



Questions and Answers on **Gender-Based Violence, Gun Rights, and the Equal Rights Amendment**

On November 7, 2023, the Supreme Court will hear oral arguments in *United States v. Rahimi*¹ and decide whether a federal law banning people from possessing guns while under a domestic violence protective order² violates the Second Amendment right to bear arms.³ The United States is an international outlier in terms of both gun violence and a lack of gender equality. Indeed, the U.S. accounts for about 92% of the women killed by guns in high-income countries⁴ and a woman is five times more likely to die if her abusive partner has access to a gun.⁵ The pressing need to amend the U.S. Constitution by adding explicit sex equality protections is demonstrated by the potential in *Rahimi* for the Supreme Court to subordinate gender-based violence prevention to the right to possess a gun. Sex equality must be placed on an equal footing with other fundamental constitutional rights. By guaranteeing sex equality in the Constitution, the Equal Rights Amendment (ERA) will provide a constitutional foundation for eliminating sex discrimination and strengthening congressional authority to pass laws protecting against gender-based violence.

The ERA, first introduced in Congress 100 years ago, is a constitutional amendment that prohibits discrimination on the basis of sex.⁶ Several procedural steps remain before the ERA is added to the

¹ U.S. v. Rahimi, 61 F.4th 443 (5th Cir. 2023).

² 18 U.S.C. § 922(g)(8).

³ 18 U.S.C. § 922(g)(8).

⁴ In a dataset of gun violence from 31 high-income countries, 91.6% of the women killed by guns and 96.7% of the children aged 0-4 years killed by guns lived in the US. Erin Grinshteyn & David Hemenway, *Violent death rates in the US compared to those of the other high-income countries, 2015*, NURSING AND HEALTH PROFESSIONS FACULTY RESEARCH AND PUBLICATIONS (2019), https://repository.usfca.edu/nursing_fac/130.

⁵ *Everytown for Gun Safety, Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem*, EVERYTOWN RESEARCH AND POLICY (Apr. 10, 2023), <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/>; see also *Guns and Violence Against Women: America's Uniquely Lethal Intimate Partner Violence Problem*, EVERYTOWN RESEARCH & POLICY (Apr. 10, 2023), <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/>; see also Lois Becket & Abene Clayton, *'An unspoken epidemic': Homicide rate increase for Black women rivals that of Black men*, THE GUARDIAN (June 25, 2022) (by the end of 2020, the overall homicide rate in the U.S. increased by 30%, but the increase for Black women was 33%), <https://www.theguardian.com/world/2022/jun/25/homicide-violence-against-black-women-us>.

⁶ See Proposed Amendment to the Constitution of the United States, 92d Cong., 2d Sess. (1972) (“SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” “SEC. 2. The

Constitution as the 28th Amendment.⁷ In the face of opposition to the ERA and a rollback of constitutional sex equality rights, it is essential to define the transformative power of the ERA’s basic principle of sex equality— including the potential for a constitutional right to live free from gender-based violence.

This Q&A explains the background of the *Rahimi* case, what’s at stake when the constitutional right to possess a gun is used to undermine protections against gender-based violence, and how the final ratification of the ERA could, and should, alter the way the Supreme Court values the importance of comprehensive sex equality.



What are the facts in *Rahimi*?

In 2019, Zackey Rahimi attacked his ex-girlfriend (“CM”) in a public parking lot, grabbed her by the wrist, knocked her to the ground, and dragged her to his car before pushing her inside it.⁸ Aware that a bystander was witnessing this abduction, Rahimi retrieved a gun in his possession and fired a shot at the witness.⁹ During this distraction, CM escaped the car and fled the parking lot.¹⁰ Rahimi later called and threatened to shoot CM if she told anyone about the assault.¹¹ Fearing for her life, CM successfully obtained a civil protective order from a Texas court restraining Rahimi from harassing, stalking, or threatening her and her child.¹² The order also expressly prohibited Rahimi from possessing a firearm.¹³ Rahimi then became the suspect in five further shootings, leading to his conviction for violating both the protective order and a federal law that bars gun possession by people who are subject to a domestic violence protective order.¹⁴ Rahimi challenged the federal law, claiming that it violated his Second Amendment rights by prohibiting his possession of guns while under the protective order.

Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” “SEC. 3. This amendment shall take effect two years after the date of ratification.”)

⁷ In 2020, Virginia became the 38th state to ratify the ERA as the 28th amendment to the U.S. Constitution, fulfilling all constitutional requirements for constitutional amendment. The ERA is not recognized as part of the constitution yet due to legal questions about whether a deadline found in the preamble of the Amendment is binding and whether three states may rescind their ratifications. As of 2023, members of Congress have blocked efforts to finalize the ERA.

⁸ Petition for Writ of Certiorari, at 3-4, *U.S. v. Rahimi*, (2023) (No. 21-11001).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ *Id.* at 3-4. In August 2020, Rahimi violated the DVRO by contacting and stalking C.M., in November 2020 he threatened another woman with a gun, and then participated in a series of five shootings, including during road rage incidents.



Rahimi’s pattern of behavior from 2019 to 2021—from multiple domestic violence incidents to multiple shootings¹⁵—is far from exceptional and fits an established pattern of gendered gun violence in the U.S.¹⁶ People with known patterns of abusive behavior who possess guns pose a deadly threat not only to their intimate partners,¹⁷ but also to the public.¹⁸ In 68.2% of mass shootings in the U.S., the perpetrator had either previously killed a partner or family member, or had a history of domestic violence.¹⁹ The gendered nature of gun violence and the harmful impact of gender-based violence on whole communities informs the need to shift social norms towards sex equality. A constitutional guarantee of sex equality could make that shift possible.



What federal law is the Supreme Court considering striking down in *Rahimi*?



The federal law at issue is 18 U.S.C. § 922(g)(8) (“Section 922(g)(8)”), a section of the federal criminal code that temporarily bars gun possession by people who are subject to a domestic violence protective order.²⁰ Survivors of domestic or intimate partner violence can petition for a civil domestic violence protective order in all fifty states and the District of Columbia.²¹ To address the

¹⁵ *Id.*

¹⁶ For a discussion applying a toxic masculinity framework to the issue of gendered gun violence where men are more likely than women to own, kill with, and die by guns, see Hayley N. Lawrence, *Toxic Masculinity and Gender-Based Gun Violence in America: A Way Forward*, 26 J. Gender, Race & Just. 33 (2023).

¹⁷ An average of 70 women are shot and killed by an intimate partner every month in the United States. Everytown analysis of CDC, National Violent Death Reporting System (2019), <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem>.

¹⁸ High profile mass shooters from recent years who also had a prior history of committing domestic violence include the Sandy Hook Shooter, the Pulse Nightclub shooter, and Uvalde school shooter. And most mass shootings are directly related to domestic disputes, e.g. entire families targeted or unrelated bystanders incidentally victimized. See Abigail R. Esman, *SCOTUS is Really Considering if Domestic Abusers Should be Allowed Guns: There is a clear pattern between domestic abuse and broader violence*, Slate (July 6, 2023), <https://slate.com/news-and-politics/2023/07/supreme-court-rahimi-domestic-abuse-guns.html>

¹⁹ See Lisa B. Geller, et al, *The Role of Domestic Violence in Fatal Mass Shootings in the United States, 2014-2019*, 8 Inj. Epidemiol., 31 (2021).

²⁰ H.R. Res. 3355, 103d Cong. (1994) (enacted); see also 18 U.S.C. § 922(g)(8) (“It shall be unlawful for any person[] who is subject to a court order that[:] (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits 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 to possess in or affecting commerce, any firearm or ammunition”).

²¹ See *Definition of Domestic Violence/Abuse for Civil Protection Orders*, NATIONAL CENTER ON PROTECTION ORDERS AND FULL FAITH & CREDIT (2020), <https://bwjp.org/09-29-20-ncpoffc-definitions-matrix.pdf>. Depending on the jurisdiction, these civil orders may be called protective orders, orders of protection, restraining orders, etc. Definitions of the classes of persons with standing to petition for a protective order varies by jurisdiction, and may include victims of intimate partner violence, family violence, and stalking.



deadly impact of guns in contexts of domestic violence, 32 U.S. states have laws similar to Section 922(g)(8) prohibiting gun possession by subjects of protective orders.²² The Supreme Court striking down Section 922(g)(8) in *Rahimi* would embolden legal challenges to state laws prohibiting possession of firearms by people subject to protective orders. It could also lead to the invalidation of federal background checks on people buying guns that have prevented gun purchases by over 300,000 people.²³ As critical tools for reducing fatal incidents of domestic violence, civil protective orders and related gun regulations are necessary for advancing gender equality. The Supreme Court has insisted in a broad range of cases that no constitutional right is absolute, but rather must be interpreted in light of other fundamental rights and interests: “Ordered liberty sets limits and defines the boundary between competing interests.”²⁴ This principle certainly applies to the Second Amendment: the right to bear arms is not absolute and must be interpreted in light of other compelling interests, such as the need to prevent the use of guns as a weapon of gender-based violence and mass shootings.



Will the Supreme Court consider the rights of the person protected by the protective order?



Probably not. The Supreme Court *should* consider the fundamental rights to bodily integrity and sex equality implicated in the case, however, the Court will focus primarily on Rahimi’s rights under the Second Amendment to bear arms regardless of the threat he poses to his ex-girlfriend and the public. In gun rights cases brought under the Second Amendment, courts require the government to show that the gun regulation has roots in “the nation’s history and traditions” dating back to the ratification of the Second Amendment in 1791.²⁵ In 1791, domestic violence was not only unregulated but explicitly permitted under common law.²⁶ The absence of historical gun regulations in contexts of domestic violence led the government’s defense of Section 922(g)(8) to rely, in part, on a Fifth Circuit decision that described Founding-era attitudes toward gun control as permitting the disarmament of

²² The strongest state laws close the “boyfriend loophole” left by laws that only contemplate spousal abuse by including multiple forms of intimate partnerships and dating violence. Twenty-two states also require subjects of civil protective orders to surrender any firearms – a policy known to reduce intimate partner homicide rates in those states by 14-16%. *See Which states prohibit domestic abusers under restraining orders from having guns?* EVERYTOWN RESEARCH AND POLICY (2023), <https://everytownresearch.org/rankings/law/prohibition-for-domestic-abusers-under-restraining-orders/>.

²³ *Domestic Violence & Firearms*, GIFFORDS LAW CENTER (2023), <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>.

²⁴ *Dobbs v. Jackson Women’s Health Organization*, 97 U.S. ___, 142 S.Ct. 2228, 2257 (2022).

²⁵ *Supra* note 17, at 2132.

²⁶ *See* Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2121-2122 (1996) (recounting how early settler law was based on English common law permitting husbands to beat their wives with sticks no bigger than their thumb, and the physical abuse of wives within a marriage remained legal in every state until Alabama became the first state to rescind that right in 1871); *see also* *Fulgham v. State*, 46 Ala. 143 (Ala. Sup. Ct. 1871).



people who “posed a potential danger,” including law-abiding enslaved and freed Black people.²⁷ If the Court interprets the meaning of the Constitution by reference to racist laws from the nation’s history,²⁸ it will further entrench inequality in a legal system that does not acknowledge the gendered and racial impact of gun violence on women, LGBTQ+ individuals, and people of color.²⁹



What could the ERA do to adequately address gender-based violence?

The ERA would empower Congress to robustly enforce gender equality and prioritize gender-based violence as a compelling public interest. The Constitution separates powers between the branches of government and limits the laws that Congress may pass. For example, in 2000, the Supreme Court significantly limited the reach of the Violence Against Women Act (VAWA), and held in *United States v. Morrison* that Congress has limited constitutional authority to create broad civil remedies for gender-motivated crimes, including the kind of gun violence at issue in *Rahimi*.³⁰ The ERA would grant Congress new and stronger authority to pass laws addressing gender-based violence by promoting sex equality. Without specific sex equality protections in the text of the Constitution, the Supreme Court will continue to ignore some of the most fundamental forms of sex-based inequality and violence.

As the Supreme Court recently held in *Dobbs v. Jackson Women’s Health Organization*—and in similar constitutional cases—sex equality and other rights that have been “found hiding in the Constitution’s penumbras,”³¹ without “any grounding in the constitutional text”³² are to be given little weight when they come into conflict with explicit constitutional rights such as the right to bear arms, religious liberty, or free

²⁷ See Petition for Writ of Certiorari, at 8-9, *U.S. v. Rahimi*, (2023) (No. 21-11001) (citing *NRA v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012) (citing Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 113–18 (2011));

²⁸ See Duke Center for Firearm Laws, Repository of Historical Gun Laws: Race and Slavery Based <https://firearmslaw.duke.edu/subjects/race-and-slavery-based/> (see, e.g. An Act Prescribing Additional Penalties for the Commission of Offences against the State, and for Other Purposes, Ch. 1460, No. 3, §§ 12-15, 1865 Fla. Laws 23, 25-27; see also Laws regulating the sale of firearms to minors and Native Americans, Title 10, §§ 342 & 362 of AZ Penal Code in The Revised Statutes of Arizona Territory (1901); see also An Act prescribing the rules and conduct to be observed with respect to Negroes and other Slaves of this territory, in A General Digest of the Acts of the Legislature of Louisiana, Passed from the Year 1804 to 1827, Inclusive, And in Force at this Last Period, With An Appendix and General Index, Black Code (Approved June 7, 1806) (L. Moreau Lislet, Printed by Benjamin Levy, 1828).

²⁹ Black women are three times more likely and American Indian women four times more likely than white women to be fatally shot by an intimate partner. *Everytown for Gun Safety, Guns and Violence Against Women: America’s Uniquely Lethal Intimate Partner Violence Problem*, EVERYTOWN RESEARCH AND POLICY (Apr. 10, 2023), <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem/>.

³⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

³¹ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ___, 141 S.Ct. 63, 71 (2020) (Gorsuch, J. concurring)

³² *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ___, 142 S.Ct. 2228, 2272 (2022).



speech. Not only would the ERA put sex equality rights on the same constitutional footing as other important constitutional rights, but it would empower Congress to enact laws designed to implement that fundamental equality guarantee.

The ERA's explicit mandate guaranteeing that rights "shall not be denied or abridged by any state on the basis of sex" should be interpreted to modernize constitutional equality doctrine and bring the Constitution into alignment with modern constitutions around the world by creating a duty for state actors to affirmatively address gender-based violence, especially where there has been a pattern of similar violence as in the *Rahimi* case. This is an important departure from *Town of Castle Rock, Colorado v. Gonzales*, a 2005 Supreme Court opinion holding that the police do not have a constitutional duty to enforce a protective order in a domestic violence case.³³ The selective failure to enforce laws addressing gender-based violence would be a denial of rights on the basis of sex, and would therefore violate the ERA.

Gender-based violence disproportionately impacts women. The right to live free from violence should never be treated as a second-class right outranked by the more "masculine" right to bear arms.³⁴ Finalization of the ERA would ensure that sex-based inequality no longer structures the Supreme Court's skewed balancing of constitutional rights. Instead, the inclusion of sex-based equality in the Constitution would mean that the Court can no longer ignore gender-based violence.

³³ *Town of Castle Rock, Colorado v. Gonzales*, 125 S.Ct. 2796 (2005).

³⁴ Contrast this principle with existing Second Amendment jurisprudence that concerns itself with ensuring that "the constitutional right to bear arms . . . is not a second-class right . . ." *See supra* note 5, at 453 (quoting *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111, 2156 (2022) (quoting *McDonald v. Chicago*, 561 U.S. 742, 780 (2010))).