

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

March 2, 2023

Lyle W. Cayce  
Clerk

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No. 21-11001

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

ZACKEY RAHIMI,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:21-CR-83-1

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Before JONES, HO, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

Our prior panel opinion, *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023), is WITHDRAWN and the following opinion is SUBSTITUTED therefor:

~~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), a specific statute that does so, is constitutional under the Second~~

JAMES C. HO, *Circuit Judge*, concurring:

The right to keep and bear arms has long been recognized as a fundamental civil right. Blackstone saw it as an essential component of “‘the natural right’” to “‘self-preservation and defence.’” *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139–40 (1765)). And the Supreme Court has repeatedly analogized the Second Amendment to other constitutional rights guaranteed to every American. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing the First, Second, Fourth, Fifth, and Sixth Amendments as the “civil-rights Amendments”); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49–50 n.10 (1961) (comparing “the commands of the First Amendment” to “the equally unqualified command of the Second Amendment”); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2126, 2130 (2022) (quoting *Konigsberg*).

But lower courts have routinely ignored these principles, treating the Second Amendment as “a second-class right.” *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion). So the Supreme Court has now commanded lower courts to be more forceful guardians of the right to keep and bear arms, by establishing a new framework for lower courts to apply under the Second Amendment.

“When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *Bruen*, 142 S. Ct. at 2129–30. “The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 2130. “[T]his historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm

regulation requires a determination of whether the two regulations are ‘relevantly similar.’” *Id.* at 2132. This framework “is neither a regulatory straightjacket nor a regulatory blank check.” *Id.* at 2133. It requires the government to “identify a well-established and representative historical *analogue*, not a historical *twin*.” *Id.*

Our court’s decision today dutifully applies *Bruen*, and I join it in full. I write separately to explain how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from violent criminals. Our Founders firmly believed in both the fundamental right to keep and bear arms and the fundamental role of government in combating violent crime.

## I.

“[T]he right to keep and bear arms . . . has controversial public safety implications.” *Bruen*, 142 S. Ct. at 2126 n.3 (quotations omitted). But it’s hardly “the *only* constitutional right” that does. *Id.* (quotations omitted, emphasis added). To the contrary, “[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.” *McDonald*, 561 U.S. at 783 (plurality opinion).

So any legal framework that involves any of these constitutional provisions can have significant and controversial public safety consequences. A framework that under-protects a right unduly deprives citizens of liberty. But a framework that over-protects a right unduly deprives citizens of competing interests like public safety.

Take, for example, the exclusionary rule. *See Mapp v. Ohio*, 367 U.S. 643 (1961). Since its inception, the rule has been sharply criticized for over-protecting the accused and releasing dangerous criminals into our neighborhoods. It’s often said that nothing in the Constitution requires the criminal to “go free because the constable has blundered.” *Herring v. United*

*States*, 555 U.S. 135, 148 (2009) (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)). “The exclusionary rule generates substantial social costs” by “setting the guilty free and the dangerous at large.” *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (cleaned up).

The same can be said about *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court has “repeatedly referred to the *Miranda* warnings as ‘prophylactic’ and ‘not themselves rights protected by the Constitution.’” *Dickerson v. United States*, 530 U.S. 428, 437–38 (2000) (citations omitted). What’s more, “[i]n some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.” *Miranda*, 384 U.S. at 542 (White, J., dissenting).

So it’s easy to see why decisions like *Mapp* and *Miranda* have been criticized for over-protecting constitutional rights and harming public safety.

But there’s a big difference between the first criticism and the second, at least as far as the judiciary is concerned. It’s our duty as judges to interpret the Constitution based on the text and original understanding of the relevant provision—not on public policy considerations, or worse, fear of public opprobrium or criticism from the political branches. *See, e.g., McDonald*, 561 U.S. at 783 (plurality opinion) (finding “no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2278 (2022) (“[W]e cannot allow our decisions to be affected by any extraneous influences such as concern about the public’s reaction to our work.”); *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) (“Constitutional rights must not give way to hoplophobia.”).

And that’s precisely the problem here: Members of the Supreme Court have repeatedly criticized lower courts for disfavoring the Second Amendment.<sup>1</sup> The Supreme Court has now responded by setting forth a new legal framework in *Bruen*. It is incumbent on lower courts to implement *Bruen* in good faith and to the best of our ability.

*Bruen* calls on us to examine our Nation’s history and traditions to determine the meaning and scope of the Second Amendment. It’s hardly the first time that the Supreme Court has looked to history and tradition to interpret constitutional provisions.<sup>2</sup> And it surely won’t be the last.

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<sup>1</sup> See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari) (bemoaning “lower courts’ general failure to afford the Second Amendment the respect due an enumerated constitutional right”); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (lamenting “distressing trend” of “the treatment of the Second Amendment as a disfavored right”); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (criticizing “noncompliance with our Second Amendment precedents” by “several Courts of Appeals”); *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (“lower courts, including the ones here, have failed to protect [the Second Amendment right]”); *id.* at 2802 (“‘A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.’”) (quoting *Heller*, 554 U.S. at 634).

<sup>2</sup> See, e.g., *Myers v. United States*, 272 U.S. 52, 109–76 (1926) (noting that “the power of removal of executive officers . . . was presented early in the first session of the First Congress,” known as the “decision of 1789,” and also surveying English and colonial history and subsequent Congressional and Executive practice); *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983) (noting that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country” and surveying colonial history, the deliberations of the First Congress, and “unambiguous and unbroken history of more than 200 years”); *Crawford v. Washington*, 541 U.S. 36, 43–50 (2004) (examining the “historical background” of the Confrontation Clause, noting that “[t]he right to confront one’s accusers is a concept that dates back to Roman times,” and surveying English history and colonial and early state practice); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (reviewing “historic and traditional categories” of speech that government has been allowed to regulate “[f]rom 1791 to the

## II.

Those who commit violence, including domestic violence, shouldn't just be disarmed—they should be detained, prosecuted, convicted, and incarcerated. And that's exactly why we have a criminal justice system—to punish criminals and disable them from engaging in further crimes.

The Constitution presumes the existence of a criminal justice system. *See, e.g.*, U.S. CONST. amends. V, VI (setting forth various rights of the accused in criminal proceedings); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments). That system allows the government to deny convicted criminals a wide range of liberties that it could not deny to innocent, law-abiding citizens. For example, the government cannot deprive innocent citizens of their liberty of movement. *See, e.g., Williams v. Fears*, 179 U.S. 270, 274 (1900); *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999). But it can certainly arrest and incarcerate violent criminals.

Arrest and incarceration naturally entail the loss of a wide range of liberties—including the loss of access to weapons. *See, e.g., Chimel v. California*, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.”); *State v. Buzzard*, 4 Ark. 18, 21 (1842) (Ringo, C.J.) (“Persons accused of crime, upon their arrest, have constantly been divested of their arms, without the legality of the act having ever been questioned.”).

The Supreme Court has also made clear that our Nation's history and traditions include “longstanding prohibitions on the possession of firearms

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present”); *Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019) (observing that “[t]he Excessive Fines Clause traces its venerable lineage back to at least 1215” and surveying authorities from English history and colonial practice).

by felons” —and that such measures are “presumptively lawful.” *Heller*, 554 U.S. at 626 & n.26. *See also McDonald*, 561 U.S. at 786 (plurality opinion) (“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons,’” and “[w]e repeat those assurances here. . . . [I]ncorporation does not imperil every law regulating firearms.”). So the government can presumably disarm dangerous convicted felons, whether they’re incarcerated or not, without violating the Second Amendment.

The Second Amendment is not “a second-class right.” *Bruen*, 142 S. Ct. at 2156. It is not “subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Id.* That principle guides us here: The government can impose various restrictions on the rights of dangerous convicted felons, consistent with our Nation’s history and traditions—and that includes the right to keep and bear arms.

### III.

The power to incarcerate violent criminals is not just constitutionally permissible—it’s imperative to protecting victims. After all, anyone who’s willing to break the law when it comes to domestic violence is presumably willing to break the law when it comes to guns as well. The only way to protect the victim may be to detain as well as disarm the violent criminal.

For example, the government can detain and disarm, not just after conviction, but also before trial. Pre-trial detention is presumed by the Excessive Bail Clause and the Speedy Trial Clause. And it plays a significant role in protecting citizens from violence, including domestic violence. *See, e.g., United States v. Salerno*, 481 U.S. 739, 755 (1987) (permitting “the detention prior to trial of arrestees charged with serious felonies who . . . pose a threat to the safety of individuals or to the community”).

In addition, the government can detain and disarm, based not just on acts of violence, but criminal threats of violence as well. *See, e.g., United States v. Ackell*, 907 F.3d 67 (1st Cir. 2018) (upholding criminal stalking law); *United States v. Gonzalez*, 905 F.3d 165 (3rd Cir. 2018) (same); *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2014) (same); *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (same); *see also People v. Counterman*, 497 P.3d 1039 (Colo. App. 2021) (same), *cert. granted sub nom. Counterman v. Colorado*, 143 S. Ct. 644 (2023). After all, to the victim, such actions are not only life-threatening—they’re life-altering, even if they don’t eventually result in violence.

#### IV.

18 U.S.C. § 922(g)(8) disarms individuals based on civil protective orders—not criminal proceedings. As the court today explains, there is no analogous historical tradition sufficient to support § 922(g)(8) under *Bruen*.

Moreover, there are additional reasons why disarmament based on civil protective orders should give us pause. Scholars and judges have expressed alarm that civil protective orders are too often misused as a tactical device in divorce proceedings—and issued without any actual threat of danger. That makes it difficult to justify § 922(g)(8) as a measure to disarm dangerous individuals.

#### A.

“Many divorce lawyers routinely recommend pursuit of civil protection orders for clients in divorce proceedings . . . as a tactical leverage device.” Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 62 n.257 (2006). *See also, e.g.,* Randy Frances Kandel, *Squabbling in the Shadows: What the Law Can Learn from the Way Divorcing Couples Use Protective Orders as Bargaining Chips in Domestic Spats and Child Custody Mediation*, 48 S.C. L.



REV. 441, 448 (1997) (civil protective orders are deployed as “an affirmative element of divorce strategy”).

That’s because civil protective orders can help a party in a divorce proceeding to “secure [favorable] rulings on critical issues such as [marital and child] support, exclusion from marital residence and property disposition.” *Murray v. Murray*, 631 A.2d 984, 986 (N.J. Super. Ct. App. Div. 1993). Protective orders can also be “a powerful strategic tool in custody disputes.” Suk, *supra*, at 62.

That makes civil protective orders a tempting target for abuse. Judges have expressed “concern[] . . . with the serious policy implications of permitting allegations of . . . domestic violence” to be used in divorce proceedings. *Murray*, 631 A.2d at 986. *See also City of Seattle v. May*, 256 P.3d 1161, 1166 n.1 (Wash. 2011) (Sanders, J., dissenting) (noting “the growing trend to use protection orders as tactical weapons in divorce cases”). And for good reason. “[N]ot all parties to divorce are above using [protective orders] not for their intended purpose but solely to gain advantage in a dissolution.” Scott A. Lerner, *Sword or Shield? Combating Orders-of-Protection Abuse in Divorce*, 95 ILL. BAR J. 590, 591 (2007). Anyone who is “willing to commit perjury can spend months or even years . . . planning to file a domestic violence complaint at an opportune moment in order to gain the upper hand in a divorce proceeding.” David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Act*, 57 RUTGERS L. REV. 1009, 1014 (2005). So “[a] plaintiff willing to exaggerate past incidents or even commit perjury can have access to a responsive support group, a sympathetic court, and a litany of immediate relief.” Peter Slocum, *Biting the D.V. Bullet: Are Domestic-Violence Restraining Orders Trampling on Second Amendment Rights?*, 40 SETON HALL L. REV. 639, 662–63 (2010).

Moreover, these concerns are exacerbated by the fact that judges are too often ill-equipped to prevent abuse. Family court judges may face enormous pressure to grant civil protective orders—and no incentive to deny them. For example, family court judges may receive mandatory training in which they’re warned about “the unfavorable publicity” that could result if they deny requests for civil protective orders. *Id.* at 668. As one judge has noted, “[a] newspaper headline can be death to a municipal court judge’s career.” *Id.* at 667 n.213 (quotations omitted). So “the prospect of an unfavorable newspaper headline is a frightening one.” *Id.* To quote another judge: “Your job is not to become concerned about all the constitutional rights of the [defendant] you’re violating as you grant a restraining order. Throw him out on the street, give him the clothes on his back and tell him, ‘See ya’ around.’” *Id.* at 668. Yet another judge said: “If there is any doubt in your mind about what to do, you should issue the restraining order.” *Id.*

As a result, “[r]estraining orders . . . are granted to virtually all who apply.” *May*, 256 P.3d at 1166 n.1 (Sanders, J., dissenting) (quotations omitted). So there’s a “tremendous” risk that courts will enter protective orders automatically—despite the absence of any real threat of danger. Heleniak, *supra*, at 1014. *See generally* Slocum, *supra*. In one case, for example, a family court judge granted a restraining order on the ground that the husband told his wife that he did not love her and was no longer attracted to her. *See Murray*, 631 A.2d at 984. “There was no prior history of domestic violence,” yet the judge issued the order anyway. *Id.* Another judge issued a restraining order against David Letterman on the ground that his presence on television harassed the plaintiff. *See* Todd Peterson, *David Letterman Fights Restraining Order*, PEOPLE (Dec. 21, 2005).

**B.**

Moreover, the consequences of disarming citizens under § 922(g)(8) may be especially perverse considering the common practice of “mutual” protective orders.

In any domestic violence dispute, a judge may see no downside in forbidding *both* parties from harming one another. A judge “may think that mutual restraining orders are not substantially different from regular restraining orders—after all, the goal is to keep the parties away from one another so that the violence will not continue.” Jacquie Andreano, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CAL. L. REV. 1047, 1054 (2020). “Judges may also feel that issuing a mutual restraining order saves time because they do not have to hear testimony and make a finding regarding which party is a primary aggressor or even that one party has committed domestic violence.” *Id.*

But “[t]hese judicial assessments have often led to the issuance of *unmerited* mutual restraining orders, namely in situations where one party is the abuser and the other party is a victim.” *Id.* (emphasis added). As a result, “both parties are restrained *even if only one is an abuser.*” *Id.* at 1055 (emphasis added). *See also* Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1055–56 (1992) (“[J]udges often issue a mutual protection order without any request from the respondent or his lawyer. . . . [J]udges and lawyers . . . may be tempted to resort to mutual protective orders frequently. However, when they do this in cases where there truly is one victim and one batterer, they ignore some of the real difficulties of mutual protection orders.”). *See generally* DAVID HIRSCHL, NAT’L CRIMINAL JUSTICE REFERENCE SERV., DOMESTIC VIOLENCE

CASES: WHAT RESEARCH SHOWS ABOUT ARREST AND DUAL ARREST RATES (2008).

The net result of all this is profoundly perverse, because it means that § 922(g)(8) effectively disarms *victims* of domestic violence. What's worse, victims of domestic violence may even be put in greater danger than before. Abusers may know or assume that their victims are law-abiding citizens who will comply with their legal obligation not to arm themselves in self-defense due to § 922(g)(8). Abusers might even remind their victims of the existence of § 922(g)(8) and the entry of a mutual protective order to taunt and subdue their victims. Meanwhile, the abusers are criminals who have already demonstrated that they have zero propensity to obey the dictates of criminal statutes. As a result, § 922(g)(8) effectively empowers and enables abusers by guaranteeing that their victims will be unable to fight back.

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We must protect citizens against domestic violence. And we can do so without offending the Second Amendment framework set forth in *Bruen*.

Those who commit or criminally threaten domestic violence have already demonstrated an utter lack of respect for the rights of others and the rule of law. So merely enacting laws that tell them to disarm is a woefully inadequate solution. Abusers must be detained, prosecuted, and incarcerated. And that's what the criminal justice system is for. I concur.