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Written by **Bob Adelmann** on February 6, 2023

# Bruen Decision Continues to Support Second Amendment Right to Keep and Bear Arms

A federal law preventing someone "subject to domestic violence orders" (DVOs) from possessing "a firearm or ammunition" was tossed by a federal court last Thursday. Prior to *Bruen — New York State Rifle & Pistol Association, Inc. v. Bruen* — a federal law prohibited those under DVOs from owning firearms.

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But under *Bruen* the legal landscape shifted in favor of the Second Amendment, and the reverberations continue to be felt across the land. That would include California, one of the most anti-gun states in the union.

In *United States of America v. Zackey Rahimi*, the Department of Justice tried to find historical support for its DVO rule under the new *Bruen* ruling. That ruling now requires that governments attempting to restrict Second Amendment rights must show historical evidence that such laws may be justified today.

In the present case, the DOJ failed:

> The question presented in this case is *not* whether prohibiting the possession of firearms by someone subject to a domestic violence restraining order is a laudable policy goal. The question is whether 18 U.S.C. § 922(g)(8) [the federal law] … is constitutional under the Second Amendment of the United States Constitution.
>
> In the light of *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, … it is not.

The ruling by three members of the Fifth Circuit Court of Appeals, two of whom were nominated by President Trump and the other by President Ronald Reagan, noted that *Bruen*, along with *D.C. v. Heller*, put the onus on states seeking to infringe Second Amendment rights to provide historical support for such infringements:

> Enter *Bruen*. Expounding on *Heller*, the Supreme Court held that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."
>
> In that context, 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."
>
> Put another way, "the [G]overnment 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."

The "Government" — i.e., the federal government, represented by its Department of Justice — failed to prove it. Quoting from *Bruen*:

> "When it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."
>
> We thus afford greater weight to historical analogues more contemporaneous to the Second Amendment's ratification.

The DOJ presented three such "historical references" to bolster its case in support of the federal law — and failed. Wrote the court: "We discuss in turn why each of these historical regulations falter."

Prior to *Bruen*, the court had admitted that the federal law was constitutional: the ends (attempting to reduce gun violence by those under DVOs) justified the means (infringing on their rights). But *Bruen* now makes such laws unconstitutional:

> Doubtless, 18 U.S.C. § 922(g)(8) embodies salutary policy goals meant to protect vulnerable people in our society. Weighing those policy goals' merits through the sort of means-end scrutiny our prior precedent indulged, we previously concluded that the societal benefits of § 922(g)(8) outweighed its burden on Rahimi's Second Amendment rights.
>
> But *Bruen* forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right.
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> Through that lens, we conclude that § 922(g)(8)'s ban on possession of firearms is an "outlier that our ancestors would never have accepted."
>
> Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated.

Such adherence to the Second Amendment was met with derision and defiance in California. In a press release, California Governor Gavin Newsom declared:

> A federal appeals court has ruled domestic abusers have the right to carry firearms. Where is the line? Who's next?…
>
> These three zealots [the three judges appointed by Trump and Reagan that made up the panel] are hellbent on a deranged vision of guns for all, leaving [the federal] government powerless to protect its people.
>
> This is what the ultra-conservative majority of the U.S. Supreme Court wants.…
>
> Wake up, America — this assault on our safety will only accelerate.

Newsom's state attorney general, Rob Bonta, defied the Circuit Court's ruling:

> This is a dangerous decision.… Californians should know that restraining orders, including Domestic Violence Restraining Orders, still prohibit the possession of firearms. These orders are an essential tool that remain in effect and may be requested at any time. I urge

> Californians to utilize these life-saving tools.

And Joe Biden's Attorney General Merrick Garland is going to appeal the Fifth Circuit's ruling:

> Whether analyzed through the lens of Supreme Court precedent, or of the text, history, and tradition of the Second Amendment, that statute is constitutional.…
>
> Accordingly, the Department will seek further review of the Fifth Circuit's contrary decision.

It cannot be emphasized too often: *Bruen* is directly attributable to Presidents Trump and Reagan, who nominated originalists to the Supreme Court. In fact, the author of Thursday's Fifth Circuit's decision, Judge Cory Wilson, was the 200th federal judge to be nominated by President Trump, and the sixth judge nominated by him to the Fifth Circuit.