No. 22-915

In The
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZACKEY RAHIMI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR NICHOLAS J. JOHNSON IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

This Court's Second Amendment jurisprudence has addressed three distinct subcategories of cases and treated them in distinctly different ways. These subcategories fit neatly within the text, history, and tradition standard that the court articulated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). The Court should make those distinctions explicit in this case.

Recognizing these three subcategories of cases allows *Bruen*'s text, history and tradition analysis to acknowledge, properly partition and limit the application of *tainted* historical arms restrictions based on invidious distinctions like race and religion.

Starting with *District of Columbia v. Heller*, 554 U.S. 570 (2008), and proceeding through *Bruen* this Court has provided guidance on: (1) sweeping bans on possession of firearms in common use (Category One); (2) gun prohibition applied to persons deemed dangerous (Category Two); and (3) gun regulations that add friction to the possession and carrying of firearms by the law-abiding (Category Three).

Category One cases are properly resolved under the common-use test articulated in *Heller*. Category Two Cases are properly resolved under *Heller*'s declaration that restrictions on dangerous persons are presumptively valid, as affirmed by loose analogies to the robust but tainted history and tradition of barring arms to dangerous persons. Category Three cases are

properly resolved under tight analogical reasoning that excludes the *tainted* historical restrictions.

The text, history and tradition standard also entails an additional element that is underacknowledged by the lower courts. That element is the function of limited federal power as a check on federal restrictions of constitutional rights. While the presumptive validity of restrictions on dangerous persons is robust in the context of state and municipal restrictions grounded on general police powers, the presumptive validity of similar federal restrictions is far less robust because the federal government lacks general police powers. Absent a strong showing of federal power, which is lacking in this case, Respondent's challenge to 18 U.S.C. § 922(g)(8) should be upheld.

ARGUMENT

I. Respondent's Claim Should Be Resolved by the Distinct Standard Applicable to His Case-Type

This Court's Second Amendment jurisprudence has addressed three distinct subcategories of cases and treated them in distinctly different ways. These subcategories fit neatly within the text, history and tradition standard that the Court articulated in *Bruen*. The Court should make those distinctions explicit in this case.

Starting with *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court has contemplated and provided guidance on: (1) sweeping bans on firearms in common use; (2) gun prohibitions on persons deemed dangerous; and (3) laws that added friction to the lawful possession and carrying of firearms. *See Heller*, 554 U.S. at 628–629 (discussing Category One); *id.*, at 626 (discussing Category Two); *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (discussing Category Three).

In *Heller*, the Court discussed two basic categories of Second Amendment cases. The first category was bans on firearms in common use. *Heller* held that, at its core, the Second Amendment prohibits blanket bans on firearms in common use. *Heller*, 554 U.S. at 628–629; *see also Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (finding that approximately 200,000 stun guns in civilian hands constitutes a weapon in common use) (*Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("The Second Amendment as construed in *Heller* protects weapons that have not traditionally been banned and are in common use by law-abiding citizens.").

The *Heller* decision also discussed a second category of cases that went beyond the facts of the case. The court explicitly affirmed that laws prohibiting possession of firearms by those deemed dangerous, such as felons and the mentally ill, are presumptively lawful. 554 U.S. at 626.

A third category of cases was not addressed by *Heller*. The core question in that third category is what sort of friction the government can apply to the keeping and bearing of arms by law-abiding citizens who have not been debarred the use of arms because of conduct nor by status that renders them dangerous in the eyes of the legislature. *Heller* did not provide an explicit standard for resolving those Category Three cases.

The absence of a standard for addressing Category Three cases in *Heller* opened the door for lower courts to apply means-ends scrutiny. Some courts applied that method of review to every type of Second Amendment case, including those that should have been resolved under *Heller*'s common use standard. *See*, *e.g.*, *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) ("[T]he Second Amendment as construed in *Heller* protects weapons that have not traditionally been banned and are in common use by law abiding citizens.").

Members of this Court criticized that application of means-ends scrutiny to a variety of Category Three cases threatened to render the Second Amendment a second-class right. *Heller II*, 670 F.3d at 1271-1285 (Kavanaugh, J., dissenting); *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) (arguing that the Court's refusal to grant certiorari where the decision below applied an analysis "indistinguishable from rational-basis review" shows that the Second Amendment is a "disfavored right"); *Friedman v. Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of

certiorari) ("The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions."); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2799–2800 (2015) (Thomas, J., dissenting from denial of certiorari) ("Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document. . . .").

Means-ends scrutiny, applied to Second Amendment cases, was easily manipulated and imposed minimal concrete limits on regulators. It resulted in judicial approval of virtually every challenged restriction, including restrictions that effectively banned the carrying of arms. *See*, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1544 (2020) (Alito, J., dissenting) (noting "cause for concern" that New York City's near-total ban on taking licensed handguns outside of city limits was upheld under means-end scrutiny); *Drake v. Filko*, 724 F.3d 426, 454 (3d Cir. 2013) (Hardiman, J., dissenting) (arguing that the majority opinion upheld New Jersey's restrictive "may-issue" public carry law based on "no evidence at all").

The standard of review announced in *Bruen* was a response to *that* problem. *Bruen* wisely rejected the means-ends scrutiny standard of review, which had become in effect the very sort of balancing test that the *Heller* Court explicitly rejected. *Heller*, 554 U.S. at 634; *see generally* Alan Gura, *The Second Amendment as a*

Normal Right, 127 Harv. L. Rev. F. 223 (2014); *Heller*, 554 U.S. at 634.

To summarize, the Court's Second Amendment jurisprudence so far is best construed as follows:

1) Sweeping bans on possession of firearms in common use are properly resolved under the common-use test as articulated in *Heller*. These are *Category One* cases.

2) Gun restrictions applied to persons deemed dangerous can be resolved via *Heller*'s declaration that restrictions on dangerous persons are presumptively valid. These are *Category Two* cases. These cases are bolstered, as discussed below, by loose analogies to the broad but tainted tradition of barring dangerous individuals from possessing firearms. The tainted historical restrictions (*e.g.*, those based on race and relition) underscore that contemporary regulations in Category Two must be grounded on constitutionally and factually legitimate markers of dangerousness.

3) Gun regulations that add friction to the possession and carrying of firearms by the law-abiding are properly resolved under tight analogical reasoning that excludes the *tainted* historical restrictions. These are *Category Three* cases. And these were the primary focus of *Bruen*.

II. By Acknowledging the Distinct Subcategories of Cases Already Embedded in Existing Second Amendment Doctrine, the Court Can Properly Credit the Tainted Historical Arms Restrictions and Also Properly Contain Them

There is abundant evidence that the framing generation anticipated robust restrictions (grounded on state and local police powers) prohibiting arms access by those deemed dangerous. *See*, *e.g.*, *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023). Those prohibitions included tainted, invidious classifications, based on characteristics such as race and religion, that are plainly unconstitutional today. *See*, *e.g.*, Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo. L. Rev. 249, 258-271 (2020) (detailing the English and American history of disarming violent and dangerous persons).

These tainted historical restrictions are entirely inapt analogies for deciding Category Three cases (*i.e.*, restrictions on lawful keeping and bearing of arms by the law-abiding). Category Three cases that were the primary focus of *Bruen* are properly resolved under tight analogical reasoning that excludes the tainted historical restrictions.

However, the tainted historical restrictions *do* affirm a broad tradition within which targeted restrictions on persons deemed dangerous under the standards of the day were valid. That tradition

undergirds the declaration in *Heller* that restrictions on felons and the mentally ill are presumptively lawful. *Heller*, 554 U.S. at 626.

The tainted historical restrictions are at best only loose analogies to modern restrictions on persons deemed dangerous because they invoke classifications that are facially unconstitutional today. But they do affirm *Heller*'s declaration that barring arms to those deemed dangerous is presumptively valid. *Heller*, 554 U.S. at 626.

The tainted historical restrictions also add an important filter to contemporary assessments of the legitimacy of barring arms to those deemed dangerous. They underscore, by comparison, that contemporary Category Two regulations must be grounded on constitutionally and factually legitimate markers of dangerousness.

III. Fully Integrating the Constitution's Limited Power Framework into the *Bruen* Analysis Favors Respondent

The limited power structure of the United States Constitution plays an important role in the understanding of individual constitutional rights and is implicit in the text, history and tradition standard articulated in *Bruen*. Full integration of the rights-protecting function of limited power into the *Bruen* analysis favors a decision for Respondent. While the sort of arms prohibition at issue here might fairly be

grounded on state police powers, it outruns the limited powers of the Federal Government.

The United States Constitution did not create individual rights. The document that emerged from the Constitutional Convention in September 1787, and was ratified in 1788, did not include a bill of rights. Rather, it protected individual rights through a structure of limited, enumerated powers. Limited, enumerated powers prevented the new government from acting in ways that would infringe the rights of individuals and the prerogatives of the states. *See generally* Nicholas J. Johnson, *The Power Side of the Second Amendment Question: Limited, Enumerated Powers and the Continuing Battle over the Legitimacy of the Individual Right to Arms*, 70 Hastings L. J. 717 (2019).

The limited grant of jurisdiction to the new federal government was widely viewed as equally, if not more, effective than a positive declaration of rights. In Federalist 84 Alexander Hamilton explained that a bill of rights was inapt in a constitution that protected individual rights through a scheme of limited powers:

> [A] minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns.

The Federalist No. 84, at 512-13 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *See also* Richard A.

Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1390 (1987) ("Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits.").

The rights-protecting function of limited power did not disappear when the Bill of Rights was subsequently proposed and then ratified in 1791. The Bill of Rights did not create individual rights. It simply affirmed a select list drawn from a broad spectrum of rights already protected in 1788 by virtue of the limited power granted to the new federal government. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 287-288 (1990) (Brennan, J., dissenting) ("[T]he Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.").

State ratifying conventions endorsed the Constitution and amendments in a way that underscored the rights-protecting function of limited power. *See* Johnson, *supra*, at 734-736 (discussing the explicit linkage between individual rights and limited power in the ratification messages of Virginia, North Carolina, Rhode Island and Pennsylvania). Virginia's ratification statement, for example, treated individual rights and limits on federal power as synonymous.

> [T]hose clauses which declare that congress shall not exercise certain powers [referring to

> proposals for explicit enumeration of certain of rights], be not interpreted in any matter whatsoever; to extend the powers of congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

Debates and Other Proceedings of the Convention of Virginia 475 (2d ed. Richmond, Enquirer-Press, 1805).

Understanding the right to arms in historical context requires viewing the Second Amendment within the framework of the limited, enumerated powers granted to the newly created federal government. That view of the Second Amendment controlled well into the twentieth century. Indeed, it is a primary driver of the first major federal gun control law, the 1934 National Firearms Act, which was structured as a prohibitive tax on the view that Congress had no outright constitutional authority to ban "gangster weapons." *See* Johnson, *The Power Side of the Second Amendment Question* at 750-760 (discussing the passage of the 1934 National Firearms Act).

Lower courts have started to acknowledge limited federal power as a factor in the analysis of Second Amendment rights under *Bruen*. *See*, *e.g.*, *Range v. Attorney General United States*, 69 F.4th 96 at 107-108 (3d Cir. 2023) (Porter, J., concurring) ("The right declared in the Second Amendment was important, but cumulative. The people's first line of defense was the reservation of a power from the national government."). Even *Amici* Professional Historians, who have

harshly criticized this Court's Second Amendment jurisprudence, acknowledge that, at the time of the Framing, "outside the question of whether militia members would be armed at national, state, or personal expense, there was no credible basis upon which the national government could regulate possession of firearms." Brief of *Amici Curiae* Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer, *et al.*, in Support of Petitioners at 31, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290). Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 Fordham L. Rev. 721, 740-42 (2013) (characterizing the majority opinion in *Heller* as a "scam" resting on "manipulations and misrepresentations."); Jack Rakove*, A Challenge of Heller's Historical Interpretations*, SCOTUSblog June 28, 2010 ("The most encouraging note, from my vantage point, is the willingness of the two dissenting opinions to challenge the historical suppositions (for I cannot call them valid arguments) that underlay the original decision in *Heller*."), https://www.scotusblog.com/2010/06/mcdonald-challenging-hellers-historical-interpretations/.

The proceedings against Respondent fall neatly into Category Two (limitations on dangerous persons). However, integrating the role of limited power into the analysis casts serious doubt on the legitimacy of 18 U.S.C. § 922(g)(8) in this case.

The presumptive validity of restrictions on dangerous persons is robust in the context of state and

municipal restrictions grounded on general police powers. Virtually all of the historical precedents from the founding era are state and local regulations. If Respondent were directly and solely challenging a state restriction classifying him as dangerous and depriving him of arms, he should lose.

However, this case involves *federal* restrictions, penalties and infringements on the right to arms. The presumptive validity of federal restrictions on the right to arms is far less robust because the federal government lacks general police powers.

One could not guess this from the brief of the United States, which argues that "the Second Amendment Allows Congress to Disarm Persons Who Are Not Law-Abiding, Responsible Citizens." Brief of the United States, p.10. But the Second Amendment does not grant authority to Congress to legislate. Rather, it prohibits Congress from infringing the right to keep and bear arms.

Where, then, does Congress acquire the power to infringe the right? The brief of the United States is silent on the point. The only arguable source of congressional power would be the Interstate Commerce Clause of Article I, Section 8 of the Constitution. However, the argument in the brief of the United States ignores it.

18 U.S.C. § 922(g)(8) potentially prohibits four acts. A subject person may not ship, transport, possess or receive a firearm in interstate or foreign commerce. 18 U.S.C. § 922(g)(8). Nothing suggests that

Respondent shipped or transported firearms. Thus, the United States must show that Respondent either possessed or received a firearm "in or affecting commerce." *Id.*

The United States does not even attempt to explain how the Respondent's possession of a firearm while subject to a state domestic relations protective order was either "in" or "affecting" any commerce at all, much less interstate commerce.

This case is similar to *United States v. Lopez*, 514 U.S. 549 (1995). There the Court struck down a provision of the Gun-Free School Zones Act of 1990, that made it a federal offense to knowingly possess a firearm in a school zone. The Court held that the Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." 514 U.S. at 551.

If mere possession is not commercial activity, *viz. Lopez*, then it requires a stretch of the imagination to picture mere possession as *affecting* commerce. *See United States v. Morrison*, 529 U.S. 598 (2000) (rejecting an attenuated causal chain theory as a basis for Commerce Clause regulation). *See also Lopez* at 663 (Thomas, J., concurring) ("From the time of the ratification of the Constitution to the mid-1930's . . . there was no question that activities wholly separated from business, such as gun possession were beyond the reach of the commerce power"). Finally, the statute contains no findings as to whether or how interstate commerce is affected by mere possession.

Were Respondent's firearms once items of interstate commerce that were "received" in violation of 18 U.S.C. § 922(g)(8)? There is nothing on this point in the brief of the United States or in the Joint Appendix. Even if his firearms once traveled across state lines, they must be presumed, absent more, to have exited the stream of interstate commerce. *See A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).[2]

The Interstate Commerce power does not trump the Second Amendment. An Article I constitutional power cannot be used to abrogate rights protected by amendments. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[2] *Scarborough v. United States*, 431 U.S. 563 (1977), decided decades before *Bruen*, is not dispositive of this case. There the Court merely interpreted the scope of the statute and did not reach the question of the constitutional sufficiency of Congress's rationale.

CONCLUSION

Integrating the historical limits on federal power into the *Bruen* analysis dictates that Respondent's Second Amendment challenge to 18 U.S.C. § 922(g)(8) should prevail.

Respectfully submitted,

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