

This transcript is a version of the episode.

Imani: Hello fellow law nerds! Welcome to another episode of Boom! Lawyered, I'm Rewire News Group's Editor at Large Imani Gandy.

Jess: I'm Jess Pieklo, Rewire News Group's Executive Editor. Rewire News Group is the one and only home for expert repro journalism and the Boom! Lawyered podcast is part of that mission. A big thanks to our subscribers and welcome to our new listeners.

Today we're going to talk about a guy named Zack Rahimi who apparently has never met a situation he didn't try to shoot his way out of. The Supreme Court heard arguments in his case, *U.S. v. Rahimi*, last week. It's a doozy of a case. And it demonstrates exactly why originalism is absolute nonsense that should be tossed into the bin.

Imani: If there was ever a person who needs anger management classes, it's Zack Rahimi. He's a domestic abuser who was pushing his ex-girlfriend and mother of his child around in a parking lot. He knocked her to the ground, dragged her to his car, and shoved her inside. When he saw that there was a bystander, he grabbed a gun and fired it at the bystander. The woman was able to escape from Rahimi. Then he said he'd shoot her if she told anyone about the abusive incident.

Jess: Texas state court awarded the ex-girlfriend a two-year protective order against Rahimi in February 2020. The court concluded that Rahimi had engaged in "family violence" and that it was likely to happen again. Rahimi was not allowed to approach, threaten, or harass his former girlfriend or her family while under the protection order. It also prohibited him from owning a gun. The Texas protective order automatically triggered a federal ban on gun ownership in addition to these state-level limitations.

Imani: After the protective order, Rahimi went on a shooting spree. He shot at someone's house after that someone made a mean post about him on social media. Twice he shot at cars: once after a car accident and another time he shot at a car on a highway for flashing his lights at him but it turned out he shot the wrong car. Rahimi shot the car behind the car that had flashed its lights at him.

Jess: Wait, isn't that an urban legend? The gang ritual of driving around with no lights on and then bustin caps in people who try to give you a friendly warning.

Imani: Nope! This dude is seriously trigger happy. And here's my favorite one. He went to Whataburger with a friend and when his friend's credit card was declined, he shot his gun in the air.

Jess: I mean Whataburger is really good but that's no reason to start shooting a gun in the air.

Imani: Police were investigating the myriad shootings Rahimi was involved in and they found guns and ammo in his home and charged him with violating federal law for possessing guns while under a protective order.

Rahimi, who again, is one trigger-happy motherfucker, challenged the law, claiming it violated his Second Amendment rights. And at first, the district court and the Fifth Circuit affirmed Texas' right to take away his firearms.

Jess: And then came *New York State Rifle & Pistol Association v. Bruen*. In *Bruen*, the Supreme Court said states can't implement restrictions on guns unless those restrictions are consistent with this country's "historical tradition of firearm regulation."

Imani: It's a dumb ruling and a dumb case that has caused a ridiculous number of problems in lower courts. Because it is abjectly absurd to determine whether or not a current gun regulation is valid by looking to whether or not people in the 18th century would have found that regulation valid.

Jess: Well as a result, the Fifth Circuit reversed course and issued a ruling that said while it thinks the policy goals of keeping guns out of the hands of abusers is good, "our ancestors would never have accepted it."

Imani: This is originalism on steroids. It's incoherent. It's dumb. I counted the number of times quote history and tradition quote was mentioned—it was more than 30. According to Rahimi, there is a lack of quote history and tradition" when it comes to banning guns outright. And that means Rahimi, who again is one trigger happy motherfucker has a right to keep a gun.

Jess: Solicitor General Elizabeth Prelogar countered with a valiant attempt to ground her argument in originalism in order to appeal to Thomas, Alito, and the rest of the justices who think that our current behavior ought to be governed by what white dudes in the 18th century thought.

Prelogar's basic argument is that there's a history and tradition of disarming dangerous people. That provides the justification for a court to decide to disarm a person who was the subject of a protection order. And then once it's decided that dangerous people can be disarmed, then we can look to modern sensibilities about who counts as a dangerous person. So the fact that domestic abusers weren't considered dangerous then doesn't mean we can't consider them dangerous now.

Imani: But that's not originalism. And it drives me bananas! From a purely originalist standpoint, the fact that the founders really didn't give a shit about domestic violence should be enough to say that in 2023, domestic abusers should have the right to have guns, even though statistically, women are five times more likely to die in a situation if a gun is present, according to the group Everytown for Gun Safety which tracks this stuff. But it doesn't matter. The 2A says what it says, and back in the day, nobody would have had a problem with a guy shooting up his girlfriend, so let's all go home. Even though of course, shooting someone in 1789 took about ten minutes per shot what with all the musket cleaning and what not.

Either originalism demands that we look to the founding and find specific founding era sources for our current jurisprudence, or originalism is bullshit. Guess what the answer is? Originalism is bullshit.

Jess: It IS bullshit and Justice Jackson kept pointing that out. She noted that the history and traditions test means that only certain people's history counts. She also expressed incredulity at the idea that the Court has to look for Founding Era sources—basically what regulations “applied to the regulation of white protestant men related to domestic violence”—to determine whether or not a particular firearm regulation is valid.

And I need to nerd out for a minute on Prelogar's advocacy here. Because she absolutely pantsted originalism.

I said this to you in a Slack convo but her oral argument showed that if you believe in originalism like really believe it with your whole chest, then you also really believe in Christian patriarchy that includes men have dominion over women and children the same way God has dominion over his creations—it's how you enshrine that religious belief into legal code right—dominion as a philosophy is the basis of property law and now it might become the basis of Second Amendment law.

Imani: Right.

Jackson also raised the fact that early American history saw many laws disarming Native Americans and Black slaves. She said that the Bruen framework does not

adequately represent the history of all Americans and appears to place an excessive amount of emphasis on the rights granted to white Protestants in early America.

So Jess, what do you think is going to happen?

Jess: Rahimi is a terrible person to test the limits of Bruen with. And his attorney wasn't doing him any favors. At one point, Roberts specifically said the man is obviously a violent and dangerous person who shouldn't be able to own a gun.

The good thing is that the court doesn't seem inclined to rule in his favor so the question is whether they're going to give some guidance on Bruen so that legislators trying to regulate guns in 2023 don't have to find an analog rule from the 1780s, and judges don't have to pontificate about what a bunch of landowning musket enthusiasts would have thought about gun regulation.