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COMMENT

UNITED STATES v. RAHIMI: "WE DO NOT RESOLVE ANY OF THOSE QUESTIONS BECAUSE WE CANNOT"

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Two years ago, the Supreme Court restructured Second Amendment jurisprudence in *New York State Rifle & Pistol Ass'n v. Bruen*.[1] That decision created a historical test for Second Amendment challenges to firearm regulations.[2] To be constitutional, such a regulation must now be "consistent with the Nation's historical tradition of firearm regulation."[3] This holding spawned a wave of Second Amendment challenges[4] upon which lower courts have struggled to rule uniformly.[5] *United States v. Rahimi* represents the Supreme Court's first application of the historical test since *Bruen* was decided.[6]

Rahimi provides almost no guidance to lower courts struggling to apply *Bruen*. The fractured Court added little of substance to clarify the historical test. Instead, the seven opinions issued in *Rahimi* are a case

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[1] 142 S. Ct. 2111, 2122, 2127 (2022).

[2] Id. at 2129–30.

[3] Id.

[4] Rebecca Brown, Lee Epstein & Mitu Gulati, Guns, Judges, and Trump, 74 Duke L.J. Online (forthcoming 2025) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4873330 [https://perma.cc/A8CW-G48Z] (asserting that *Bruen* caused a 455% increase in annual Second Amendment challenges).

[5] United States v. Rahimi, 144 S. Ct. 1889, 1927 & n.1 (2024) (Jackson, J., concurring).

[6] Id. at 1903–04 (Sotomayor, J., concurring, joined by Kagan, J.).

study of *Bruen*'s flaws—namely, that it created an unworkable, subjective test that leads to judicial partisanship.

The facts of *Rahimi* are as follows. In 2019, Zackey Rahimi injured his girlfriend, C.M., during an argument.[7] He fired a gun as C.M. fled, later threatening to shoot her if she reported the incident.[8] Pursuant to this threat, C.M. sought a restraining order against Rahimi.[9] A state court in Texas granted the order, finding that Rahimi was "a credible threat to the physical safety of C.M. [or her child]."[10] The restraining order prohibited Rahimi from contacting C.M. for two years, except to discuss their child.[11] During those two years, the order also suspended Rahimi's gun license.[12]

While he was under this restraining order, law enforcement identified Rahimi as a suspect in five shootings.[13] Police searched Rahimi's home, where they found two firearms and a copy of the restraining order.[14] Rahimi was subsequently charged with violating 18 U.S.C. § 922(g)(8) by possessing a firearm while subject to a domestic violence restraining order.[15]

For this statute to apply, the restraining order in question must meet several requirements. The order must have been issued after a hearing.[16] The defendant must have had actual notice of that hearing and must have had an opportunity to participate.[17] The restraining order must also either prohibit the use, attempted use, or threatened use of physical force against an intimate partner or include a finding that the defendant represents a credible threat to the physical safety of a partner.[18] Rahimi's restraining order satisfied all of these elements.[19]

[7] Id. at 1894–95 (majority opinion).
[8] Id. at 1895.
[9] Id.
[10] Id. (quoting Joint Appendix at 2–3, *Rahimi*, 144 S. Ct. 1889 (No. 22-915)).
[11] Id. (citing Joint Appendix at 3–7, *Rahimi*, 144 S. Ct. 1889 (No. 22-915)).
[12] Id. (citing Joint Appendix at 5–6, *Rahimi*, 144 S. Ct. 1889 (No. 22-915)).
[13] Id.
[14] Id.
[15] Id.
[16] 18 U.S.C. § 922(g)(8)(A).
[17] Id.
[18] Id. § 922(g)(8)(C).
[19] *Rahimi*, 144 S. Ct. at 1896.

Asserting that § 922(g)(8) violates the Second Amendment facially, Rahimi moved to dismiss the indictment.[20] The district court denied the motion, and the U.S. Court of Appeals for the Fifth Circuit initially affirmed.[21] While Rahimi's petition for rehearing en banc was pending, *Bruen* was decided.[22] The Fifth Circuit panel withdrew its opinion and ordered additional briefing to account for the change in law.[23] On rehearing, the Fifth Circuit determined that the Government failed to present any historical evidence establishing § 922(g)(8) as "within our Nation's historical tradition of firearm regulation," and therefore vacated Rahimi's conviction.[24] The Supreme Court granted certiorari.[25]

Writing for a nearly unanimous Court, Chief Justice Roberts criticized lower courts for misunderstanding *Bruen*.[26] In deciding *Rahimi*, the Fifth Circuit had looked for a "historical twin," but according to Chief Justice Roberts, only a "historical analogue" is required to establish a law as constitutional.[27] A modern law only needs to be "'relevantly similar' to laws that our tradition is understood to permit" to survive a Second Amendment challenge.[28]

The Court then identified two types of historical legislation that are "relevantly similar" to § 922(g)(8): surety laws and affray laws.[29] Surety laws allowed judges to impose a bond on a person suspected of future misbehavior, including spousal abuse.[30] These bonds were temporary and based upon the findings of a magistrate.[31] Affray laws outlawed "riding or going armed, with dangerous or unusual weapons, . . . [to] terrify[] the

[20] Id. (citing Motion to Dismiss Indictment at 1, United States v. Rahimi, No. 21-cr-00083 (N.D. Tex. May 7, 2021)).

[21] Id.

[22] Id.

[23] Id.

[24] United States v. Rahimi, 61 F.4th 443, 460, 461 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

[25] United States v. Rahimi, 143 S. Ct. 2688, 2688–89 (2023) (mem.).

[26] United States v. Rahimi, 144 S. Ct. 1889, 1897, 1903 (2024) (criticizing both lower courts generally and the Fifth Circuit specifically for misunderstanding recent Second Amendment decisions).

[27] Id. at 1903 (quoting N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022)).

[28] Id. at 1898 (quoting *Bruen*, 142 S. Ct. at 2132).

[29] Id. at 1901 (quoting *Bruen*, 142 S. Ct. at 2132).

[30] Id. at 1900.

[31] Id.

good people of the land."[32] Both surety laws and affray laws date back to at least the 18th century.[33]

Drawing upon these historical regulations, the Court held that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."[34] With the facial constitutionality of § 922(g)(8) established, the Court reversed the Fifth Circuit's decision.[35]

Over the last two years, courts have struggled to apply *Bruen*'s historical test consistently.[36] Justice Jackson's concurrence in *Rahimi* cites a dozen lower court opinions complaining about the ambiguity of the *Bruen* test.[37] *Rahimi* is the Supreme Court's first application of the historical test since *Bruen* was decided.[38] The *Rahimi* opinion, therefore, was tasked with resolving the ambiguities in *Bruen* that have troubled lower courts. To this end, the Court first rephrased the rule set forth in *Bruen*,[39] then applied that rule to the statute at issue in *Rahimi*.[40] Neither the rule nor its application provides guidance to lower courts.

In *Bruen*, the Court wrote that, to withstand a Second Amendment challenge, a regulation must be "consistent with this Nation's historical tradition of firearm regulation."[41] This central holding of *Bruen* is not accompanied by an "exhaustive historical analysis . . . of the full scope of the Second Amendment,"[42] and has therefore become a source of confusion for lower courts.[43] Judges were largely left to determine for

[32] Id. at 1901 (second and third alterations in original) (quoting 4 William Blackstone, Commentaries on the Laws of England 149 (Richard Burn & John Williams eds., 10th ed. 1787)).

[33] Id. at 1899 (finding that surety laws and affray laws developed as "two distinct legal regimes" to address "firearms violence").

[34] Id. at 1903.

[35] Id. at 1902–03.

[36] Id. at 1927 (Jackson, J., concurring).

[37] See id. at 1927 n.1.

[38] Id. at 1903–04 (Sotomayor, J., concurring, joined by Kagan, J.) ("Today the Court applies its decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen* for the first time." (citation omitted)).

[39] Id. at 1897–98 (majority opinion).

[40] Id. at 1901–02.

[41] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

[42] Id. at 2134 (quoting District of Columbia v. Heller, 554 U.S. 570, 626 (2008)).

[43] See, e.g., United States v. Bartucci, 658 F. Supp. 3d 794, 800 (E.D. Cal. 2023) ("However, the unique test the Supreme Court announced in *Bruen* does not provide lower courts with clear guidance as to how analogous modern laws must be to founding-era gun laws. In the short time post-*Bruen*, this has caused disarray among the lower courts when applying the new framework.").

themselves what our national tradition is and how a law can be consistent or inconsistent with that tradition. In *Rahimi*, the Court rephrased the rule to resolve this and other ambiguities.

Where *Bruen* says that a regulation must be "consistent with this Nation's historical tradition of firearm regulation,"[44] *Rahimi* says that a regulation must be "consistent with the principles that underpin our regulatory tradition."[45] This rephrasing encourages courts to lower their standard for consistency with the regulatory tradition. To be constitutional, according to *Rahimi*, a modern regulation only needs to be consistent with the principles of our tradition, not identical to older regulations.[46] *Bruen* already included language to that effect: "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."[47]

The Court clearly considers this new "principles" language an important part of the *Rahimi* opinion because it is quoted four times in the concurring opinions.[48] Justice Sotomayor calls the quote "an important methodological point that bears repeating,"[49] while Justice Jackson describes it as a welcome "clarifying effort[]."[50] Welcome as it is, the effort fails—the new phrasing is no less ambiguous than the first. None of the uncertainties inherent in the *Bruen* rule are addressed in the *Rahimi* restatement. Where our nation's historical tradition is nebulous, the principles that underpin that tradition are equally undefined. There is no list of principles. There is no demarcation line for acceptable consistency. This rephrasing provides no guidance to lower courts applying *Bruen*.

Unaided by the restated rule, lower courts will look to the Supreme Court's application of the rule to the facts in *Rahimi*. Though *Bruen* did not provide a comprehensive list of methods through which consistency with the national regulatory tradition could be established, the Court discussed historical analogues at length. Analogues are historical laws

[44] *Bruen*, 142 S. Ct. at 2126.

[45] *Rahimi*, 144 S. Ct. at 1898 (citing *Bruen*, 142 S. Ct. at 2131–34).

[46] See id. (recognizing that such a law must only comply with the principles underlying the Second Amendment, not be their "historical twin").

[47] *Bruen*, 142 S. Ct. at 2133.

[48] See *Rahimi*, 144 S. Ct. at 1926, 1929 (Jackson, J., concurring); id. at 1904 (Sotomayor, J., concurring).

[49] Id. at 1904.

[50] Id. at 1926 (Jackson, J., concurring).

that are so similar to modern laws that the Court has chosen to treat them as strong evidence of the constitutionality of the modern law.[51]

When applying the historical test in *Rahimi*, the Court parroted language in *Bruen* about analogically similar regulations. To be an analogue, a historical law must be "relevantly similar" to a modern regulation.[52] Relevant similarity is not fully defined in either *Bruen* or *Rahimi*, but both opinions cite two metrics as "central" considerations: the burden placed on the Second Amendment right and the justification for that burden.[53] The Court refers to these metrics as "how" and "why."[54] The Court found surety laws and going armed laws to be analogues to § 922(g)(8) because they each share a how and a why.[55]

This analysis is firstly an unfaithful application of *Bruen*. When creating the test, the Court certainly discussed whether modern and historical laws were "relevantly similar," but only in the context of "modern regulations that were unimaginable at the founding."[56] Domestic violence, tragically, is not the sort of modern problem that would have been unimaginable when the Constitution was written. Rather, it is a "general societal problem that has persisted since the 18th century."[57] In *Bruen*, the Court wrote that "the lack of a *distinctly* similar historical regulation addressing" such persistent problems is "relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[58]

Though neither has been completely defined, "distinctly similar" seems to be a more stringent standard than "relevantly similar." The difference in adverbs is no accident. It makes sense that legislation addressing new problems would be held to a lower standard of similarity. The Framers cannot have been expected to precisely address problems that did not exist at the Founding. Given the language in *Bruen* and the nature of domestic violence, the Court should have been searching for a *distinctly* similar analogue to § 922(g)(8). But none of the opinions in *Rahimi* make any attempt to identify such a regulation. Instead, the Court applied the

[51] *Bruen*, 142 S. Ct. at 2132–34.
[52] *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 142 S. Ct. at 2132).
[53] Id.; *Bruen*, 142 S. Ct. at 2133 (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).
[54] *Rahimi*, 144 S. Ct. at 1898.
[55] Id. at 1901 ("This provision is 'relevantly similar' to those founding era regimes in both why and how it burdens the Second Amendment right." (quoting *Bruen*, 142 S. Ct. at 2132)).
[56] *Bruen*, 142 S. Ct. at 2132.
[57] Id. at 2131.
[58] Id. (emphasis added).

relevantly similar standard, which seemed in *Bruen* to be reserved for unimaginable modern problems.

Even if "relevantly similar" is the appropriate standard, this analysis is not useful to lower courts because it raises the impossible question of generality. *Rahimi* requires courts to identify the how and the why for challenged statutes and proposed analogues but does not explain how general the how and why can be.

Take, for example, § 922(g)(8). At its most specific, the justification (why) for the law seems to be to protect people from being threatened or injured by intimate partners carrying firearms. But the Court in *Rahimi* finds a more general why: "to mitigate demonstrated threats of physical violence."[59] It would be easy to find an even more general justification, such as "to reduce violence." The more general the description of the why, the easier it is to identify an analogue with a matching justification. After all, at the root of every regulation are the ideas expressed in the Constitution's preamble: "to form a more perfect Union" and "promote the general Welfare."[60] At the highest level of generality, every law shares a why and could theoretically be used as an analogue for every other law.

Obviously, abstraction to the preamble of the Constitution is impermissible, but the acceptable level of generality remains to be identified. Justices Barrett, Jackson, and Kavanaugh each noted this problem in their *Rahimi* concurrences.[61] *Rahimi* requires judges to identify a burden and a justification for every challenged statute, but it does not explain how specific they need to be. Even Justice Barrett, whose concurrence expounds on the generality problem for roughly two pages, provides no answer: "Harder level-of-generality problems can await another day."[62]

Apart from the generality issue, *Rahimi*'s application of the *Bruen* test leaves many other questions unanswered. What types of sources can be

[59] *Rahimi*, 144 S. Ct. at 1901.

[60] U.S. Const. pmbl.

[61] *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring) ("To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right. . . . [R]easonable minds sometimes disagree about how broad or narrow the controlling principle should be."); id. at 1929 (Jackson, J., concurring) ("[W]hether *Bruen*'s test is satisfied in a particular case seems to depend on . . . the level of generality at which a court evaluates those sources . . . ."); id. at 1916 n.4 (Kavanaugh, J., concurring) (noting that an "important question[]" that arises when applying "[p]ost-ratification history" is "the level of generality at which to define a historical practice").

[62] Id. at 1926 (Barrett, J., concurring).

used to establish a historical tradition? What era must those sources be from? Does an analogue need to share both a how and a why with a modern law? What other features can render two laws relevantly similar? What features render two laws distinctly similar? How many analogues are required to establish a tradition? Can laws that were unconstitutional for Equal Protection reasons establish constitutionality under the Second Amendment?

Lower courts cannot be expected to glean any insight from the Court's application of the *Bruen* test to the facts in *Rahimi*. It seems to ignore the language of *Bruen*, creating more questions than it answers. The analysis is also not novel. The Fifth Circuit performed a nearly identical analysis—complete with relevantly similar, how, and why—but came to the opposite conclusion.[63] This subjectivity is the chief flaw in *Bruen*'s historical test. Judges and Justices reviewing the same historical sources consistently disagree about what they say.

The opinions in *Rahimi* illustrate this point. While every Justice but one signed the majority opinion, the dissenter was Justice Thomas, who wrote the majority opinion in *Bruen*.[64] According to the Supreme Court, the author of *Bruen* misapplied the historical test in his first attempt at applying it. Justice Thomas's dissent evaluates the same laws as the majority opinion for the same features,[65] subsequently finding that the burdens and justifications of the proffered analogues were not sufficiently analogous to those of the challenged statute.[66]

For a more striking example of *Bruen*'s subjectivity, consider the current circuit split regarding the constitutionality of 18 U.S.C. § 922(g)(1), the federal ban on firearm possession by felons.[67] The Third Circuit held the statute unconstitutional under the Second Amendment,[68] while the Eighth Circuit, reviewing largely the same historical evidence,

[63] See United States v. Rahimi, 61 F.4th 443, 453–61 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1889 (2024).

[64] See *Rahimi*, 144 S. Ct. at 1894 (Thomas, J., dissenting); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2121 (2022) (Thomas, J.).

[65] *Rahimi*, 144 S. Ct. at 1933–41 (Thomas, J., dissenting).

[66] Id. at 1933. ("Despite canvassing laws before, during, and after our Nation's founding, the Government does not identify even a single regulation with an analogous burden and justification.").

[67] 18 U.S.C. § 922(g)(1).

[68] See Range v. Att'y Gen., 69 F.4th 96, 98 (3d Cir. 2023), *vacated sub nom.* Garland v. Range, 144 S. Ct. 2706 (2024) (mem.).

held that such laws were within the nation's regulatory tradition.[69] The historical test is subjective and leads to inconsistent rulings.

This criticism of the *Bruen* test is not a hunch—rather, it is empirical. Recently published research compares federal judicial decisions in Second Amendment cases during three periods: Before *District of Columbia v. Heller*,[70] between *Heller* and *Bruen*, and after *Bruen*.[71] *Heller* was a landmark 2008 case in which the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense.[72] The following statistics include only reported decisions. During the *Heller* era, when faced with a gun rights claim, judges appointed by Republican presidents cast votes in favor of gun rights 25% of the time,[73] while Democrat-appointed judges favored gun rights 13% of the time.[74] That 12% gap between Republican appointees and Democrat appointees grew to 18% in the *Bruen* era.[75]

Even more disturbing results surface when the data is filtered for age. Republican appointees aged 56 or older voted in favor of gun rights 23% of the time in *Heller*-era decisions and 28% of the time in *Bruen*-era decisions.[76] Democrat appointees in the same age group mirrored this five percent increase: 12% in the *Heller* era, 17% in the *Bruen* era.[77]

Younger judges, though, exhibited remarkably different patterns. Democrat appointees under age 56 voted in favor of gun rights 17% of the time in the *Heller* era and 18% of the time in the *Bruen* era.[78] Republican appointees in the same age group voted in favor of gun rights 35% of the time in the *Heller* era and a staggering 60% of the time in the *Bruen* era.[79] *Bruen* caused a 5% increase of votes in favor of gun rights from older judges, regardless of what president appointed the judge. But younger Democrat appointees only cast 1% more votes in favor of gun

[69] See United States v. Jackson, 69 F.4th 495, 502–05 (8th Cir. 2023), *vacated*, 144 S. Ct. 2710 (2024).

[70] 554 U.S. 570 (2008).

[71] Brown et al., supra note 4 (manuscript at 1, 4–5) (analyzing the impact of the Supreme Court's Second Amendment decisions on "*gun-rights-related decisions—reported and unreported*—issued between 2000 and 2023" by lower courts).

[72] *Heller*, 554 U.S. at 635.

[73] Brown et al., supra note 4 (manuscript at 15 fig.7, 16).

[74] Id. (manuscript at 15 fig.7).

[75] Id.

[76] Id. (manuscript at 21 fig.10).

[77] Id.

[78] Id.

[79] Id.

rights, while younger Republican appointees saw a 25% increase—five times more than any other group.

The breakdown along age lines is notable because presidents making lifetime appointments tend to favor younger judges. President Trump once affirmed an advisor's remarks on federal judges: "We like people in their thirties so they're there for fifty years or forty years."[80] Some scholars theorize that if judges have discretion in decision-making and perceive the opportunity for promotion, they will create rulings that align with the preferences of politicians who might promote them.[81] Under this theory, young judges appointed by Republican presidents are likely to decide cases in a way that will please Republican politicians, and the converse is true of young Democrat-appointed judges. *Bruen*'s subjective test appears to have given judges the opportunity to do just that.

The solution to this problem is to create a rule that limits judicial discretion. Judges with clear rules are bound to apply them faithfully. In *Rahimi*, the Court was unable to refine *Bruen*'s test in any meaningful way, leaving judges unconstrained to make history agree with them.

Justice Kavanaugh and Justice Gorsuch each wrote concurring opinions in *Rahimi* to defend the historical test.[82] Justice Gorsuch asserted that the *Bruen* test is superior to the means-end inquiry that preceded it because the historical test "keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs."[83] Justice Kavanaugh echoed this sentiment, writing that "[h]istory is far less subjective than policy. And reliance on history is more consistent with the properly neutral judicial role than an approach

[80] Jeremy Childs, Trump Wants to Shape Legal System for '50 Years' by Appointing Young Judges, Rolling Stone (May 18, 2024), https://www.rollingstone.com/politics/politics-news/trump-young-judges-national-rifle-association-speech-1235023584/ [https://perma.cc/3UBB-MN2J].

[81] See Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 5–6, 6 n.9 (1993); Lee Epstein, Some Thoughts on the Study of Judicial Behavior, 57 Wm. & Mary L. Rev. 2017, 2024 n.24, 2034 & n.91, 2046–47, 2047 n.166 (2016); Ryan C. Black & Ryan J. Owens, Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court, 60 Am. J. Pol. Sci. 30, 30–32, 41 (2016); Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice 337, 348–49 (2013).

[82] See United States v. Rahimi, 144 S. Ct. 1889, 1907 (2024) (Gorsuch, J., concurring); id. at 1910 (Kavanaugh, J., concurring).

[83] Id. at 1909 (Gorsuch, J., concurring).

where judges subtly (or not so subtly) impose their own policy views on the American people."[84]

The data says otherwise. *Bruen*'s historical test is poorly defined, confusing, and subjective. It lends itself to judicial partisanship. In *Rahimi*, the Court put lipstick on a pig. Neither the rephrased rule nor its application provides any real guidance to the chorus of lower courts struggling to apply the test. As long as *Bruen* stands, "the Rule of Law suffers."[85]

[84] Id. at 1912 (Kavanaugh, J., concurring).
[85] Id. at 1929 (Jackson, J., concurring).