge. Furthermore, there is nothing explicitly stated in *Heller, McDonald*, or *Bruen* to suggest any of the three remaining Justices would sustain such a challenge. This is relevant because, in many jurisdictions, one's presumptive eligibility for a license to carry a firearm is removed if they are subject to a protection order. Accordingly, in those jurisdictions where *Rahimi*-type arguments are raised, litigants should research whether the licensing authority in their state extends to people subject to protection orders. If it does not, then Courts should be made aware of the incongruity of an implicit majority of the *Bruen* Court recognizing the validity of "shall-issue" regimes with a request to suggest that civil protection orders do not have the authority to prohibit firearm possession. The *Rahimi* Court rejected this argument on the grounds that the *Bruen* Court was merely accepting the general concept of shall-issue regimes rather than the specifics; however, another perspective would suggest this a further deviation between *Rahimi* and the controlling authority of *Heller, McDonald*, and *Bruen.*

Distinguishing § 922(g) from Categorical Bans in Heller, McDonald, and Bruen

The firearm bans examined in *Heller, McDonald*, and *Bruen* were effectively categorical bans without a limiting principle as opposed to a targeted, specific ban such

as one prohibiting a person subject to a protection order from possessing a firearm. When analyzing firearm bans imposed by protective orders, the *Rahimi* Court was effectively looking for a historical twin, rather than an analogue, such as the ones listed below, which imposed targeted, specific bans—unlike the broad, unlimited, and categorical bans in *Heller, McDonald*, and *Bruen*. In its effective rejection of this controlling authority, the *Rahimi* Court appears to have neglected Justice Alito's statement in his concurring opinion to *Bruen*:

> Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or [*McDonald*] about restrictions that may be imposed on the possession or carrying of guns.[140]

Accordingly, precedent such as *Emerson* and *McGinnis*, the latter of which admittedly engaged in the sort of means-end scrutiny testing declined in *Heller* and *Bruen*, also engaged in an active exercise of historical analysis to determine analogies to protective orders banning firearm possession. Those portions of *Emerson* and *McGinnis*, as well as similar historical analysis from other jurisdictions, should be deemed undisturbed by *Bruen*.[141]

Historical Analogues to Protection Order Prohibitions on Firearm Possession

There are many potential historical analogues to protection order prohibitions on firearm possession, many of which were raised by the government in the cases discussed above, including some addressed by the court in *Rahimi*. These include, but are certainly not limited to, surety laws, brandishing laws, gun regulations against drunken people, gun regulations against felons, gun prohibitions against Native Americans and slaves during colonial times, gun regulations against those who assisted Native Americans, pre-trial procedures resulting in the forfeiture of guns, and regulations preventing dangerous persons from possessing firearms. These will all be examined in more detail below.[142]

One critical note to add here is that some of these laws, especially those targeting slaves or Native Americans, were based in a distorted and oppressive colonial understanding of the dangerousness of arming those individuals. In no way does this article suggest that the justification behind such laws would or should be a valid justification for disarming such individuals today. As historical analogues, however, these laws demonstrate that the Second Amendment was drafted with the understanding that the freedoms it conferred were neither unqualified nor universal and were thus limited to those the government assessed as responsible, law-abiding, and without risk.

State Conventions

Many courts, including the Supreme Court in *Bruen* and *Heller,* looked to the historical understanding of states adopting the Second Amendment by looking at records of legislative debates, proposals, and conventions that were meeting during the time of the ratification. Many states recognized from the outset that the right to keep and bear arms was not an unlimited or unmitigated one. For example, the Pennsylvania Convention held, "[N]o law shall be passed for disarming the people or any of them *unless for crimes committed*, or real danger of public injury from individuals."[143] Debates surrounding the New Hampshire convention commonly understood that dangerous individuals (especially those who had been deemed to have engaged in rebellion) could and should be disarmed, and it was stated there that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion."[144] Further, the Massachusetts Convention clearly delineates that "the right to keep arms extended only to 'peaceable citizens,' not to criminals."[145]

There are multiple historical examples for the proposition that "any person viewed as potentially dangerous could be disarmed by the government without running afoul of the 'right to bear arms.'"[146] It is clear that traditionally, the application of the Second Amendment was limited to "virtuous" citizens.[147]

Brandishing Laws

Brandishing laws make up one group of historical examples that are pertinent for Second Amendment *Bruen* evaluations. These laws criminalized using enumerated weapons in threatening manners. They typically prohibited "exhibit[ing] any of said deadly weapons in a rude, angry or threatening manner," or with similar language.[148] Brandishing statutes from the late 1800s forbade "draw[ing] or threaten[ing] to use" certain weapons.[149] There were typically exceptions from these laws, however, for self-defense and military use.[150]

For example, in 1642, New York had a statute which stated, "No one shall presume to draw a knife much less to wound any person, under the penalty of fl.50, to be paid immediately, or in default, to work three months... in chains; this, without any respect of person. Let everyone take heed against damage and be warned."[151]

A 1736 Virginia legal manual also prohibited the aggressive brandishing of weapons.[152] It even permitted constables to confiscate the weapons of violators, stating that they "may take away Arms from such who ride, or go, offensively armed, in Terror of the People."[153] The manual provided additional guidance for constables by directing them to bring offenders and their weapons before a Justice of the Peace.[154] Similar laws were passed in Massachusetts Bay in 1692, New Hampshire in 1759, and Massachusetts in 1795.[155]

Finally, Arkansas had an 1868 statute that stated as unlawful, "When any person shall draw a pistol, gun, or any other deadly weapon, upon any other person or citizen, for the purpose of frightening or intimidating him or them from doing or attempting to do any lawful act, when such person or persons drawing said pistol, gun, or other deadly weapon, are not justified."[156]

Gun Regulations Against Dangerous Persons

The historical tradition of gun regulation in the colonies was aimed at preventing dangerous people from owning firearms.[157] It was on this basis that they passed laws prohibiting drunken individuals from owning a firearm; laws prohibiting minors from owning or possessing guns; laws prohibiting those who had engaged in insurrection from owning or possessing guns; and laws aimed at individuals who were perceived (albeit, as discussed above often wrongly) as being dangerous. Laws even allowed for individuals to be found as dangerous without a criminal process: Many such laws, including Surety laws, would allow for a civil finding of dangerousness as the basis for the restriction (akin to a finding in a civil protective order hearing), and some required no process at all.[158]

Surety Laws

Surety laws operated like a peace bond, requiring individuals to post bond before carrying weapons in public. At common law, an individual complainant could demonstrate that they were rightfully afraid another individual would injure him or his property. The complainant could then demand assurances of peace, or surety, against the person.[159] Surety operated as a preventative measure to crime before any crime was committed by the other party. If the Court found the demand of Surety to be reasonable, and the demanded party refused to post Surety, "he would be forbidden from carrying a weapon in public absent special need."[160] Despite what many experts and advocates claim, gun laws were not always aimed at a threat to the peace of the community at large; individualized threats were recognized as an area in which the government could, and should, regulate.

For example, in Massachusetts, an 1836 statute stated:

> [I]f any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace be required to find Sureties for keeping the peace, for a term not exceeding six months[.][161]

This statute required a showing of need only *after* reasonable accusations had been made.[162] In other words, Surety laws recognized that individuals could be required to pay a Surety or forfeit their firearms if

an individualized threat existed. Those who forfeited their Second Amendment rights by causing a reasonable fear of harm could, upon complaint by the other party and absent a showing of good cause on their part, be required to post a peace bond. Although it is true that those who were subject to the application of surety laws were still permitted to carry, the important historical context is that many Founding-era militia laws required free men to be armed for national defense purposes.[163] Additionally, the Surety laws were unique in that they involved a civil finding rather than a criminal one.

Drunkenness and Firearms Restrictions

Although regulations prohibiting drunken persons from firing guns in public places had less severe penalties (generally, fines) than civil protection orders, these statutes can still be analogized to protection orders because they deem drunken persons as "dangerous."

One 1655 law in New York prohibited firing guns in certain places (including houses) on New Year's Eve and the first two days of January.[164] The law was aimed at preventing the "great Damages … frequently done on [those days] by persons going House to House, with Guns and other Fire Arms and being often intoxicated with Liquor." [165]Justice Scalia noted this statute in Heller and stated that it provided no support for the severe restriction in that case because "[i]t is inconceivable that this law would have been enforced against a person exercising his right to self-defense on New Year's Day against such drunken hooligans."[166] In contrasting the 1655 law with the broad restriction at issue in Heller, Scalia implicitly makes an important legal distinction between persons "exercising [their] right to self-defense"— i.e., law-abiding citizens, for whom the restriction should not apply— and "drunken hooligans" — i.e., persons who may pose a threat to the safety of the public or individuals, for whom the restriction should conceivably apply. This distinction provides further support for the argument that specific, temporally limited, and targeted firearm restrictions should pass constitutional muster.

Pennsylvania enacted a law in 1750 that stated:

> That if any persons or persons whatsoever, within any county town, or within any other town or borough, in this province, already built and settled, or hereafter to be built and settled… shall fire any gun or other fire-arm, or shall make or cause to be made, or sell or utter, or offer or expose for sale, any squibs, rockets or other fire-works, within any of the said towns or boroughs without the governors special license for the same, every such person or persons, so offending shall be subject to the like penalties and forfeitures.[167]

Justice Breyer pointed to this law in his dissent of *Heller*.[168] In the majority opinion, Justice Scalia argued that this law "provide[s] no support for the severe restriction in the present case" because "it is unlikely that this law… would have ever been enforced against a person who used firearms for self-defense."[169] Scalia's statement against provides implicit support for the legal distinction between law-abiding citizens and dangerous persons.

Regulations Against Minors

Similar prohibitions against minors were aimed at protecting public safety. An 1856 Alabama law prohibited selling, giving, or lending, "to any male minor, a bowie knife, or knife, or instrument of the like kind or description, by whatever named called, or air gun, or pistol."[170] A similar law from Tennessee prohibited selling, loaning, giving, or delivering "to any minor a pistol, bowie-knife, dirk, Arkansas tooth-pick, hunter's knife, or like dangerous weapon, except a gun for hunting or weapon for defense in traveling."[171] A Kentucky statute also prohibited selling, giving, or loaning "any pistol, dirk, bowie-knife, brass-knucks, slung-shot, colt, cane-gun, or other deadly weapon … to any minor."[172]

While notably not criminal in nature, in a similar historical attempt to curb gun violence, multiple universities passed regulations that prohibited students from possessing firearms on campuses. The University of Georgia passed a resolution that prohibited students from possessing firearms not only on campus, but anywhere. The University of Virginia and the University

of North Carolina passed similar resolutions.[173] In this context, at least sixteen states and the District of Columbia passed some kind of ban on minors possessing firearms. Some modern courts have found that these historical regulations burdened citizens to an even greater extent than modern prohibitions.[174]

Gun Prohibitions Against Native Americans and Slaves During Colonial Times

In the Colonial period, gun ownership was restricted to property owning males and often further restricted to Protestants.[175] Although firearms were an essential part of daily life in Colonial America, Americans continued some English arms traditions, including disarming those perceived as dangerous.[176] Colonial laws were sometimes discriminatory and overbroad, but even those were intended to prevent perceived danger.

New York had such laws in the 17th century. A 1664 law forbade "any slave or slaves to have or use any gun pistol sword club or any other kind of weapon whatsoever, but in the presence or by the direction of his her or their master or mistress, and in their own ground,"[177] while a 1656 law prohibited, "the admission of any Indians with a gun or other weapon… on pain of forfeiting such arms, which may and also shall be taken from them…" in order to prevent "dangers of isolated murders and assassinations[.]"[178]

Gun Regulations Against Those Who Assisted Native Americans

Many early firearm regulations restricted, sometimes temporarily, one's right to own firearms if they helped Native Americans obtain firearms or other arms and ammunition.[179] The first laws of this kind were passed in Virginia, the first formal legislative body in America. Notably, many of these laws continued to exist throughout the eighteenth and nineteenth centuries.[180]

For example, in 1619, Virginia's legislative body enacted a gun control law stating that "if any person or persons shall sell or barter any guns, powder, shot or any arms or ammunition unto any Indian or Indians within this territory, the said person or persons shall forfeit to public uses all the goods and chattels that he or they then have to their own use, and shall also suffer imprisonment during life."[181] Most colonies had similar laws, including New Jersey and New York, which punctuated the degree of tension, suspicion, and confrontation between Native Americans and settlers.[182] The need to be more heavily armed than their English 'brethren' follows, in part, from this tension. This shows that public safety was central to the government's desire to regulate guns.

In 1723, over a century after the Virginia statute was enacted, in 1723 Connecticut passed a law punishing persons who lent or sold any guns or ammunition to Native Americans.[183] By doing so, the Connecticut Court ordered that every gun lent would be forfeited.[184] Over forty years later, Pennsylvania passed a very similar law.[185]

Gun Regulations Against Felons

Historically, felons have been deprived of the Second Amendment right to bear arms without controversy. The *Rahimi* court insists that the application of the right to bear arms to only "law-abiding, responsible citizens" was nothing more than a shorthand explanation that the decision "should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons[.]"[186] Felons, as a class, were determined to be a threat to the safety of others, or a specified individual. Some estimates indicate that there were no fewer than eleven laws among the colonies—predating the ratification of the Constitution—regulating or prohibiting the possession of firearms by convicted felons, other 'criminals,' or non-citizens.[187]

For example, Ohio enacted a statute in 1788 that penalized persons if they broke and entered into any dwelling and committed or attempted to commit "any personal abuse, force, or violence" with a "dangerous weapon" indicating a violent intention.[188] Persons found violating this statute had to "forfeit all of his, her or their estate, real and personal" and sent to jail "for a term not exceeding forty years."[189]

The notion that a felon forfeits his Second Amendment right to bear arms has been a largely uncontroversial point in our nation's history; early penalties for felony convictions included being required to pay a surety or disarmament and revocation of the right to keep and

bear arms.[190] Most disarmament efforts during the colonial and revolutionary periods targeted persons the colonists feared as potential insurrectionists.[191] While these laws were sometimes misused to punish political dissidents, there was always the justification that those being disarmed were dangerous.[192] The law at issue does not appear to be a threat to 'responsible gun owners' when placed within the proper context.

In 1776, the Continental Congress recommended the disarmament of people "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies."[193] Massachusetts and Pennsylvania both responded quickly and acted "to cause all persons to be disarmed, within their respective colonies, who are notoriously disaffected to the cause of America."[194]

These laws are certainly analogous enough to modern-day civil protection orders prohibiting firearms to warrant discussion because they regard pre-convicted persons as dangerous. Additionally, these types of statutes raise questions about the claim that the right to bear arms was meant to "facilitate an individual right of revolution."[195]

In 1637, prior to independence, Massachusetts enacted a law that required disarmament of citizens who proclaimed seditious libel.[196] They could have their rights restored if they admitted their wrongdoing.[197] As this law shows, Massachusetts Bay leadership was particular sensitive to sedition, treating it like treason and prosecuting it frequently.[198] Further, those found to be guilty of sedition could face disarmament if they were not outright banned from the colony.[199]

Similarly, Connecticut punished those who remained loyal to the British leading up to the Revolutionary War.[200] Loyalists who actively assisted the British or libeled acts of the Continental Congress faced not only disarmament, but other penalties, including imprisonment or disenfranchisement.[201] Further, the Continental Congress continually recommended the disarmament of loyalists, stating "they ought to be disarmed, the dangerous kept in safe custody, or bound with sureties for good behavior."[202]

Additional states adopted similar measures. In 1777, New Jersey passed a statute which gave its Council of Safety the authority "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess."[203] Also in 1777, North Carolina stripped citizenship rights from "all Persons failing or refusing to take the Oath of Allegiance." Those "permitted . . . to remain in the State" could "not keep Guns or other Arms within his or their house."[204] Virginia passed that same law later in 1777.[205] Further, in 1779, Pennsylvania declared that "it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms."[206] This allowed militia officers to "disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state."[207] At the time of this law's passage, ten other states had similar laws allowing the taking of privately held firearms during the Revolutionary War.[208]

Massachusetts passed multiple laws during this era that are relevant to this issue. For example, it passed one act that disarmed "such Persons as are notoriously disaffect to the Cause of America, or who refuse to associate to defend by Arms the United American Colonies."[209] The Massachusetts law required "every Male Person above sixteen Years of Age" to subscribe to a "test" of allegiance to the "United American Colonies."[210] Anyone who did not subscribe to this test faced disarmament as a consequence.[211] This Massachusetts law is particularly interesting because it exempted Quakers from signing. As a religious accommodation, Quakers were provided with a different declaration.[212] Thus, while the right to freedom of religion outweighed the state's interest in its preferred test of allegiance, the right to bear arms did not outweigh the state's interest in maintaining security through disarmament of those considered dangerous to the state. Instead, the state's interest in public safety dominated.

In 1787, the Massachusetts legislature passed another law, which set out the terms for pardons for those who were involved in Shay's rebellion.[213] To obtain the par-

don, an oath of allegiance was required as well as the surrendering of all privately owned firearms for three years.[214] Further, the person would lose other civil rights such as the right to vote, serve on a jury, or hold government office.[215] It must be noted that these other penalties were civic in nature. There was no loss of freedom of speech or religion, and the loss of the right to bear arms demonstrates that it was thought of as a right connected to an individual's duties to society.[216]

Finally, a Massachusetts Report from 1844 denotes criminal activities that might result in a Justice of the Peace imposing a Surety of the peace or good behavior upon those accurately categorized as "dangerous or disorderly person."[217] The report listed any "affrayer, rioter, disturber of the peace," and "those uttering menaces or threatening speeches," while treating individuals that traveled "offensively armed" as its own category.[218] This latter category included a "good cause," self-defense exception; however, the narrow exception only encompassed situations where "they faced a specified threat."[219]

Conclusion

While the Fifth Circuit's decision in *Rahimi* might be cause for reasonable alarm, prosecutors must carry on and utilize the laws at their disposal to protect victims. *Rahimi* certainly has more immediate effects for the states within the Fifth Circuit, but it could have impacts nationwide should the U.S. Supreme Court affirm the Fifth Circuit's decision. While the case is pending before the Supreme Court, prosecutors can and should prepare themselves and their cases using the strategies above to stymie the impacts of *Rahimi*. Above all else, careful preparation and presentation of cases are the best strategy to protect victims and hold offenders ac-countable for their crimes.

ENDNOTES

*Jonathan Kurland is an Attorney Advisor at AEquitas and Brooke Swann and Jennifer Newman are Associate Attorney Advisors at AEquitas.

1 18 U.S.C. § 922(g)(8) reads as follows:

> (g) It shall be unlawful for any person...
>
> (8) who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2 The Court initially handed down an opinion in this case on February 2, 2023. *See United States v. Rahimi,* 59 F.4th 163 (5th Cir. 2023), *withdrawn and superseded by* 61 F.4th 443 (5th Cir. 2023). On March 2, 2023, however, it withdrew that opinion and issued a new opinion. *See United States v. Rahimi,* 61 F.4th 443 (5th Cir. 2023). The new opinion did not alter the court's ruling, and the primary difference is the level of detail contained in Judge Ho's concurring opinion.

3 *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

4 *District of Columbia v. Heller*, 554 U.S. 570 (2008).

5 *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).

6 *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020).

7 *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

8 *See, e.g. United States v. Guthery,* No. 2:22-CR-00173-KJM, 2023 WL 2696824 (E.D. Cal. Mar. 29, 2023) (a post-Rahimi challenge to the constitutionality of 18 U.S.C. 922(g)(1), which ultimately held that the regulation is constitutional under the Second Amendment).

9 *See, e.g., United States v. Cleveland-McMichael*, No. 3:21-CR-00119-SLG, 2023 WL 2613548 (D. Alaska Mar. 23, 2023) (holding that 18 U.S.C. 922(g)(3), which prohibits users of a controlled substance from possessing a firearm is constitutional under the Second Amendment); *but see United States v. Connelly*, No. EP-22-CR-229(2)-KC, 2023 WL 2806324 (W.D. Tex. Apr. 6, 2023) (holding that 18 U.S.C. 922(g)(3) is unconstitutional under the 2nd amendment).

10 *See, e.g.*, *Barragan-Gutierrez v. United States*, No. 14-CR-232-NDF, 2023 WL 2837337 (D. Wyo. Apr. 7, 2023) (holding that 18 U.S.C. § 924(c), which criminalizes possession of a firearm in furtherance of a drug trafficking offense, is constitutional under the 2nd amendment).

11 See, e.g., *United States v. Hammond*, No. 422CR00177SHLHCA, 2023 WL 2319321 (S.D. Iowa Feb. 15, 2023).

12 See *United States v. Le*, No. 423CR00014SHLHCA, 2023 WL 3016297 (S.D. Iowa Apr. 11, 2023) (holding that 18 USC 922(g)(8) is constitutional even in light of Bruen, and directly contradicting the opinion in Rahimi).

13 *Rahimi,* 61 F.4th at 450 (quoting *Emerson*, 270 F.3d at 261).

14 *Emerson*, 270 F.3d at 261.

15 *Heller*, 554 U.S. at 628.

16 The court also dismissed Mr. Emerson's Due Process claims, finding that he possessed adequate knowledge of the existence of the protection order and was provided sufficient notice that while under such an order, federal law prohibited his possession of a firearm. *Emerson*, 270 F.3d at 216.

17 *Heller*, 554 U.S. at 570.

18 *Id.* at 576.

19 *Id*. at 581-585.

20 *Id*. at 595.

21 *Id*. at 625.

22 *Id*. at 626-627 (noting that this list was not exhaustive as to the types of regulations the Court would find permissible).

23 Chicago, Ill., Municipal Code § 8-20-040(a) (2009) (repealed).

24 Chicago, Ill., Municipal Code § 8-20-050(c).

25 Oak Park, Ill., Municipal Code §§27–2–1 (2007); 27–1–1 (2009).

26 *McGinnis*, 956 F.3d at 747.

27 *Id*. at 754 (quoting *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012)).

28 *Id.* (quoting *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 194).

29 Means-end scrutiny is an analytical process examining the purposes (ends) which conduct is designed to serve and the methods (means) chosen to further those purposes. When government action is subject to a constitutional limit, courts may evaluate the justification for that action. Essentially, the Court will examine the government's interest in the regulation, the effectiveness of that regulation at achieving the interest, and whether less restrictive methods might be used to achieve the same goal. The greater the impact on the right, the greater degree of scrutiny that should be applied – for example, a regulation that is not significantly burdensome might only require having any rational basis connecting it to government ends, but an extremely burdensome regulation must be supported by significant government interest, effectively further that interest, and have no other reasonable alternative.

30 *Id*.

31 *Id*. at 757.

32 *Id.* at 757.

33 *Id*. at 758.

34 *Id.*

35 *Bruen,* 142 S. Ct. at 2111.

36 N.Y. Penal Law Ann. § 400.00(2)(f) (as written at the time *Bruen* was decided, was interpreted to require this standard by *In re Klenosky*, 75 App. Div. 2d 793 (N.Y. App. Div. 1980)).

37 *Bruen*, 142 S. Ct. at 2118.

38 *Id.* (quoting *Heller*, 554 U.S. at 626).

39 *Id.* at 2119-20.

40 The government identified a class of laws described broadly as "surety laws" which allowed a plaintiff who claimed they had cause to fear an injury or breach of the peace from a specific individual to seek a judicial ruling which would allow a judge to require the respondent in that action to post a bond to keep the peace in order to continue to carry arms.

41 *Id*. at 2120.

42 *Id*. at 2157 (internal citations omitted).

43 *Id*. at 2161-2162.

44 *Id*. at 2162.

45 *Id.*

46 This case constituted Rahimi's second appeal to the Fifth Circuit Court of Appeals. Rahimi's first appeal after his guilty plea alleged that his federal sentence was unconstitutionally run consecutive to his state sentence. The Court upheld the constitutionality of his sentence in that case and declined to remand.

47 The Rahimi opinion notes that the legal questions at issue do not concern relevant policy goals.

48 *Id*. at 2127.

49 *Rahimi,* 61 F.4th at 448.

50 *McGinnis*, 956 F.3d at 755 (quoting *Emerson*, 270 F.3d at 261-64).

51 *Rahimi,* 61 F.4th at 450.

52 *Id.* at 461 (quoting *Bruen,* 142 S. Ct. at 2129-30).

53 *Id.* at 450 (quoting *Bruen,* 142 S. Ct. at 2130).

54 *Id.* at 450 (quoting *Bruen,* 142 S. Ct. at 2127).

55 *Id*. at 450 (quoting *Bruen,* 142 S. Ct. at 2128-30).

56 *Id.*

57 *Id*. at 451 n.5.

58 *Id.*

59 *Id*. at 451.

60 While the court does not expressly explain what it means by this distinction, based on the application of its reasoning, it seems that the first approach involves using history to identify to whom the right applies to and under what circumstances. The second approach is to use history to identify the govern-

ment's power to restrict the right within its scope (*e.g.,* among all people who we have already established are within the scope of the right (which *Rahimi* purports to be everyone), what restrictions can the government enact on law-abiding citizens).

61 *Id.*

62 *Id.* at 452-453.

63 *Heller*, 554 U.S. at 580.

64 *Id.*

65 *Id.* at 581.

66 *Rahimi,* 61 F.4th at 451.

67 *Id.* 452

68 *Id.* at 452-453.

69 *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019).

70 *Id.* at 452-53.

71 *Rahimi,* 61 F.4th at 453.

72 *Id.*

73 *Id.* at 453-454.

74 *Id.* at 453.

75 *Id.* at 454.

76 *Id.* at 461.

77 *Id.* at 454.

78 *Id.*

79 *Id.* at 459.

80 *Bruen* categorically rejected analogues based on English law, despite *Heller* holding that the Second Amendment "codified a right 'inherited from our English ancestors.'" *See Heller*, 554 U.S. at 599.

81 *Rahimi,* 61 F.4th at 456.

82 *Id.*

83 *Id.*

84 *Id.* at 456-457.

85 *Id.*

86 *Id.* at 457.

87 *Id.*

88 *Id.*

89 *Id.* at 457-58.

90 *Id.* at 458.

91 *Id.*

92 *Bruen*, 142 S. Ct. at 2147–48.

93 *Rahimi,* 61 F.4th at 459.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 460.

100 *Id.*

101 *Id.* at 461.

102 *Id.*

103 *Id.* at 461.

104 *Id.*

105 *Rahimi*, 59 F.4th at *23.

106 *Rahimi,* 61 F.4th at 467.

107 *Id.* at 453.

108 *Id* at 461.

109 *Id.*

110 *Id.*

111 *Id.* at 462.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.* at 463.

116 *Id.* at 464.

117 *Id.* at 465.

118 *Id.* at 466.

119 *Id.* at 466-467.

120 *Id.* at 467.

121 *Heller*, 554 U.S. at 635.

122 *Bruen*, 142 S. Ct. at 2122 (emphasis added).

123 *Rahimi,* 61 F.4th at 452.

124 *Bruen*, 142 S. Ct. at 2133.

125 *See* Neil Websdale et al., *The domestic violence fatality review clearinghouse: introduction to a new National Data System with a focus on firearms*, 6(6) Injury Epidemiology (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6582678/; Jacquelyn Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93(7) Am. J. Pub. Health 1089 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/.

126 Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19(4) Trauma, Violence & Abuse 431 (2016), https://doi.org/10.1177/1524838016668589.

127 Harvard T.H. Chan Sch. of Pub. Health, Homicide leading cause of death for pregnant women in U.S. (2022), https://www.hsph.harvard.edu/news/hsph-in-the-news/homicide-leading-cause-of-death-for-pregnant-women-in-u-s/.

128 Everytown Rsch. & Pol'y, Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem (2023), https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/.

129 *Id.*

130 See *Rahimi*, 61 F.4th at 452 n.6; *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022).

131 *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

132 *Rahimi*, 61 F.4th at 452.

133 Texas law defines "family violence" as an act where a family or household member commits an act (or threatens to commit an act) intending to cause physical harm, bodily injury, assault, or sexual assault. *See* Tex. Penal Code Ann. § 1.07(a)(8); Tex. Fam. Code Ann. § 71.004(1).

134 Tex. Fam. Code Ann. § 85.001(a).

135 Nat'l Inst. of Just., Civil Protection Orders: Victims' Views on Effectiveness 2 (1998), https://www.ojp.gov/pdffiles/fs000191.pdf.

136 *Id.*

137 *See United States v. Harrison*, No. CR-22-00328-PRW, 2023 WL 1771138 (W.D. Okla. Feb. 3, 2023).

138 *See, e.g., In re Bonvillian Marine Serv., Inc.* 19 F.4th 787, 792 (5th Cir. 2021) (holding that "under the rule of orderliness, one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court.").

139 *Bruen*, 142 S. Ct. at 2161.

140 *Id.* at 2157.

141 *See, e.g., United States v. Cleveland-McMichael*, No. 3:21-CR-00119-SLG, 2023 WL 2613548 (D. Alaska Mar. 23, 2023) (holding that Bruen did not overturn 9th Circuit precedent finding that 18 U.S.C. § 922(g)(8) was constitutional).

142 The full text of any of the historical statutes discussed in this article can be obtained by contacting AEquitas at info@aequitasresource.org.

143 Bernard Schwartz, The Bill of Rights: A Documentary History 665 (1971).

144 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (Jonathan Elliot eds., 1836).

145 Stephen P. Halbrook, The Founders' Second Amendment: Origins of the Right to Bear Arms 206 (2008).

146 Carlton F.W. Larson, *Four Exceptions in Search of A Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60(6) Hastings L. J. 1371, 1377 (2009), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=3749&context=hastings_law_journal.

147 Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461, 480 (1995), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=960788.

148 *See generally* 1867 Ariz. Sess. Laws 21-22, *An Act to Prevent the Improper Use of Deadly Weapons and the Indiscriminate Use of Fire Arms in the Towns and Villages of the Territory*, § 1; 1875 Ind. Acts 62, An Act Defining Certain Misdemeanors, and Prescribing Penalties Therefor, § 1; The Revised Ordinances of the City of Bloomfield 155 (1836).

149 *See generally* 1867 Ariz. Sess. Laws 21-22; 1875 Ind. Acts 62.

150 *See generally* 1867 Ariz. Sess. Laws 21-22; 1875 Ind. Acts 62.

151 1642 N.Y. Laws 33, *Ordinance of the Director and Council of New Netherland Against Drawing a Knife and Inflicting a Wound Therewith*.

152 George Webb, The Office of Authority of a Justice of Peace 92 (1736).

153 *Id.*

154 *Id.*

155 *See* 1 Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 53-58 (1869); Acts and Laws of His Majesty's Providence of New Hampshire in New England 24-25 (1761); 1 The Laws of the Commonwealth of Massachusetts 346 (1801); *see also* Symposium, *The Second Amendment at the Supreme Court: "700 Years of History" and the Modern Effects of Guns in Public*, 55(5) U.C. Davis L. Rev. 2545 (2022).

156 1868 Ark. Acts 218, Acts of the General Assembly of Arkansas, § § 12-13.

157 See *Heller*, 554 U.S at 601-610 (examining an extensive array of colonial-era gun regulations and outlining the purposes behind the restriction); see also *Rahimi*, 61 F.4th at 46 (outlining the process by which a complainant could request surety).

158 *Bruen*, 142 S. Ct. at 2148-49.

159 *Rahimi*, 61 F.4th at 459-60.

160 *Id.* at 459.

161 Theron Metcalf, The Revised Statutes of the Commonwealth of Massachusetts 750 (1836).

162 Eugene Volokh, *How Should Courts Evaluate Gun Regulations After Bruen?*., Reason (June 6, 2023), https://reason.com/volokh/2022/06/23/how-should-courts-evaluate-gun-regulations-after-bruen/?comments=true.

163 *See generally* Clayton Carter, Colonial Firearms Regulations (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759961.

164 5 Colonial Laws Of New York From The Year 1664 to the Revolution 532 (1894).

165 *Heller*, 554 U.S. at 632.

166 *Id.*

167 1750 Pa. Laws 208, *An Act For The More Effectual Preventing Accidents Which May Happen By Fire, And For Suppressing Idleness, Drunkenness, and Other Debaucheries*.

168 *Heller*, 554 U.S. at 642.

169 *Id.* at 632-33.

170 1856 Ala. Laws 17, *To Amend the Criminal Law*, § 1.

171 The Code of Tennessee Enacted by the General Assembly of 1857-'8 871 (Return J. Meigs & William F. Cooper eds. 1858).

172 1859 Ky. Acts 245, *An Act to Amend an Act Entitled "An Act to Reduce to One of the Several Acts in Relation to the Town of Harrodsburg,"* § 23.

173 *See* Univ. of Va. Bd. of Visitors, University of Virginia Board of Visitors Minutes (October 4-5, 1824*)* 68 (1824), https://encyclopediavirginia.org/entries/university-of-virginia-board-of-visitors-minutes-october-4-5-1824/; Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North Carolina 15 (1838), https://docsouth.unc.edu/true/ncga/ncga.html.

174 *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir. 2023).

175 Gene Demby & Natalie Escobar, *From Negro Militias To Black Armament*, NPR, https://www.npr.org/sections/codeswitch/2020/12/22/949169826/from-negro-militias-to-black-armament (last visited July 5, 2023).

176 Joseph G.S. Greenlee, *Disarming the Dangerous: The American Tradition of Firearm Prohibitions*, 16 Drexel L. Rev. 1, 2 (2023).

177 2 The Colonial Laws of New York from the Year 1664 to the Revolution 687 (1894).

178 1656 N.Y. Laws 235, *Ordinance Of The Director And Council Of New Netherland Renewing The Ordinances For The Formation Of Villages, And Against Admitting Armed Indians Into Cities, Villages And Houses.*

179 An 1853 statute in Oregon, for example, penalized any white citizen, or other person" from selling, bartering, and giving Native Americans "any gun, rifle, pistol or other kind of firearms, any powder, lead, percussion caps or other ammunition whatever." The Statutes of Oregon: Enacted and Continued in Force by the Legislative Assembly, at the Session Commencing 5th December, 1853, 257 (1854). Any person who offended under this statute were deemed guilty of a misdemeanor, and upon conviction, persons were punished by imprisonment.

180 *Id.*

181 1633 Va. Acts 209, *Acts Made By The Grand Assembly Holden At James City, August 21st, 1633, Act X, That No Arms or Ammunition Be Sold To The Indians*.

182 1645 N.Y. Laws 47, *By The Director And council Of New Netherland Further Prohibiting The Sale Of Firearms, etc., To Indians*; 1639 N.J. Laws 18, *Ordinance Of The Director And Council Of New Netherland, Prohibiting The Sale Of Firearms, etc. To Indians*.

183 *See* Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs 55, 57 (2017), https://rockinst.org/wp-content/uploads/2018/03/Gun-Law-History-in-the-United-States-and-Second-Amendment-Rights.pdf; *see also* 1723 Conn. Acts 292, *An Act For Preventing Lending Guns Ammunition etc. to the Indian*.

184 1723 Conn. Acts 292.

185 1763 Pa. Laws 319, *An Act To Prohibit The Selling Of Guns, Gunpowder Or Other Warlike Stores To The Indians*, § 1.

186 *Rahimi*, 61 F.4th at 452 (quoting *Heller*, 554 U.S. at 626-27).

187 Spitzer, *supra* note 186, at 60.

188 1788 Ohio Laws 20, *A Law Respecting Crimes and Punishments*.

189 *Id.*

190 Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 268 (2020), https://scholarship.law.uwyo.edu/cgi/viewcontent.cgi?article=1434&context=wlr [hereinafter *Historical Justification*].

191 *Id.* at 265.

192 *Id.* at 250-252.

193 Continental Congress 1776, v5:244.

194 *Id.*; *see also* Kevin M. Sweeney, *Firearms, Militias, and the Second Amendment, in* The Second Amendment On Trial 310, 310-11 (Paul A. Cornell and Nathan Kozuskanich eds., 2013).

195 Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73(2) Fordham L. Rev. 487, 508 (2004), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4021&context=flr.

196 1 Mass. Bay. Co., Records of the Governor and Company of the Massachusetts Bay in New England 211–12 (Nathaniel B. Shurtleff ed., 1853).

197 *Id.*

198 Bradley Chapin, Criminal Justice in Colonial America, 1606–1660 103 (2010).

199 Edward Johnson, Johnson's Wonder-Working Providence: 1628–1651 175 (J. Franklin Jameson ed., 1959).

200 *Historical Justification, supra* note 194, at 263-64.

201 G.A. Gilbert, *The Connecticut Loyalists*, 4(2) Am. Hist. Rev. 273, 282 (1899), https://www.jstor.org/stable/pdf/1833556.pdf?refreqid=excelsior%3A26f3e4c7153788dc5fe5a3aa03f7c4bf&ab_segments=&origin=&initiator=&acceptTC=1.

202 *Id.* at 283.

203 1777 N.J. Laws 90, ch. 40 § 20.

204 24 Walter Clark, The State Records of North Carolina 89 (1905).

205 9 William Waller Hening, The Statutes at Large; Being a Collection of all the Laws of Virginia, From the First Session of the Legislature, in the year 1619 282 (1821).

206 1776 Pa. Laws 193, *An Act... for Disarming Persons Who Shall not Have Given Attestations of Allegiance and Fidelity to this State*, §§ 4-5.

207 *Id.*

208 *Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America* 113 (2011).

209 1776 Mass. Acts 31-32, 35.

210 *Id.*

211 *Id.* at 35.

212 *Id.*

213 *Acts and Laws of the Commonwealth of Massachusetts* 177 (1893) (the law applied to any person or persons, "who have acted in the capacity of non-commissioned officers or privates, or persons of any other description, who, since the first day of

August, seventeen hundred and eighty-six, have been, now are, or hereafter may be in arms against the authority and Government of this Commonwealth, or who have given or may hereafter give them counsel, aid, comfort or support…").

214 *Id.*

215 *Id.* (The three-year period could be shortened for these punishments but not for the disarmament-provided that the person could "exhibit plenary evidence [to the General Court] of their having returned to their allegiance, and kept the peace, and that they possess an unequivocal attachment to the Government.").

216 Cornell & DeDino, *supra* note 200, at 508.

217 Report of the Penal Code of Massachusetts Prepared Under a Resolve of the Legislature, Passed on 10th of February, 1837 Chapter 37 § 1 (1844).

218 *Id.*

219 *Id.* at Chapter 35 § 13. There is evidence that these regulations were not just for show; enforcement data from Boston in the 1800s tends to show, for example, that gun violence was prosecuted, but that gun crimes were less common than other ordinary assaults. See Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting*, 1328-1928, 55 U.C. Davis L. Rev. 2545, 2590 (2022), https://lawreview.law.ucdavis.edu/issues/55/5/articles/files/55-5_Cornell.pdf.

This project was supported by Grant No. 15JOVW-22-GK-03987-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women (OVW).

Washington, DC • 202-558-0040 • info@aequitasresource.org