



Americans Against Gun Violence  
7862 Winding Way #151  
Fair Oaks, CA 95628  
(916) 668-4160  
aagunv.org / info@aagunv.org

## **SCOTUS Tosses Us A Crumb In *Rahimi*:**

### **Insurrectionists and the Gun Lobby Get the Cake and the Frosting**

#### **A Message from the President of Americans Against Gun Violence**

On June 21, 2024, the Supreme Court ruled in an 8-1 decision that Zackey Rahimi didn't have a constitutional right to own a gun. Clarence Thomas was the lone dissenter. It shouldn't have taken the Court 356 days from the date that it agreed to hear this case and 227 days from the date that it heard oral arguments to reach this decision. Here are some of the undisputed facts in the case of *United States v. Rahimi*:

- Zackey Rahimi was a drug dealer in Texas.
- Rahimi assaulted his girlfriend in public in December of 2019. As his girlfriend was fleeing with their young child, Rahimi grabbed a gun and fired at his girlfriend and/or a witness to the assault. Rahimi later called his girlfriend and threatened that he would shoot her if she reported the assault.
- Rahimi's girlfriend obtained a domestic violence restraining order (DVRO) under Texas law prohibiting Rahimi from contacting her except to discuss the care of their child. The order also suspended Rahimi's Texas gun license for two years. Rahimi repeatedly violated the restraining order.
- In November of 2020, Rahimi threatened another woman with a gun and was arrested for assault with a deadly weapon. After the arrest, Texas police identified Rahimi as a suspect in at least five additional shootings, including shooting into the home of a drug customer, shooting at a driver of a another car after colliding with that car, shooting at a truck driver who flashed his lights at him while Rahimi was driving recklessly, and shooting into the air at a fast food restaurant when the restaurant refused to accept the credit card of Rahimi's friend.
- After Rahimi's arrest, police searched his home and found a rifle, a pistol, ammunition, and a copy of the DVRO.
- Rahimi was convicted of being in possession of a firearm while under a DVRO, in violation of federal law 18 U.S.C. §922(g)(8), which prohibits some persons subject to a DVRO from possessing guns. (I'll refer to this law subsequently as the "DVRO prohibition law.")

## SCOTUS Tosses Us A Crumb In *Rahimi*

- Rahimi appealed his conviction on the basis that the DVRO prohibition law violated his constitutional rights under the Second Amendment. His appeal was initially denied, but after the Supreme Court issued its *Bruen* decision in June of 2022, a three judge panel of the Fifth Circuit Court of Appeals in Texas ruled in favor of Rahimi, citing the *Bruen* decision as the basis for their ruling.
- The U.S. Government appealed the Fifth Circuit ruling to the Supreme Court, and the Court agreed to hear the case on June 30, 2023. The Court's ruling on June 21, 2024, sends the case back to the Fifth Circuit Court of Appeals "for further proceedings consistent with this opinion."

Other gun violence prevention (GVP) organizations are hailing the *Rahimi* decision as a major victory – and as a reason to send them money. The messages that I've received from organizations to which I've contributed in the past include:

- From the Giffords Law Center to Prevent Gun Violence: "The Supreme Court Rules to Protect Women from Domestic Violence....Donate."
- From Brady United Against Gun Violence: " FINALLY, a life-saving decision by the Supreme Court....Make a Matched Gift."
- From March For Our Lives: "VICTORY – SCOTUS finally did its job and prohibited domestic violence abusers from owning guns....Donate \$25 now."
- From Everytown for Gun Safety: "The Supreme Court just issued a life-saving decision....Donate now."

These organizations must not have read and understood the entire *Rahimi* decision. If they did read the entire decision carefully, then they're knowingly misrepresenting it.

There's one good thing about the *Rahimi* decision. It will almost certainly result in Zackey Rahimi going back to prison. But that's essentially the *only* good thing about the decision. And there are a lot of bad things about it.

The question that the Supreme Court agreed to consider in the case of *United States v. Rahimi* was, "Whether 18 U.S.C. 922(g)(8), which prohibits the possession of firearms by persons subject to domestic-violence restraining orders, violates the Second Amendment on its face." As Chief Justice Roberts explained in detail in his majority opinion, in which all the other justices except Thomas joined, the "on its face" phrase means that Rahimi had to prove that there could be no case in which the federal law prohibiting persons subject to a DVRO from owning guns did not violate the Second Amendment. The Court ruled that Rahimi failed to meet this high standard.

The question of whether the DVRO prohibition law violates the Second Amendment "on its face" is very different, though, from the question of whether this law **is constitutional** "on its face." The majority opinion described what a scoundrel Zackey Rahimi was and concluded that in his particular case, his constitutional rights were not violated. The *Rahimi* decision definitely **did not state**, however, that the DVRO prohibition law is

## SCOTUS Tosses Us A Crumb In *Rahimi*

constitutional in every case. In other words, according to the *Rahimi* decision, someone who is under a DVRO but who didn't do all the terrible things that *Rahimi* did might still be able to claim that the DVRO prohibition law violates his rights under the Second Amendment.

Here are some other bad things – in fact, very bad things - about the *Rahimi* decision.

In his majority opinion, Justice Roberts endorses the myth that the term, “keep and bear arms” refers to private gun ownership; the myth that the Second Amendment “codified” a pre-existing right to private gun ownership inherited from the Founders’ English ancestors; and the myth that private gun ownership provides net protective value as a means of “self-defense.” Worse still, he also tacitly endorses the exceedingly dangerous myth that the Second Amendment was intended to confer a right to armed insurrection. Roberts writes:

We have held that the right to keep and bear arms is among the “fundamental rights necessary to our system of ordered liberty [quoting Justice Alito’s majority opinion in the 2010 *McDonald* decision]”<sup>1</sup>....Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense....The spark that ignited the American Revolution was struck at Lexington and Concord, when the British governor dispatched soldiers to seize the local farmers’ arms and powder stores.

Roberts also quotes an obscure 19<sup>th</sup> Century U.S. Representative, Thaddeus Stevens, as allegedly stating in 1868:<sup>2</sup>

“Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.”

In the *amicus* briefs that we filed on behalf of Americans Against Gun Violence in both the *Rahimi*<sup>3</sup> and *Bruen*<sup>4</sup> cases, we presented extensive evidence documenting that the term, “keep and bear arms” was almost universally understood during the Founding Era to refer to carrying weapons of war in the setting of military service, not private gun ownership for other purposes; that there was no pre-existing right to widespread civilian gun ownership that the Founders could have possibly inherited from their English ancestors, much less “codified” in the Second Amendment; and that guns in the homes and communities of honest, law-abiding Americans are far more likely to be used to harm them than to protect them. In our *amicus* brief in *Bruen*, we not only called on the Court to uphold the constitutionality of New York’s restrictions on carrying concealed handguns, we also urged the Court to overturn the rogue 2008 *Heller* decision in which a narrow 5-4 majority of justices reversed over two centuries of legal precedent, including four prior Supreme Court decisions,<sup>5</sup> in ruling for the first time in U.S. history that the Second Amendment conferred an individual right to own guns unrelated to service in a “well

## SCOTUS Tosses Us A Crumb In *Rahimi*

regulated militia.” Similarly, in our *amicus* brief in *Rahimi*, we not only called on the Court uphold the constitutionality of the DVRO prohibition law, we also urged the Court to overturn both the *Heller* and *Bruen* decisions.

There are word limits, however, for *amicus* briefs, and we felt that the assertion that the Second Amendment was intended to confer a right to armed insurrection – an assertion first advanced by the late Justice Antonin Scalia in the 2008 *Heller* decision,<sup>6</sup> from which *McDonald*, *Bruen* and *Rahimi* are descended – was too absurd to warrant comment.

Roberts’ sanctimonious reference in *Rahimi* to “The spark that ignited the American Revolution” being “struck at Lexington and Concord” evokes memories of poems by Longfellow and Emerson of “the midnight ride of Paul Revere”<sup>7</sup> and “the shot heard ‘round the world.”<sup>8</sup> These are romanticized versions, though, of the history of the American Revolution. Roberts’ implication that an armed volunteer militia is still necessary to preserve “our system of ordered liberty” is two and a half centuries out of date. The Red-coats aren’t coming any more, and we’ve got the world’s largest professional military force. Also, since 1788, we’ve had the U.S Constitution – a constitution that Chief Justice Roberts should be well familiar with - that provides for non-violent redress of grievances. Applying Roberts’ interpretation of the Second Amendment to the January 6, 2021, attack on the U.S. Capitol, the insurrectionists should have brought their “weapons of defense” with them to facilitate “their inalienable right of defending liberty.” But as the Supreme Court ruled unanimously in the 1939 *Miller* decision, one of the purposes of the Second Amendment was to provide for a well regulated militia that could be used to suppress insurrections, not facilitate them.<sup>9</sup> It would have been not only absurd, but suicidal for the members of the first U.S. Congress who drafted the Second Amendment to intentionally include a clause in the Bill of Rights that would have given aggrieved citizens the right to rise up in arms against their elected government.

The fact that Justices Alito, Gorsuch, Kavanaugh, and Barrett signed on to Roberts’ majority opinion without disputing the myths it promotes (and that Thomas would also endorse these myths in his dissent, which doesn’t warrant further comment) is not surprising. It’s extremely disappointing, though, that the so-called “liberal” justices - Sotomayor, Kagan, and Jackson - didn’t refute these myths in their concurring opinions.

In his dissenting opinion in the *Bruen* decision, Justice Stephen Breyer, who subsequently retired and was replaced by Justice Jackson, made a specific reference to our Americans Against Gun Violence *amicus* brief as evidence that the *Heller* case was wrongly decided.<sup>10</sup> Justices Sotomayor and Kagan joined in that dissent. In Justice Sotomayor’s concurring opinion in *Rahimi*, however, in which Justice Kagan joined, she states that she continues to believe that *Bruen* was wrongly decided, but she makes no reference to *Heller* being wrongly decided, nor does she advocate that *Bruen* even be re-examined, much less overturned. She also makes no comment concerning any of the myths discussed above in Roberts’ majority opinion.

## SCOTUS Tosses Us A Crumb In *Rahimi*

Justice Sotomayor details the seriousness of the problem of gun-related domestic violence in her concurring brief, including the facts that a woman who lives in a house with a domestic abuser is five times more likely to be murdered if the abuser has access to a gun; that over 70 people are shot and killed by an intimate partner each month in the United States; that 863 people were killed with a firearm by an intimate partner in 2020; that in roughly a quarter of cases in which an abuser kills an intimate partner, the abuser also kills someone else, such as a child, family member, or roommate; and that police are killed while responding to domestic violence calls more often than in responding to any other type of call. Justice Sotomayor fails to acknowledge, however, that these dreadful statistics are due to the lax U.S. gun control laws and the associated vast pool of privately owned guns that existed before the Fifth Circuit Court of Appeals ever ruled that Zackey Rahimi had a constitutional right to own a gun. She also fails to acknowledge that the Supreme Court's reversal of the Fifth Circuit ruling will do nothing to strengthen U.S. gun control laws or reduce the vast pool of privately owned guns; that the kind of gun-related domestic violence that she describes is virtually unheard of in any other high income democratic country of the world; or that the Court on which she sits as a justice has erected constitutional obstacle through the *Heller* decision and its progeny that prevent the United States from adopting the stringent gun control laws needed to stop our country's epidemic of gun violence, including gun-related domestic violence.

When I speak of lax U.S. gun control laws, I'm including the DVRO prohibition law that was the focus of the *Rahimi* case. All of the gun-related domestic violence that Justice Sotomayor describes in her concurring brief in *Rahimi* occurred while this law was in effect.

Not everyone under a DVRO is prohibited from owning guns under the DVRO prohibition law. For the DVRO to qualify as prohibiting gun ownership, the person must have had the opportunity to participate in the hearing in which the DVRO was issued; the DVRO must prohibit the person from engaging in conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or the partner's child; the DVRO must include a finding that the person represents a credible threat to the physical safety of such intimate partner or child; and the DVRO must explicitly prohibit the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.

The DVRO prohibition law doesn't include any mechanism for identifying individuals who legally acquired a gun prior to becoming subject to a DVRO, nor does the law include a mechanism for confiscating the guns from such individuals once they become prohibited. Furthermore, as soon as a qualifying DVRO expires or is lifted, the domestic violence offender is free to get his old guns back and/or acquire new ones. (I'm using the male pronoun to refer to domestic violence offenders and other perpetrators of gun violence with the understanding that most - but not all - gun violence offenders are males.)

## SCOTUS Tosses Us A Crumb In *Rahimi*

Most background checks for gun purchases in the United States are done almost instantaneously by computer via the National Instant Criminal Background Check System (NICS), which is maintained by the FBI.<sup>11</sup> For a prospective gun purchaser to be denied a gun purchase, he must be on the NICS database of prohibited persons, which is perennially incomplete. In the case of the DVRO prohibition law, there's no penalty for agencies that issue DVRO's but fail to report them to NICS. Many high profile shootings in the United States have been committed by individuals who met criteria for being prohibited for possessing guns but who were not on the NICS database. Examples include the 2007 Virginia Tech mass shooting committed by Seung-Hui Cho;<sup>12</sup> the 2015 mass shooting at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, committed by Dylan Roof;<sup>13</sup> and the 2017 mass shooting at the First Baptist Church in Sutherland Springs, Texas, committed by Devin Kelley.<sup>14</sup> Even most other mass shooters in the United States have been able to legally purchase the guns that they subsequently used in committing their horrific crimes because they didn't meet the narrow criteria for being prohibited when they first purchased their weapons.<sup>15</sup> Finally, as Zackey Rahimi himself demonstrated, due to the vast pool of privately owned guns in our country, regardless of whether an individual is on the NICS database of prohibited persons, almost anybody who wants a gun can easily acquire one. In summary, the DVRO prohibition law that was at issue in the *Rahimi* case is minimally effective in preventing gun-related domestic violence.

The United States is the only high income democratic country in the world in which the burden of proof is on the government to show that a person seeking to acquire a gun should not have one (a "permissive" guiding policy).<sup>16</sup> In all other advanced democracies, the burden of proof is on the potential gun purchaser to prove that he needs a gun and can handle one safely (a "restrictive" guiding policy). And recognizing that there's no net protective value in owning or carrying a gun in a democratic society, countries like Australia, Great Britain, Japan, and New Zealand don't accept "self-defense" as a legitimate reason for owning a firearm.<sup>17</sup> Furthermore, instead of conducting background checks instantly by computer, these countries conduct extensive background checks that in many cases involve in person interviews with the prospective gun purchaser and the person's past and present domestic partners.

Although the *Rahimi* case didn't directly involve a question concerning the guiding principle for firearm ownership in the United States, Chief Justice Roberts, apparently ignorant of the difference between the permissive guiding policy in the United States and the restrictive policy in all the other high income democratic countries of the world, went out of his way to make it clear in his majority opinion that the Supreme Court will not tolerate a restrictive guiding policy on his watch. He wrote:

Finally, in holding that Section 922(g)(8) is constitutional as applied to Rahimi, we reject the Government's contention that Rahimi may be disarmed simply because he is not "responsible." "Responsible" is a vague term. It is unclear what such a rule would entail.

## SCOTUS Tosses Us A Crumb In *Rahimi*

All the other high income democratic countries of the world have figured out what the word, “responsible,” means when it comes to gun ownership, and as a result, their rate of gun homicide is, on average, 1/25<sup>th</sup> the rate in our country.<sup>18</sup>

The concurring opinion by Justice Jackson is just as disappointing, if not more so, as the concurring opinion by Justices Sotomayor and Kagan. Citing Justice Breyer’ dissenting opinion in *Bruen*, Jackson states she would have joined the dissent had she been a member of the Court at that time. Strangely, though, rather than advocating that *Bruen* be overturned or at least re-examined, Jackson states that, “*Bruen* is now binding law,” and that she joins the *Rahimi* majority opinion “in full.” Even more strangely, citing Justice Stevens’ dissenting opinion in the 2008 *Heller* decision, Jackson acknowledges that the *Heller* decision reversed over two centuries of previous legal precedent concerning the proper interpretation of the Second Amendment. Rather than advocating that the *Heller* decision be overturned or at least re-examined, though, Jackson refers to the radical reinterpretation of the Second Amendment in *Heller* as a “newly unearthed right.”

The *Heller* decision didn’t “unearth” a new constitutional right. The five member *Heller* majority endorsed the gun lobby’s invented constitutional right, and it wasn’t a newly invented one. The gun lobby had been working insidiously for decades to promote the myth that the Second Amendment was intended to confer an individual right to own gun unrelated to service in “a well regulated militia.”<sup>19</sup> Previous Supreme Court Justices had called out the gun lobby for its disinformation campaign. Justice William Douglas wrote in a dissenting opinion in the case of *Adams v. Williams* in 1972:

A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police.<sup>20</sup>

Former Chief Justice Warren Burger was even more emphatic on the subject of the misrepresentation of the Second Amendment by the gun lobby. In an interview on the PBS NewsHour in 1991, Burger stated:

This has been the subject of one of the greatest pieces of fraud – I repeat the word, “fraud” – on the American public by special interest groups that I have ever seen in my lifetime.<sup>21</sup>

In the 2008 *Heller* decision, five of nine Supreme Court Justices (Scalia, Roberts, Alito,

## SCOTUS Tosses Us A Crumb In *Rahimi*

Thomas, and Kennedy) became a party to this fraud. The same five justices doubled down on their endorsement of this fraud in the 2010 *McDonald* decision. In the 2022 *Bruen* decision, after Scalia and Ginsburg had died and Kennedy had retired, six of nine justices, including three new Trump appointees (Gorsuch, Kavanaugh, and Barrett) and the three justices remaining from the *Heller* majority (Roberts, Alito, and Thomas) endorsed the gun lobby's fraudulent misrepresentation of the Second Amendment once again. In the *Rahimi* decision announced on June 21, 2024, eight of nine justices correctly ruled that Zackey Rahimi does not have a constitutional right to own a gun, but it shouldn't have taken them more than two minutes to come to that decision. And sadly, in the *Rahimi* decision, nine out of nine justices endorsed the interpretation of the Second Amendment that the late Chief Justice Warren Burger had described as one of the greatest pieces of fraud on the American public by special interest groups that he had ever seen in his lifetime.

Zackey Rahimi is almost certainly going back to prison, but at Americans Against Gun Violence, we find little other reason to celebrate the *Rahimi* decision. In the *Rahimi* case, as in the *Bruen* case, we were the only gun violence prevention organization in the entire country to file an *amicus* brief calling on the Supreme Court to reverse the *Heller* decision and its progeny. Contrary to the fund-raising messages from other organizations, the *Rahimi* decision isn't going to do anything to prevent the terrible gun-related domestic violence that Justice Sotomayor describes in her concurring opinion.

So where do we go from here? As I see it, there are three choices: a) give up; b) give in; or c) work harder. Since we don't really consider "a" or "b" to be acceptable options, we're stuck with "c."

Within the next few days, we'll be posting the winning essays in our 2024 National High School Essay Contest on the Americans Against Gun Violence website. The prompt for this year's contest was the following excerpt from our Americans Against Gun Violence mission statement:

In creating constitutional obstacles, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws in other high income democratic countries, the Supreme Court's 2008 *Heller* decision and its progeny are literally death sentences for tens of thousands of Americans annually.

We awarded \$16,000 in scholarships this year distributed among 30 essay contest winners. Everyone single one of the 30 high school students chosen as a winner demonstrates a far greater understanding of the disastrous consequences of the *Heller* decision and its progeny than any of our current Supreme Court justices.

Despite our best efforts to get other gun violence prevention organizations to join us, Americans Against Gun Violence remains the only U.S. GVP organization that openly



SCOTUS Tosses Us A Crumb In *Rahimi*

advocates and is actively working toward overturning the *Heller* decision and its progeny and toward adopting stringent gun control law in the United States comparable to the laws in other high income democratic countries. If you're OK with over 40,000 Americans being killed with guns every year, then contribute to the other GVP organizations that are claiming the *Rahimi* decision to be a great victory. If you agree with us that this death sentence must be lifted, then we'd appreciate your support of Americans Against Gun Violence, because as I stated above, for us, giving up or giving in isn't an option.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Bill Durston, M.D.  
President, Americans Against Gun Violence

Note: Dr. Durston is a retired emergency physician and a former U.S. Marine Corps expert marksman and combat veteran of the Vietnam War, decorated for "courage under fire."

References

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- <sup>2</sup> The reference that Roberts provides for this quotation is “Cong. Globe, 40th Cong., 2d Sess., 1967 (1868).” This citation does not lead to the source for this quotation.
- <sup>3</sup> Carley O. Alameda and Hilary C. Krase, “BRIEF OF AMERICANS AGAINST GUN VIOLENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER in the Case of UNITED STATES OF AMERICA v. ZACKEY RAHIMI,” August 21, 2023, [https://www.supremecourt.gov/DocketPDF/22/22-915/275932/20230822134841531\\_22-915\\_Brief.pdf](https://www.supremecourt.gov/DocketPDF/22/22-915/275932/20230822134841531_22-915_Brief.pdf).
- <sup>4</sup> “BRIEF OF AMICUS CURIAE AMERICANS AGAINST GUN VIOLENCE in the Case of New York State Rifle and Pistol Association v. Kevin P. Bruen et Al,” September 21, 2021.
- <sup>5</sup> United States v. Cruikshank, 92 US 542 (Supreme Court 1876); Presser v. Illinois, 116 US (Supreme Court 1886); U.S. v. Miller, 307 U.S. 174 (1939) (n.d.); Lewis v. United States, No. 55 (U.S. 1980).
- <sup>6</sup> District of Columbia v. Heller, 554 US 2801 (Supreme Court 2008).
- <sup>7</sup> “Longfellow’s Poem,” Paul Revere House, accessed June 24, 2024, <https://www.paulreverehouse.org/longfellows-poem/>.
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- <sup>12</sup> “Opinion | Dangerous Omissions,” *The New York Times*, July 11, 2011, sec. Opinion, <https://www.nytimes.com/2011/07/11/opinion/11mon2.html>.
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- <sup>17</sup> “Key Components of Federal Gun Control Laws in the United States and Five Other High Income Democratic Countries: Australia, Canada, Great Britain, Japan, and New Zealand” (Americans Against Gun Violence, 2024), <https://aagunv.org/wp-content/uploads/2024/01/Key-Components-of-gun-control-laws.pdf>.
- <sup>18</sup> Erin Grinshteyn and David Hemenway, “Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010,” *The American Journal of Medicine* 129, no. 3 (March 1, 2016): 266–73, <https://doi.org/10.1016/j.amjmed.2015.10.025>.
- <sup>19</sup> Michael Waldman, “How the NRA Rewrote the Second Amendment,” POLITICO Magazine, May 19, 2014, <http://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856.html>.
- <sup>20</sup> Adams v. Williams, 407 US 143, 150 (Supreme Court 1972) Justice Douglas dissented from the majority on the question of whether Williams had been subjected to illegal search and seizure, not on the proper interpretation of the Second Amendment.

## SCOTUS Tosses Us A Crumb In *Rahimi*

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<sup>21</sup> Warren Burger, PBS News Hour, December 16, 1991,  
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