U.S. v. Rahimi: Understanding the Implications for Protection Orders and Firearms Prohibitions

NCPOFFC and NRCDVF Technical Assistance Bulletin

December 2024

BWJP

Background

The Gun Control Act prohibits persons subject to certain "qualifying" protection orders, among other enumerated statuses, from possessing or receiving firearms or ammunition. 18 U.S.C. § 922(g)(8).[1] In 2022, the U.S. Supreme Court decided *New York State Rifle & Pistol Association v. Bruen*[2] in which it established a new framework for courts to determine whether a regulation on firearm access unduly burdens individuals' Second Amendment rights. Under this *Bruen* framework, when a court determines that a challenged law in some way burdens one's Second Amendment rights then the court must determine whether the law is consistent with the Nation's historical tradition of firearm regulation. Such consistency, to establish a regulation's constitutionality, does not require identifying a "historical twin" to the challenged law. Lower courts' attempts to apply this framework demonstrates its difficulty promoting uniform application and its fostering of broad subjectivity—with huge variation in application across the country. Under this framework, the 5th Circuit found 18 U.S.C. § 922(g)(8) unconstitutional in the underlying *Rahimi* decision.

The *Rahimi* Decision

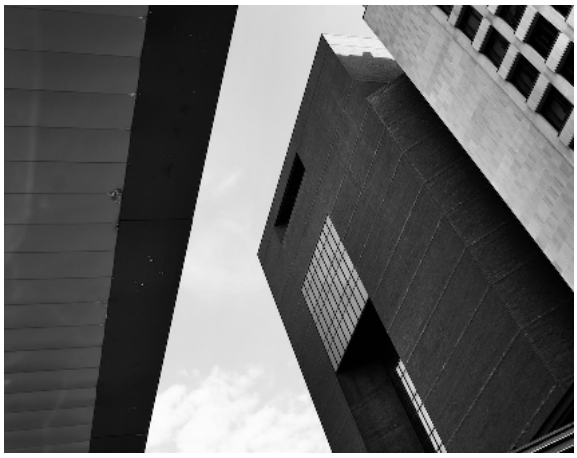
Zackey Rahimi was subject to a domestic violence protection order issued by a Texas court. The protected party was a former girlfriend with whom Rahimi had a child in common. A particular incident giving rise to the issuance of the protection order involved Rahimi's threats with a firearm and firing a gun at a passerby. That protection order qualified under 922(g)(8), thus Rahimi was prohibited by federal law from possessing a firearm or ammunition. While subject to that protection order Rahimi did in fact possess a firearm and ammunition on numerous occasions, committing several shootings in the community. He was convicted of that unlawful possession under 922(g)(8).

To be prohibited from accessing firearms and ammunition under 922(g)(8), one must be subject to a protection order that:

A. Was issued after a hearing of which the person received actual notice and had an opportunity to participate;
B. Restrains the person from harassing, stalking or threatening an intimate partner or child of such an intimate partner or person or from engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
C. Either (i) includes a finding that the person poses a credible threat to the physical safety of the intimate partner or child; or (ii) by the order's terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

It was undisputed that the order to which Rahimi was subject met all the elements of 922(g)(8)--including both (i) and (ii) of subsection (C) (though only one such subsection is required). Rahimi brought a facial challenge of 922(g)(8), arguing that it violates the Second Amendment and there is no application of the law that would be constitutional.

The Supreme Court held, in an 8-1 decision, that 922(g)(8) is constitutional. Specifically, the Court held that "an 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."[3] While the Court did not stray from the *Bruen* framework, the Court emphasized that the framework does not require finding a historical twin for modern firearm regulations as our laws are not "trapped in amber," clarifying that the modern regulation need only be "consistent with the principles that underpin the Nation's regulatory tradition" (such as laws protecting public safety). The Court's historical inquiry led to their determination that, while not historical twins, founding era statutory regimes such as "surety" laws and "going armed" laws established a consistent principle of our nation to disarm a person when the "individual poses a clear threat of physical violence to another." However, in reaching this decision the Court only analyzed the Rahimi protection order as it met 922(g)(8)(C)(i)--that court having made a finding that Rahimi posed a credible threat to his former intimate partner. While the order also met the alternative subsection of element (C), the Court needed only to find one constitutional application of the law to reject Rahimi's facial challenge. And they did.



Frequently Asked Questions

What is a credible threat in the context of a domestic violence protection order?

A history of abuse and violence by the respondent against their intimate partner indicates a likelihood of future violence by the respondent against that intimate partner. The past abusive behavior sufficient to establish the risk of future abuse and harm can range from one severe incident to a pattern of multiple forms of abuse over many years. Physical violence is not the only form of intimate partner violence indicative of the likelihood of future harm. For example, stalking behavior is one of the most dangerous indicators of lethality.

Where a court finds credible the evidence of violence and abuse presented in a protection order proceeding and finds that the evidence rose to a level sufficient to meet the burden of proof that authorizes the court to issue a protection order, arguably the order is inherently acknowledging and providing a remedy against the credible threat respondent presents to the intimate partner's physical safety.

Examples of such finding may include:

- [Respondent] poses a credible threat of violence to [Protected Party]
- [Respondent] has committed acts of domestic or sexual violence against [Protected Party]
- [Respondent] threatened to shoot [Protected Party]
- [Respondent] brandished a weapon (firearm, knife, other) threatening to harm [Protected Party]
- [Respondent] strangled [Protected Party]
- [Respondent] sent text messages to [Protected Party] making threats to harm [Protected Party]
- [Respondent] has physically assaulted [Protected Party] numerous times in the past year, with the level of violence escalating each time;
- [Respondent] communicated threats to kill himself and law enforcement if [Protected Party] contacted law enforcement;
- [Respondent] followed [Protected Party] to their workplace and sent unwanted gifts to [Protected Party]'s current home, which was concealed after [Protected Party] fled from their shared home.

As these examples of factual findings demonstrate, a finding of a credible threat to the physical safety of the petitioner is based on evidence that would reasonably cause the petitioner to fear for their future physical safety or that of their child. The full context of the relationship between the respondent and petitioner is important. It is necessary to be alert to conduct that may seem to have an innocuous explanation but when viewed in the entire context of the parties' relationship is clearly part of the pattern of control and abuse and demonstrates a risk to the petitioner's safety. For example, sending flowers to an intimate partner's new home might seem like a romantic overture or an act of contrition after a fight. But when those flowers were sent to an intimate partner's new home, the location of which had been concealed from the respondent after separation and a history of respondent repeatedly threatening to kill the intimate partner if they ever left, the act of sending flowers is properly seen as an imminent threat—I know where you are, and I can reach you. When determining whether the respondent poses a credible threat to the petitioning intimate partner, it is essential to consider the totality of the circumstances within that relationship.

Where can the court's finding of credible threat be found?

A protection order may use this precise language—expressly stating on the order that the court finds the respondent poses a credible threat to the physical safety of the protected party. Some protection order forms include this language as a check box that the court can mark to indicate making this finding. Neither the statute nor the *Rahimi* decision indicate that an express statement using the language "credible threat" is required, though such language is helpful.

Rather, the court might make a factual finding that specific conduct (of the sort that would demonstrate a credible threat to the physical safety of the protected party) alleged in the petition or hearing evidence is credible and established by the burden of proof. This could include finding credible alleged conduct like the examples above. Furthermore, a jurisdiction's definition of abuse that must be proven for the court to grant a protection order may be that the Respondent poses a credible threat to the protected party's physical safety. The court may, after a hearing, determine that the facts laid out in the petition have been proven in a manner that meet the requisite burden of proof and indicate within the order that the court is incorporating the facts in the petition.

While it is easiest for the court to specifically include in the order or record that it has made a finding that the respondent poses a credible threat to the safety of the intimate partner, it is not necessary that the "credible threat" language be used so precisely for the federal protection order prohibitor to apply.

What about protection orders that lack a finding of credible threat but explicitly prohibit the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury, (C)(ii)?

The *Rahimi* decision cuts off its analysis of 18 U.S.C. § 922(g)(8) at subsection (C)(i) but it says nothing to indicate the analysis under (C)(ii) would be different.[4] Protection orders that do not in some way include a finding of credible threat but do include the express prohibition that respondent refrain from use, attempted use, or threatened use of physical force against the protected intimate partner or child remain qualifying protection orders for the purposes of activating the federal firearm prohibition (to the extent all other elements are met). Here, too, the language in the order does not have to be a precise match to the language of the federal statute as long as the language used is commonly understood to involve acts of physical force, though language mirroring the above federal statutory language is helpful.[5]

Still, it is good practice for courts to clearly indicate findings of a credible threat to the protected party's safety and good practice for practitioners to advocate for such findings.

Additional Resources

For a more detailed analysis, two recorded webinars on the *Rahimi* case and practical considerations in light of the decision are available:

One-hour webinar: Understanding U.S. v. Rahimi: Practical Considerations
Fifteen-minute microlearning: https://gbvlearningcommunity.org/Courses/CourseDetails/290

The Duke Center for Firearms Law maintains a Repository of Historical Gun Laws, available at https://firearmslaw.duke.edu/repository-of-historical-gun-laws.

The National Resource Center on Domestic Violence and Firearms and the National Center on Protection Orders and Full Faith and Credit are available for training and technical assistance. Contact us at info@nrcdvf.org or ncffc@bwjp.org. Additionally, there are many resources available by visiting www.nrcdvf.org/resources and https://bwjp.org/section/protection-orders-and-full-faith-credit/.

Endnotes

1 Other statutes include felony conviction; fugitive from justice; unlawful user of controlled substance(s); adjudicated as "mental defective" or committed to a mental institution; illegally or unlawfully present in the United States; dishonorable discharge from military; renounced United States citizenship; and misdemeanor conviction for domestic/dating violence. See § 18 U.S.C. 922(g).

2 597 U.S. 1 (2022).

3 *United States v. Rahimi*, 602 U.S. ___ (2024) at *17.

4 Separate challenges to 922(g)(8) for orders qualifying under (C)(ii) have been filed. In *United States v. Perez-Gallan*, the Fifth Circuit ruled 922(g)(8) unconstitutional under its own precedent in United States v. Rahimi. 2023 U.S. App. LEXIS 19975 (5th Cir. 2023). After the Supreme Court overturned the Fifth Circuit's *Rahimi* ruling, it vacated and remanded *Perez-Gallan* back to the Fifth Circuit for reconsideration in light of the *Rahimi* ruling. No. 23-455, 144 S.Ct. 2707 (July 2, 2024). The Fifth Circuit has ordered supplemental briefing and oral arguments. Additionally, a post-*Rahimi* cert petition challenging 922(g)(8)(C)(ii) has already been denied by the Court. See *Yusupov v. United States*, No. 24-5506, 2024 LEXIS 4189 (October 24, 2024).

5 See *United States v. Coccia*, 446 F.3d 233 (1st Cir. 2006); *United States v. Bostic*, 168 F.3d 718 (4th Cir. 1999); *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020); *United States v. Sanchez*, 639 F.3d 1201 (9th Cir. 2011); *United States v. DuBose*, 598 F.3d 726 (11th Cir. 2010).

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This project was supported by Grant Nos. 15JOVW-23-GK-05140-MUMU and 15JOVW-23-GK-05133-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this program are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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