

## Understanding the Supreme Court's Decision in *United States v. Rahimi*<sup>1</sup>

On June 21, 2024, the Supreme Court held that it is not a violation of the Second Amendment to temporarily disarm individuals who present a credible threat to the physical safety of others. In reaching this decision, the Supreme Court reversed a ruling by the Fifth Circuit Court of Appeals that held that 18 U.S.C. § 922(g)(8), which criminalizes firearm possession by people who are subject to domestic violence restraining orders, is unconstitutional under the Second Amendment.<sup>2</sup>

### Background of the *Rahimi* Case

The Defendant, Zackey Rahimi, was convicted in federal court of violating § 922(g)(8) because he possessed a gun on several occasions after he consented to be subject to a domestic violence protection order issued by a Texas state court. The Fifth Circuit reversed this conviction based on the United States Supreme Court's holding in *N.Y. State Pistol and Rifle Association v. Bruen* (2022).<sup>3</sup> The *Bruen* decision directs courts to examine historical traditions of firearm regulation to determine whether a currently contested firearm regulation is consistent with the rights protected by the Second Amendment. The government presented three potential categories of analogues to the acts criminalized by § 922(g)(8). The Fifth Circuit found that none of these statutes represented sufficiently similar analogues to § 922(g)(8), and subsequently overturned Rahimi's conviction.<sup>4</sup>

The Department of Justice filed a petition for writ of certiorari to the Supreme Court rather than seeking an en banc review in the Fifth Circuit. The government justified its expedited request within its petition by pointing to the "disruptive consequences of the Fifth Circuit's decision[.]"<sup>5</sup> The Supreme Court granted certiorari to consider the question of whether 18 U.S.C. § 922(g)(8) is facially unconstitutional under the Second Amendment. To demonstrate whether a statute is facially unconstitutional, a party must establish that "no set of circumstances exists under which the [statute] would be valid."<sup>6</sup>

### The Supreme Court's Opinion in *Rahimi*

In an 8-1 decision, the Supreme Court reversed the Fifth Circuit's decision in *Rahimi*, holding that § 922(g) was constitutional as applied. There were two principal errors that the Court found in the Fifth Circuit's holding:

- The Fifth Circuit misapplied the *Bruen* decision in requiring that a current firearm regulation must have a historical twin, rather than an analogue to a historical regulation. The Court noted that the scope of permissible Second Amendment regulations is not bound by a current law needing an identical historical comparison. In other words, the scope of valid firearm regulations is not limited to "laws trapped in amber."<sup>7</sup> Were it the case that regulations were literally limited to their historical

counterparts, then the rights protected by the Second Amendment would work in the same manner and extend “only to muskets and sabers.”<sup>8</sup>

- The Court found that the Fifth Circuit misapplied the standard for a facial challenge to § 922(g)(8). A facial challenge to a statute argues that there is no way for a law to be constitutionally valid, compared to a narrower “as applied” challenge that argues the application of a law in a specific instance is constitutionally invalid. The Court criticized the Fifth Circuit for looking for ways to invalidate § 922(g)(8) rather than upholding the principle that statutes are presumed to be constitutional. The Court found § 922(g)(8) constitutional as applied.

The Court conducted an independent comparison of the firearm regulations inherent in § 922(g)(8) to historical firearm regulations. In doing so, they found that a restraining order containing a finding that a person is a credible threat to an intimate partner is analogous to laws that have existed since the nation’s founding which permitted disarming individuals who threaten physical harm to others. Accordingly, § 922(g)(8), as applied to the facts of this case, fit well within the scope of firearm regulations permitted by the Second Amendment.

The Court also noted that much of the Fifth Circuit’s concerns with § 922(g)(8) were rooted more in objections associated with due process rather than Second Amendment protections. In response, the Court noted that for a protection order to qualify under the statute, the defendant must have had notice and an opportunity to be heard before the order was entered. Thus, the surety and “going armed” provisions examined by the court not only served a similar purpose to that of § 922(g)(8), but those regulations were also limited in the scope of the disarmament they caused (a temporary restriction enacted only after a judicial finding subject to due process).

The Supreme Court’s decision in *U.S. v. Rahimi* upheld the constitutionality of § 922(g)(8) and therefore, federal prosecutions charging violations of that statute can proceed. Federal prosecutors with cases that have been held in abeyance by the Fifth Circuit holding should ensure that they can prove that the defendant received notice of the underlying protection order and that a court made a finding that the defendant posed a credible threat to the physical safety of others.

The *U.S. v. Rahimi* decision upheld a conviction under § 922(g)(8). It did not specifically apply to the other subsections in § 922(g). However, the reasoning applied in the *Rahimi* decision could likely be applied to other prosecutions under § 922(g) especially in so far as those other subsections rely on an independent finding of dangerousness to another individual and are analogous to historical traditions of firearm regulations permitted under the Second Amendment.

## Endnotes

- 1 This document was created by Jon Kurland, Attorney Advisor (AEquitas), and Jennifer Newman, Senior Associate Attorney Advisor (AEquitas).
- 2 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.
- 3 *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)
- 4 For a more complete examination of the background of the *Rahimi* case and the history of Second Amendment cases that led to the decision, see: Jonathan Kurland et al., *Keep Calm and Understand United States v. Rahimi*, 24 Strategies: The Prosecutors’ Newsletter 1 (2024) <https://aequitasresource.org/wp-content/uploads/2023/08/Keep-Calm-and-Understand-United-States-v.-Rahimi.pdf>
- 5 Petition for Writ of Certiorari for Appellant, *United States v. Rahimi*, 2023 WL 2600091 (2023) (No. 22-915).
- 6 *United States v. Rahimi*, No. 22-915, 2024 WL 3074728 at \*2 (U.S. June 21, 2024)
- 7 *United States v. Rahimi*, 2024 WL 3074728 at \*7
- 8 *Id.*

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