MUCH ADO ABOUT NOTHING: *RAHIMI* REINFORCES *BRUEN* AND *HELLER*

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On June 21, 2024, the Supreme Court issued its much-anticipated decision in *United States v. Rahimi*.[1] In that case, the Fifth Circuit had declared that a federal criminal statute, 18 U.S.C. § 922(g)(8), which prohibits persons subject to domestic violence restraining orders from possessing firearms, violated the Second Amendment. From the day that the Supreme Court granted certiorari, *Rahimi* was the talk of the town among advocates and opponents of the Second Amendment.[2]

Zackey Rahimi was a violent young man who had attacked his ex-girlfriend, shot up public places, fired at vehicles, and possessed firearms in violation of the state restraining order that his ex-girlfriend had obtained against him, which he did not contest. The Fifth Circuit held that under the historical methodology set forth just two years earlier in *New York State Rifle & Pistol Ass'n v. Bruen*,[3] there was no historical tradition of disarming individuals subject to such restraining orders. Would the Supreme Court, in this hard case, be forced to walk back or water down *Bruen*'s analytical framework?

Some had hoped that *Rahimi* would be the death knell for *Bruen* and called for the latter to be overruled.[4] But, as Mark Twain once said, responding from London to news printed in American newspapers, "the reports of my death are greatly exaggerated."[5] As it turned out, predictions of *Bruen*'s impending demise were also greatly exaggerated. Far from watering down *Bruen,* all the Court's writings in *Rahimi*—even the concurrences and the dissent—firmly cemented *Bruen*'s approach as providing the governing framework for deciding Second Amendment cases, even as the majority narrowly held that "[a]n individual found by a court to pose a credible threat to the

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[1] 144 S. Ct. 1889 (2024).

[2] *See, e.g.*, Madiba Dennie, *Originalism Is Going to Get Women Killed*, THE ATLANTIC, Feb. 9, 2023.

[3] 597 U.S. 1 (2022).

[4] *See, e.g.*, Brief of Global Action on Gun Violence, et al., as Amicus Curiae, United States v. Rahimi, No. 22-915 (U.S. Aug. 21, 2023); Brief of Professor Mary Anne Franks as Amicus Curiae, United States v. Rahimi, No. 22-915 (U.S. Aug. 21, 2023).

[5] Several versions of Twain's quip are examined in *Quote Origin: Reports of My Death Are Greatly Exaggerated*, THE QUOTE INVESTIGATOR, Jun. 7, 2024, quoteinvestigator.com/2024/06/07/report-death [perma.cc/62NK-VGBV].

physical safety of another may be temporarily disarmed consistent with the Second Amendment."[6]

I. *RAHIMI* REITERATED, AND RELIED ON, THE *BRUEN* FRAMEWORK

Bruen explicitly relied and elaborated on the method of constitutional analysis that *District of Columbia v. Heller*[7] employed in Second Amendment cases. It rejected the tiers of scrutiny and any other form of "interest-balancing" test that occasions judicial inquiry into whether the government has a sufficient reason for infringing that constitutional right. Instead, following *Heller*, *Bruen* clarified that the appropriate approach in a Second Amendment case centers on "constitutional text and history."[8] *Bruen* began with the plain text of the Second Amendment and went on to consider when our historical tradition of firearm regulation might allow some limitation on the right protected by the plain text. *Rahimi* followed the approach outlined in *Bruen*.

II. THE PLAIN TEXT OF THE SECOND AMENDMENT PROTECTS MR. RAHIMI'S CONDUCT

The Second Amendment declares that "the right of the people to keep and bear Arms, shall not be infringed."[9] If the plain text of the Second Amendment "covers an individual's conduct," then that conduct is "presumptively protected" by the Constitution.[10] A regulation infringing on that conduct cannot stand absent a showing that it "is consistent with this Nation's historical tradition of firearm regulation."[11] The burden is on the government, not the individual, to show the existence, and then the fit, of that historical tradition.[12]

Mr. Rahimi's conduct indisputably fell within the plain text of the Second Amendment's protection of the right of "the people" to "keep" and "bear" "Arms," and the Court disposed of this threshold issue quickly. Mr. Rahimi is part of "the people," a term that "unambiguously refers to all members of the political community, not an unspecified subset."[13] He possessed a rifle and a pistol, which are "Arms" as *Heller* understood that term. Echoing *Heller* and *Bruen*, the Court affirmed that the term "Arms" in the Second Amendment "extends prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence" at the Founding, noting in particular the error of applying the term "only to muskets and sabers."[14] Because the Constitution is not "a law trapped in amber"[15] but "framed for ages to come,"[16] its

[6] *Rahimi*, 144 S. Ct. at 1903.
[7] 554 U.S. 570 (2008).
[8] *Bruen*, 597 U.S. at 22.
[9] U.S. CONST. amend. II.
[10] *Bruen*, 597 U.S. at 17.
[11] *Id.*
[12] *See id.* at 33–34 ("[T]he burden falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct.").
[13] *Heller*, 554 U.S. at 578.
[14] *Rahimi*, 144 S. Ct. at 1897–98.
[15] *Id.* at 1897.
[16] Cohens v. Virginia, 19 U.S. 264, 387 (1821).

enduring text applies to modern circumstances—even those that the Framers could not have foreseen. Just as the First Amendment protects speech on the internet,[17] and the Fourth Amendment protects against tracking devices placed on one's car without a warrant,[18] the Second Amendment protects the right to keep and bear modern arms.

The federal statute under which Mr. Rahimi pleaded guilty, 18 U.S.C. § 922(g)(8), barred him from possessing (that is, "keeping") the pistol and the rifle found by law enforcement when they searched his residence.

Thus, Mr. Rahimi's conduct fell within the plain text of the Second Amendment and was of the kind that "the Constitution presumptively protects."[19]

The Supreme Court in *Rahimi* faithfully described and applied the methodology that *Bruen* requires in a Second Amendment case, "following exactly the path" that *Bruen* had laid out.[20] The *Rahimi* opinion was joined by eight justices. Only Justice Thomas dissented, and he too believed that the *Bruen* framework governed.[21] He simply disagreed whether the historical analogues mustered by the Government were sufficiently similar to § 922(g)(8) to form a historical tradition that justified upholding that statute.[22]

III. THE COURT FINDS THAT THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION SUPPORTS DISARMING MR. RAHIMI

The Court turned next, per *Bruen*'s command, to analyze whether the Government had shown that the restriction on Mr. Rahimi's right to keep and bear arms is "consistent with the Nation's historical tradition of firearm regulation."[23] The *Bruen* Court had found no need to "provide an exhaustive survey" of all the factors along which such regulatory consistency with tradition was to be measured, but it found *Heller* and *McDonald* to require "at least" that the government show in the Nation's historical tradition support for "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[24] In making the determination regarding consistency with tradition, the Court explained, any court "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the Founding generation to modern circumstances."[25] Any doubt that regulatory operation (how) and purpose (why) were both "'central' considerations when engaging in an analogical inquiry"[26] was swept away by *Rahimi*'s re-exposition of *Bruen*'s methodological command:

[17] Reno v. Am. C.L. Union, 521 U.S. 844 (1997).
[18] United States v. Jones, 565 U.S. 400 (2012).
[19] *Bruen*, 597 U.S. at 17.
[20] *Rahimi*, 144 S. Ct. at 1910 (Gorsuch, J., concurring).
[21] *Id.* at 1930 (Thomas, J., dissenting).
[22] *Id.* at 1941–43.
[23] *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 24).
[24] *Bruen*, 597 U.S. at 29.
[25] *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 28 n.7, 29).
[26] *Bruen*, 597 U.S. at 29.

> Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the Founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster."[27]

The *Rahimi* Court found that the Government had identified two kinds of historical laws sufficient to establish a tradition of disarming those found to present "a clear threat of physical violence to another."[28] First, the Court cited surety laws, which were "[w]ell entrenched in the common law"—and therefore widespread—as a form of "preventive justice."[29] These laws allowed a magistrate to require individuals suspected of future misbehavior to post a bond. The surety mechanism could be "invoked to prevent all forms of violence," including "the misuse of firearms."[30] An individual who failed to post the bond would be jailed, while one who posted the bond and violated its terms would forfeit it.[31]

The Court likewise found historical support in criminal "going armed" laws, often included within the laws governing affrays.[32] These prohibited "riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land"[33] and were adopted in American law either by inclusion within the incorporation of the common law or by specific legislative enactment.[34]

The Court concluded that § 922(g)(8) "fits neatly within" the well-established tradition represented by surety and affray laws, and thus upheld the statute against Mr. Rahimi's facial challenge.[35]

IV. JUSTICE THOMAS DISSENTS ON A NARROW POINT OF ANALOGICAL PARITY

Justice Thomas agreed with the majority on much of its opinion. He dissented only on the narrow, far-downstream portion of the majority's decision that held the *operation* (i.e., the "how") of the surety and affray laws to be sufficiently similar to that of § 922(g)(8) to take Mr. Rahimi's conduct "outside the Second Amendment's unqualified command."[36] Justice Thomas found that while the affray laws regulated public conduct, § 922(g)(8) criminalized a prohibited person's simple possession of a firearm within his home.[37] The cited surety laws, he believed, did not historically operate to disarm the individual but only averted the "threat of future interpersonal

[27] *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 30).
[28] *Id.* at 1901.
[29] *Id.* at 1899–1900.
[30] *Id.* at 1900.
[31] *Id.*
[32] *Id.* at 1901.
[33] *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 149 (10th ed. 1787)).
[34] *Rahimi*, 144 S. Ct. at 1901.
[35] *Id.*
[36] *Bruen*, 597 U.S. at 24 (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 (1961)).
[37] *Rahimi*, 144 S. Ct. at 1942–43 (Thomas, J., dissenting).

violence" by requiring the posting of a monetary bond that would be forfeited if the accused breached the peace.[38] Because the tradition represented by the surety and affray laws employed means narrower than § 922(g)(8), Justice Thomas dissented.

V. THE ANTI-SECOND-AMENDMENT SPIN ON *RAHIMI* HAS BEGUN

Many antagonists of the Second Amendment have begun the spin cycle on *Rahimi*, casting the decision as a radical departure or an "important first step away" from *Bruen*[39] and calling it the Court's "mad dash away from [Justice Thomas's] extremist position on the Second Amendment."[40] Governmental litigants defending draconian firearms regulations have already made submissions to the lower courts that *Rahimi* "bolsters all of the State's arguments."[41] That is not only outlandish but flatly false.

All members of the *Rahimi* Court—even those who would have decided *Bruen* differently—believed themselves to be faithfully applying *Bruen*.[42] It is therefore a threshold mistake to pit *Rahimi* against *Bruen* instead of focusing on the vast common ground between the majority and the dissent in *Rahimi*. All justices agreed on the *absence* of any dispute about Mr. Rahimi's conduct falling well within the textual protection of the Second Amendment, the high historical provenance and pedigree of laws required to constitute a tradition, the tight logical nexus required between the historical laws and the identified tradition connecting them, and the irrelevance of interest balancing and so-called experts to the determination of whether a modern regulation transgresses the Second Amendment as a matter of law after *Bruen*.

As for the minor disagreement between the majority and the dissent on analogical parity, "reasonable minds can disagree,"[43] and very often do, on routine application of settled doctrine to different, challenging circumstances. This often occurs in the resolution of difficult constitutional applications when other rights are at stake, like the rights of free speech[44] and freedom of religion[45] in the First Amendment, the right against unreasonable searches or seizures

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[38] *Id.* at 1938–42.

[39] Dana Bazelon, *The Supreme Court Hasn't Actually Fixed the Mess Clarence Thomas Created on Guns*, SLATE, Jun. 26, 2024, slate.com/news-and-politics/2024/06/supreme-court-scotus-thomas-barrett-gun-control-rahimi.html [perma.cc/EKC4-2X5K].

[40] Mark Joseph Stern, *The Supreme Court Walks Back Clarence Thomas' Guns Extremism*, SLATE, Jun. 21, 2024, slate.com/news-and-politics/2024/06/supreme-court-clarence-thomas-guns-extremism-rahimi-bruen.html [perma.cc/YB6R-ZHMX].

[41] Letter from the Deputy Attorney General of the State of New Jersey, Cheeseman v. Platkin, No. 22-cv-04360 (D.N.J. filed Jun. 30, 2022), ECF No. 79.

[42] *Rahimi*, 144 S. Ct. at 1910 (Gorsuch, J., concurring) ("The Court reinforces the focus on text, history, and tradition, following exactly the path we described in *Bruen*."); *id.* at 1926 (Jackson, J., concurring) ("*Bruen* is now binding law. Today's decision fairly applies that precedent, so I join the opinion in full."). Indeed, academic commentators who firmly reject originalism have written to fault the Court for rallying behind *Bruen* and originalism in *Rahimi*. *See, e.g.*, Erwin Chemerinsky, *Once Again, Originalism's Hollow Core Is Revealed*, THE ATLANTIC, Jun. 25, 2024, theatlantic.com/ideas/archive/2024/06/failure-originalism-supreme-court/678783/ [perma.cc/9YLR-UL8A].

[43] *Rahimi*, 144 S. Ct. at 1909 (Gorsuch, J., concurring).

[44] *See, e.g.*, 303 Creative v. Elenis, 600 U.S. 570 (2023) (holding, 6–3, that portions of the Colorado Anti-Discrimination Act requiring a website designer to create websites expressing messages with which she disagrees violate the First Amendment).

[45] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (holding, 6–3, that a public school violates the Free Exercise Clause and the Free Speech Clause of the First Amendment when it suspends an employee for privately initiating prayer that others are free to join or forego without consequence).

in the Fourth Amendment,[46] or the rights to due process[47] and equal protection[48] in the Fourteenth Amendment. Indeed, considering the fractures that the Court often experiences when applying long-settled doctrine to new situations, it is the unanimous agreement on *Bruen*'s doctrinal framework that is *Rahimi*'s most defining and remarkable feature. *Rahimi* also sets a milestone in the life of the Second Amendment by moving its jurisprudence into the mundane. The landmark cases of *Heller* and *Bruen* established the doctrinal framework of the Second Amendment right and the way to analyze claims arising under it. *Rahimi* has now begun the work of applying that framework to new cases—a routine enterprise for the Court.[49]

Read in this contextual light, the narrow disagreement between the majority and Justice Thomas regarding the implications to be drawn from the affray and surety laws is merely an intramural divergence on the application of analogical reasoning to a fact-bound case, on which reasonable minds and judges can—and do—disagree. But such disagreement is neither of precedential import nor an invitation for courts or litigants to consider *Bruen* jettisoned or even rewritten. In this regard, *Heller* and *Rahimi* stand together: both are applications of the methodology that *Bruen* explained in detail.

VI. RAHIMI'S TIGHT ANALOGICAL REASONING DEMONSTRATES THE COURT IS FULLY COMMITTED TO THE *HELLER*/*BRUEN* FRAMEWORK

Arguments that *Rahimi*'s reference to the "principles that underpin our regulatory tradition"[50] loosens *Bruen*'s requirement of a historical tradition are likewise misguided. *Rahimi* itself paid close attention to the operation and purpose of historical laws and did not extrapolate principles from them at a high level of generality. The Government invited the Court in *Rahimi* to find that *Heller* and *Bruen* established an extraordinarily broad principle or historical tradition, namely, that "[l]egislatures may disarm those who are not law-abiding, responsible citizens."[51] The Court rightly, and summarily, rejected that attempt to find a historical tradition based on dicta in other cases rather than close historical analysis in the case before it. Chief Justice Roberts wrote for the majority:

> [W]e reject the Government's contention that Rahimi may be disarmed simply because he is not "responsible." Brief for United States 6; see Tr. of Oral Arg. 8–11. "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller*

[46] *See, e.g.*, Carpenter v. United States, 585 U.S. 296 (2018) (holding, 5–4, that a government violates the Fourth Amendment when it warrantlessly obtains a person's cell-phone location history from third-party data repositories to trace the person's movements).

[47] *See, e.g.*, Kahler v. Kansas, 589 U.S. 271 (2020) (holding, 6–3, that the Due Process Clause of the Fourteenth Amendment does not require a state to adopt an insanity test to determine whether the defendant could discern that the crime charged was a moral wrong).

[48] *See, e.g.*, Students for Fair Admissions, Inc. v. Presidents and Fellows of Harvard College, 600 U.S. 181 (2023) (holding, 6–3, that the Equal Protection Clause requires all public universities—as Title VI of the Civil Rights Act requires all private universities accepting federal funds—to administer an admissions program that does not stereotype or penalize an applicant on the basis of race).

[49] *See, e.g.*, *Rahimi*, 144 S. Ct. at 1903–04 (Sotomayor, J., joined by Kagan, J., concurring) ("Today, the Court applies its decision in *Bruen* for the first time.").

[50] *Rahimi*, 144 S. Ct. at 1898.

[51] Brief for the United States at 7, United States v. Rahimi, No. 22-915 (Aug. 14, 2023).

> and *Bruen*, we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. [citations omitted] But those decisions did not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.

Rahimi was, therefore, a routine application of established methodology—not the shifting of the doctrinal tide that opponents of *Bruen* had desired. The path of the Second Amendment is now as perceptibly ordinary as that of any other constitutional right: the epochal establishment of substantive doctrine having occurred in *Heller* and having been explicated in *Bruen*, the Court applies that doctrine to different laws and circumstances. But no reading of the cases *applying* doctrine should be held to be in tension with the cases *establishing* it—least of all when the Court applying doctrine in a case understands itself, as in *Rahimi*, as doing so with utmost fidelity to its precedential commitments.

VII. TAKEAWAYS FOR THE LOWER COURTS

So, what does *Rahimi* mean for the lower courts? As it turns out, precious little other than an affirmation of what they already knew—or should have known—after *Bruen*. For any of the lower courts or judges thereof who wondered if *Rahimi* might chip away at *Bruen*, the unanimous doctrinal recommitment to text and historical tradition in *Rahimi* shows that *Bruen* is here to stay. Even the justices who dissented in *Bruen* showed by fully joining the majority opinion in *Rahimi* that they understand *Bruen* to be the law of the land. And while they may write separately, as they did in *Rahimi*, to express dissatisfaction with *Bruen*, such collateral grumblings about precedent give the lower courts no more ability to diverge from controlling precedent than if those reservations had never been expressed. Whatever *justices* of the Court may feel about certain precedents, and however they may express those feelings in concurrences, the lower courts are duty-bound to hew faithfully to the Court's precedential decisions.

Rahimi also shows that well-established laws are not themselves sufficient to establish whatever historical tradition the government believes is to be gleaned from them. Rather, the tradition allegedly evinced by the identified historical laws is *itself* something that the government must satisfactorily show as a matter of law. Consider, for instance, the Government's contention in *Rahimi* that the surety and affray laws demonstrated a tradition of restricting the right to keep and bear arms only to "responsible" citizens.[52] The Court *unanimously* rejected this contention, noting the absence of evidence not only on efforts to disarm "irresponsible" people but also on what responsibility even means in the context of a right to self-defense.[53] The Government could identify no guardrails on what amounted to a state-administered virtue test, which meant it proved far too much.

Rahimi, therefore, stresses a latent logical connection between history and tradition that had been implicit in *Heller* and *Bruen*: identifying a historical tradition requires *both* identifying a well-established body of historical laws *and* demonstrating the tight inferential fit between those laws and the tradition that they allegedly establish or prove.

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[52] *Id.* at 10–27.

[53] *Rahimi*, 144 S. Ct. at 1903.

This need to identify a well-defined historical tradition that closely follows the cited historical analogues demonstrates the unconstitutionality of various governmental efforts to restrict citizens' right to keep and bear arms: default carriage bans in places of public accommodation,[54] long lists of gun-free zones or so-called sensitive places,[55] lifetime possession bans on those convicted of white-collar crimes,[56] and licensing schemes that condition one's exercise of the right to bear arms on one's ability to prove to government officials one's loosely defined soundness of "moral character."[57] While they may weave together a few laws here and a few cases there, governments so far have been unable to point to *any* established traditions from the Founding of restricting the right of armed self-defense in these ways. This threshold failure to identify any such body of laws from the Founding, let alone to extract from it a logically sound tradition, forecloses any governmental reliance on *Rahimi*, which concerned the analogical fit of a *recognized and bona fide* tradition. Stated differently, *Rahimi* has no effect on any case in which the government has not already carried the weighty burden of establishing a relevant historical tradition of firearms regulation—a burden it has decisively failed to carry in virtually every case currently being litigated.

Rahimi also relied on briefing and argument to decide the case, exemplifying for the lower courts the exercise of legal research and reasoning without the need for expert reports from historians.[58] Indeed, the Court explicitly doubled down on *Bruen*'s statement that the process of analogical reasoning—a form of "[d]iscerning and developing the law"—remains, as it has always been, "a commonplace task for any lawyer or judge."[59] The Court showed by example that courts can—and ought to—resolve matters of law through competent consultation of such sources as "precedents, historical laws, commentaries on laws, law reviews, the Congressional Globe, and a handful of histories about legal topics."[60]

Another takeaway from *Rahimi*, as Justice Kavanaugh noted in his concurrence, involves alleged historical analogues that the Government pressed below in *Rahimi* but abandoned before the Court. Justice Kavanaugh reasoned that the lower courts should not rely "on the history that

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[54] *See, e.g.*, Christian v. James, No. 22-2987 (2nd Cir. filed Nov. 23, 2022).

[55] *See, e.g.*, Koons v. Att'y Gen. of N.J., No. 23-1900 (3rd Cir. filed May 17, 2023).

[56] *See, e.g.*, Range v. Garland, No. 21-2835 (3rd Cir. filed Sept. 30, 2021). After the Third Circuit, sitting en banc, held that 18 U.S.C. § 922(g)(1) violated the Second Amendment as applied to Mr. Range, 69 F.4th 96 (3rd Cir. 2023), the Solicitor General sought certiorari from the Supreme Court. On the last day of October Term 2024, the Court summarily granted certiorari, vacated the Third Circuit's judgment, and remanded the case for further consideration in light of its decision in *Rahimi*. 2024 WL 3259661. It is a routine procedural practice for the Court to so remand cases that present questions even remotely related to those it has decided in a term. *See generally* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV 711 (2009).

[57] *See, e.g.*, Antonyuk v. James, No. 22-2908 (2nd Cir. filed Nov. 8, 2022). Like *Range*, the Court summarily granted certiorari, vacated the judgment below, and remanded *Antonyuk* for further consideration in light of *Rahimi*. 2024 WL 3259671; *see also supra*, note 55.

[58] None of the Court's contemporary Second Amendment cases—*Heller*, McDonald v. Chicago, 561 U.S. 742 (2010), Caetano v. Massachusetts, 577 U.S. 411 (2016), *Bruen* and *Rahimi*—relied on expert testimony about the Second Amendment or its related history. Indeed, the Court almost never takes notice of expert declarations or testimony on the text or history of a constitutional provision, choosing instead to rely on briefing, argument, and its own research.

[59] *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 28).

[60] Stephen Halbrook, *Second Amendment Roundup: Rahimi Preserves Bruen*, REASON, Jun. 26, 2024.

the Constitution left behind."[61] This means that historical laws built on racial, ethnic, religious, or other forms of bigotry that the American people have rejected through superseding constitutional developments must be rejected as inconsistent with our constitutional commitments. When the American people incorporated the Bill of Rights against the States in 1868 and thereby extended to the newly liberated African Americans the full promise of liberty, they freed the Second Amendment—and others—from the shackles of slavery and racial prejudice. It is a grievous historical—indeed, moral—error for governments to attempt to redline constitutional rights with those portions of our history that we have overcome and rightly left behind.

And, finally, some lower courts have already begun to recognize the narrowness of *Rahimi*'s holding and its limited direct applicability to pending Second Amendment litigation. For example, the Eighth Circuit's recent decision in *Worth v. Jacobson* correctly applied *Bruen*'s framework and held unconstitutional a Minnesota statute restricting 18-to-20-year-olds' right to bear arms.[62] The court noted that *Rahimi* had little to say about the issue in *Worth*, which did not involve clear and adjudicated physical threats of the kind that Mr. Rahimi posed to others.[63] Rather, the Eighth Circuit rightly recognized that *Rahimi*'s affirmation and application of *Bruen*'s framework all the more required it to closely follow that framework in analyzing the specific statute before it.[64]

VIII. THE DOGS THAT DID NOT BARK

Far from initiating a wholesale retreat from *Bruen*, the significance of *Rahimi* is perhaps best understood by what it did *not* do:

1. It did not announce any broad new principles. Instead, it applied *Bruen* faithfully, and its holdings were narrow in scope and limited in applicability. The Court held only that individuals who have been formally adjudicated by a court "to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."[65]

2. All nine justices believed it proper to apply *Bruen*'s methodology in this case, and *none* claimed that *Rahmi* should have been decided under tiers of scrutiny or interest balancing tests.

3. All nine justices rejected the Government's overbroad assertion that all persons not governmentally deemed "responsible" may be disarmed.

4. So-called expert testimony is neither necessary nor helpful to deciding a case using *Bruen*'s historical methodology. The text and historical context of a law provide the best evidence of its meaning.

5. The Court did not address whether the Founding era (1791) or the time of the Fourteenth Amendment's ratification (1868) is the relevant period for determining the meaning of the Second

[61] *Rahimi*, 144 S. Ct. at 1915 (Kavanaugh, J., concurring).
[62] No. 23-2248, 2024 WL 3419668 (8th Cir. July 16, 2024).
[63] *Id.* at *10–11.
[64] *Id*. at *9.
[65] *Rahimi*, 144 S. Ct. at 1903.

Amendment and the rest of the Bill of Rights (although it relied principally on authorities from the Founding and the early Republic).[66]

6. Historical laws that are racist or otherwise discriminatory against ethnic, political, or religious minorities cannot be relied on by the government to disarm the people or any subset thereof.

7. Even lawless individuals like Mr. Rahimi remain part of "the people" and possess Second Amendment rights on the plain-text level.

8. The Court announced no change to the methodology that it outlined in *Bruen.*

CONCLUSION

The Supreme Court's decision in *Rahimi*, while substantively routine, is momentous in a different sense: it is a harbinger of the doctrinal steadiness and reinforcement that, until very recently, the courts have uniquely denied the Second Amendment. *Rahimi*, then, is pathbreaking because it is pedestrian—a sign that the Second Amendment, long the "constitutional orphan" of the Court's jurisprudence,[67] has been welcomed at last into the constitutional family as an equal member.

[66] The author believes—and has written—that the Supreme Court ultimately should and will find in the right case that the Founding period is the only relevant one for assessing the existence of a historical tradition of firearms regulations for the purpose of understanding the meaning of the Second Amendment. *See* Mark W. Smith, *Attention Originalists: The Second Amendment was adopted in 1791, not 1868*, 2023 HARV. J.L. & PUB. POL'Y PER CURIAM 31 (2023).

[67] Silvester v. Becerra, 583 U.S. 1139, 1149 (Thomas, J., dissenting from denial of certiorari).