

FACIAL CONFUSION: LOWER COURT MISAPPLICATION OF THE FACIAL/AS-APPLIED DISTINCTION IN SECOND AMENDMENT CASES

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INTRODUCTION

Following the Supreme Court's invocation of *United States v. Salerno*¹ to defeat a Second Amendment claim in *United States v. Rahimi*,² lower courts have begun misapplying the distinction between facial and as-applied challenges to reject Second Amendment claims. *Antonyuk v. James*³ is a prime example. There, the Second Circuit reviewed an order that had preliminarily enjoined a New York law that criminalized carrying a firearm in public parks. The Second Circuit vacated the injunction, but it did not conclude that the State was likely to succeed in showing that banning guns in parks generally is consistent with the Nation's history of firearm regulation. Rather, the court seized on the "facial" nature of the plaintiffs' challenge to conclude that the injunction should be vacated. In the court's telling, a facial challenge requires a challenger to show that a law "is unconstitutional in all its applications,"⁴ and the *Antonyuk* plaintiffs were unlikely to succeed in doing so because the State had shown "a well-established and representative tradition of firearm regulation in often-crowded public squares such as urban parks."⁵ Indeed, the court was clear that it only needed to assess whether New York's park ban was likely constitutional "insofar as the regulation prohibits firearms in *urban* parks" to sustain the law.⁶ Thus, the court concluded, the plaintiffs were unlikely to succeed in their facial challenge because "the law has a plainly legitimate sweep as to urban parks," although "doubt[ing] that the evidence presently in the record could set forth a well-established tradition of prohibiting firearm carriage in rural parks."⁷ Having concluded that the State had shown a likelihood of success in supporting a ban on firearms in urban parks, the court considered its job done in evaluating the plaintiffs' facial challenge.⁸ Thus, the court never asked whether the State had demonstrated that banning carry in parks *generally* is consistent with the Nation's history of firearm regulation.⁹ By failing to make this broader inquiry, the court did not properly analyze the facial claim before it.

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¹ 481 U.S. 739 (1987).

² 144 S.Ct. 1889, 1898 (2024).

³ 120 F.4th 941 (2d Cir. 2024).

⁴ *Id.* at 983.

⁵ *Id.* at 1026.

⁶ *Id.* at 1019.

⁷ *Id.* at 1025.

⁸ See *Antonyuk*, 120 F.4th at 1025–26.

⁹ *Antonyuk* is not a one-off decision. The Fourth Circuit, to take another example, recently rejected a challenge to Fairfax County, Virginia's ban on guns in parks. The court concluded that the ban was constitutional at least "as applied to the three

I. ANTONYUK'S APPLICATION OF THE FACIAL/AS-APPLIED DISTINCTION UNSOUND.

Antonyuk's application of the facial/as-applied distinction is unsound, even if one makes the following assumptions favorable to the *Antonyuk* panel: first, that for a facial Second Amendment challenge to succeed, a challenger must comply with the *Salerno* principle (i.e., must establish that the challenged law is unconstitutional in all of its applications); second, that the State of New York had demonstrated that banning possession of firearms in urban parks is consistent with the Nation's history of firearm regulation; and third, that the court was correct in declining to consider whether a narrower injunction was appropriate based on the facial nature of the plaintiffs' claim.¹⁰

The fundamental problem with *Antonyuk's* analysis is that to obtain a conviction for carrying a firearm in a park under the challenged statute, New York would not have to show that an offender carried a firearm in an *urban* park, even though that is a critical element if the statute is to be applied constitutionally, but only that the offender carried a firearm *in a park*. Therefore, unless New York can show that banning firearms in parks *generally* is consistent with the Second Amendment, there are zero constitutional applications of New York's park ban because all New York has to show to get a conviction under the ban is that a person possessed a firearm in a park. It is irrelevant that New York may have been able to draft a *narrower* statute making possession of a firearm in an *urban* park an element of the statute.

To be clear, the point is not to state that a facial claim succeeds if there is a single application of the statute that would be unconstitutional; that would be to eliminate as-applied claims altogether. Rather, the problem with the *Antonyuk* court's analysis is that it never asked whether banning firearms in parks, regardless of their type, generally comports with the historical tradition of firearm regulation in this country.

II. THE SUPREME COURT'S SECOND AMENDMENT CASELAW PRECLUDES ANTONYUK'S TREATMENT OF FACIAL CLAIMS.

In *District of Columbia v. Heller*, the Supreme Court considered the question "whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the Constitution."¹¹ The Court answered that question in the affirmative, and it did so facially. Indeed, the Court itself has confirmed that its judgment in *Heller* was one of facial unconstitutionality.¹² *Heller* made this ruling of facial unconstitutionality despite simultaneously suggesting that there were several situations in which the government potentially *could* ban possession of handguns consistent with the Second Amendment—for example, if the handguns

preschools and one preschool program on park property," a conclusion the court determined "doom[ed]" the plaintiffs' facial challenge to the ban. *LaFave v. County of Fairfax, Va.*, -- F.4th --, 2025 WL 2458491, at *5 (4th Cir. 2025); *see also, e.g.,* *Wolford v. Lopez*, 116 F.4th 959, 983–84 (9th Cir. 2024).

¹⁰ *But see* Nat'l Ass'n for Gun Rights v. Lamont, -- F.4th --, 2025 WL 2425399, at *8 n.16 (2d Cir. 2025) ("consider[ing] partial invalidation" in response to facial challenge since "the [Supreme] Court has acknowledged that the distinction between facial and as-applied challenges 'goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint'" (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010))).

¹¹ 554 U.S. 570, 573 (2008).

¹² *See City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015).

were automatic machineguns,¹³ were possessed by a violent felon,¹⁴ or were possessed in a particularly sensitive location.¹⁵ *Heller* thus is incompatible with the notion that a claim of facial unconstitutionality can be defeated simply by identifying some activity covered by a challenged criminal law that could be validly regulated. Rather, a court must focus on the activity *actually prohibited* by the statute and determine whether it is consistent with the Second Amendment to prohibit *that* activity.¹⁶ At bottom, the District of Columbia's ban on handguns was facially unconstitutional because the Nation's historical tradition did not support making it a crime solely to possess a handgun—even if the Nation's historical tradition would support making it a crime to possess a certain type of handgun, to possess a handgun by a certain type of person, or to possess a handgun in a certain type of place.

The Illinois Supreme Court correctly applied these principles in *People v. Burns*,¹⁷ a case concerning an Illinois law that made it a crime to carry handguns in public. The State argued that even if the Second Amendment generally protected a right to carry a handgun in public, the law was constitutional as applied to the defendant because he was a convicted felon. The Illinois Supreme Court rejected this argument, even while accepting that “it would appear . . . that the legislature *could* constitutionally prohibit felons from carrying readily accessible guns outside the home.”¹⁸ But the offense in question did “not include as an element of the offense the fact that the offender has a prior felony conviction.”¹⁹ And the court squarely rejected the notion that “an unconstitutional statute” can “become constitutional simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so.”²⁰

To sum up, then, in a facial Second Amendment challenge to a criminal statute, the court must compare the elements of the challenged restriction *as written* to the government's historical showing to determine whether the government's restriction is constitutional. It does not suffice, as the Second Circuit did in *Antonyuk*, to identify a subset of the restricted activity and conclude that the government could have constitutionally restricted that activity.

III. RAHIMI DOES NOT SUPPORT ANTONYUK'S TREATMENT OF FACIAL CLAIMS.

Rahimi involved a Second Amendment challenge to 18 U.S.C. § 922(g)(8), a federal law making it a crime to possess a firearm while subject to a domestic violence restraining order. And in rejecting *Rahimi*'s Second Amendment claim, the Court emphasized the facial nature of the claim. Invoking *Salerno*, the Court explained that *Rahimi* was required to “establish that no set of circumstances exists under which the Act would be valid,” and therefore “the Government need

¹³ 554 U.S. at 624, 627.

¹⁴ *Id.* at 626.

¹⁵ *Id.* In *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Court similarly facially invalidated the discretionary nature of New York's public carry licensing statute despite once again suggesting that carry could be barred altogether in certain sensitive places, *see id.* at 30.

¹⁶ *See, e.g., Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) (explaining that in a facial challenge, “the claimed constitutional violation inheres in the terms of the statute, not its applications”).

¹⁷ 79 N.E.3d 159 (Ill. 2015).

¹⁸ *Id.* at 165(emphasis in original).

¹⁹ *Id.*

²⁰ *Id.* (internal quotation marks omitted).

only demonstrate that Section 922(g)(8) is constitutional in some of its applications.”²¹ The Court concluded that there were constitutional applications of Section 922(g)(8) and rejected Rahimi’s facial claim.

Critically, however, the Court did not hypothesize some subset of activity encompassed by Section 922(g)(8) that could constitutionally be regulated. Rather, *Congress itself defined the subset*. Section 922(g)(8) makes it unlawful to possess a firearm in or affecting commerce by a person subject to a domestic violence restraining order that:

- (i) includes a finding that such person represents a credible threat to the physical safety of [an] 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.²²

Thus, in Section 922(g)(8), Congress “provide[d] two independent bases for liability.”²³ The Court concluded that at least one of those bases—the one concerning restraining orders with a finding of a credible threat—was constitutional, and Rahimi’s order included such a finding. The Court therefore had no need to “decide whether regulation under” the *other* independent basis for liability provided by Section 922(g)(8) was “also permissible.”²⁴

As this description should make clear, *Rahimi* did not depart from the principles guiding facial challenges evident in *Heller*, and it does not support decisions like the Second Circuit’s in *Antonyuk*. For *Rahimi* to be relevant to a law like the one at issue in *Antonyuk*, that law would have to say something like, “it is unlawful to possess a firearm in (a) an urban park, or (b) a rural park.” If firearms *could* constitutionally be banned in urban parks, then *that* statute would not be facially unconstitutional, because one of the two independent bases for liability—possessing a firearm in an urban park—would be constitutional (again, assuming for the sake of argument that firearms constitutionally can be banned in urban parks). But it does not follow that a statute banning firearms in parks *generally* would be facially constitutional. For that to be true, the government would need to show that such a general restriction is consistent with the Nation’s history of firearm regulation.

IV. SUPREME COURT CASES OUTSIDE OF THE SECOND AMENDMENT CONTEXT LIKEWISE ARE INCONSISTENT WITH ANTONYUK’S TREATMENT OF FACIAL CLAIMS.

The principles transgressed by the *Antonyuk* panel are far from novel. They were applied, for example, in *In re Trade-Mark Cases*,²⁵ in which the Court addressed a challenge to an early attempt by Congress to regulate trademarks. Congress had enacted legislation creating a federal trademark registry and making the fraudulent use, sale, and counterfeiting of registered trademarks a crime. But Congress did not include a jurisdictional element in the statute, and the Court held that the law exceeded Congress’s Commerce Clause authority. In doing so, the Court

²¹ *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (first quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

²² 18 U.S.C. § 922(g)(8)(C) (emphasis added).

²³ *Rahimi*, 144 S. Ct. at 1898.

²⁴ *Id.* at 1898–99.

²⁵ 100 U.S. 82 (1879).

rejected the argument that the law should be “held valid” with respect to trademarks “used in commerce with foreign nations and among the several States.”²⁶ “[I]t may be true,” the Court reasoned, “that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone.”²⁷ But “it is not within the judicial province to give the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body.”²⁸

Over one hundred years later, in *United States v. Lopez*,²⁹ the Court similarly held facially unconstitutional a provision of the Gun-Free School Zones Act of 1990, which made it unlawful for individuals to knowingly possess a firearm in a school zone, because there was “no requirement that [the] possession of the firearm have any concrete tie to interstate commerce.”³⁰

To be sure, *In re Trademark Cases* and *Lopez* concerned whether a statute was within Congress’s Commerce Clause authority, not whether a congressional enactment infringed upon a constitutional right. But that should not make a difference in the analysis. In either context, a statute is facially invalid if the key fact bringing the regulated activity within congressional authority (whether relating to commerce pursuant to the Commerce Clause or consistent with a historical tradition of regulation for a statute regulating arms-bearing conduct), is not required to be proved as an element of a conviction.

Moreover, this type of reasoning is not limited to the Commerce Clause context. To take another example, in *Johnson v. United States*,³¹ which concerned the Armed Career Criminal Act, the Court held that a statutory provision can be void for vagueness on its face even if “there is some conduct that clearly falls within the provision’s grasp.”³² If the statute as written is unconstitutionally vague, it is unconstitutionally vague—the Court concluded that it does not matter if there are some activities it clearly covers. Similarly, if a statute violates the Second Amendment under *Bruen*, it violates the Second Amendment—it does not matter if prohibiting some of the conduct covered by the statute does not infringe the right protected by the Second Amendment.

V. THE SUPREME COURT’S TREATMENT OF THE FACIAL/AS-APPLIED DISTINCTION IN *MOODY V. NETCHOICE, LLC* DOES NOT SUPPORT ANTONYUK’S TREATMENT OF FACIAL CLAIMS.

In *Moody v. NetChoice, LLC*,³³ the Supreme Court held that social media companies failed to establish a likelihood of success on their claim that Florida and Texas laws regulating internet platforms facially violate the First Amendment, even though the Court suggested that the laws likely were unconstitutional as applied to certain functions of the plaintiff platforms. And the

²⁶ *Id.* at 98.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 514 U.S. 549 (1995).

³⁰ *Id.* at 567 (emphasis added).

³¹ 576 U.S. 591 (2015).

³² *Id.* at 602.

³³ 144 S. Ct. 2383 (2024).

Court did so even though the standard for sustaining a facial challenge is relaxed in the First Amendment context—a challenger need only show that “a substantial number of the law’s applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”³⁴

While there may appear to be tension between *Moody* and the principles advocated here, on closer inspection any apparent tension dissolves. The key point is that the laws at issue in *Moody* were not regulations of speech as such and thus may have applied to non-expressive activities *that do not implicate the text of the First Amendment at all*, such as “how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends’ financial exchanges, or how a ride-sharing service like Uber runs.”³⁵ If the laws did apply to such activities, and if those activities were insufficiently expressive to implicate the First Amendment, then the challenged laws would be constitutional *as written* when applied to those activities. In other words, there would be perfectly constitutional applications of the statutes.³⁶

One could imagine a similar law in the Second Amendment context. For example, a law prohibiting the carriage of metal objects in a park would not implicate the Second Amendment when applied to pocket change but would when applied to handguns. But that is not akin to a law like the one at issue in *Antonyuk*, which directly regulates the possession of firearms in parks.

Conceptually, this understanding of the caselaw makes sense because in First and Second Amendment challenges, the burden only shifts to the government to defend its law if the plain text of the Amendment in question is implicated. If the text is implicated, the government can show that the regulation in question fits within a historical tradition of regulation (for example, obscenity in the First Amendment context or dangerous and unusual weapons in the Second Amendment context).

For a law that does not facially implicate the plain text of the Second Amendment but does so only in certain applications (e.g., no carrying metal objects in the park), the government can sustain a conviction by proving the elements of the statute without implicating the constitutional right at all in many applications. Even if the law turns out to be constitutionally problematic in some other applications, those problematic applications could be enjoined, and the law could continue to be constitutionally applied to the applications that do not implicate the right.

But the same is not true for a law that facially implicates the plain text of the Amendment (e.g., no possessing guns in parks). If the government cannot show that the elements in the statute as written fit within a historical tradition of regulation, then there are no constitutionally permissible applications of the statute. To stick with the parks example, even if a person were caught carrying a firearm in an urban park, and even if the government could justify banning guns in urban parks, the *offense* the person would be convicted of would be carrying a gun *in a park*. And if the government cannot show that banning guns in “parks”—as opposed to “urban parks”—is consistent with historical firearms regulation, the conviction violates the Second Amendment.

³⁴ *Id.* at 2397 (citation omitted) (internal quotation marks and brackets omitted).

³⁵ *Id.* at 2398.

³⁶ See also, e.g., *United States v. Hansen*, 599 U.S. 762, 782 (2023) (rejecting facial challenge when challenged “provision encompass[ed] a great deal of nonexpressive conduct—which does not implicate the First Amendment at all”).

CONCLUSION

As the Supreme Court recognized many years ago, “it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.”³⁷ That formulation has not lost its vitality.³⁸

When evaluating a facial Second Amendment challenge to a criminal statute, a court therefore must determine whether the government has demonstrated that the law as written is consistent with the Nation’s history of firearm regulation. A court cannot simply posit that a hypothetical narrower restriction would have been constitutional or that a subset of the regulated activity is regulable and deem the challenged law facially valid.

³⁷ *United States v. Reese*, 92 U.S. 214, 221 (1876).

³⁸ *See, e.g., Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).