No. 22-915

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZACKEY RAHIMI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Moral Law is an Alabama-based, national public-interest organization dedicated to the strict interpretation of the Constitution as intended by its Framers to recognize and secure our God-given rights. The Foundation believes that the natural right to self-defense is necessary to both enjoy and protect our other God-given rights. The Founders understood this principle well and recognized it with the Second Amendment's protection of individual ownership and use of firearms, not only for self-defense of one's person, but also one's family and community.

Believing that the Founders' original understanding of the Second Amendment is vital to maintaining a free and secure society, the Foundation for Moral Law has filed *amicus* briefs in support of the right to self-defense.

SUMMARY OF THE ARGUMENT

The United States of America as we know it owes its existence to the right of private ownership of firearms. Had American Patriots not had a long historical tradition of firearm ownership, the

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Revolutionary War would be remembered today as a simple colonial insurrection, dispatched with ease by the British Crown.

Instead, Americans' deep-rooted history of private firearm ownership enabled the defense of life, liberty, and property, and birth of the United States of America. Out of this bloody travail, the Founders enshrined the God-given right to private firearm ownership in the Second Amendment as "the right of the people to keep and bear arms." U.S. Const. amend. II.

In *New York State Rifle Pistol Ass'n v. Bruen*, this Court reiterated its holding in *District of Columbia v. Heller* that the plain text and history of the Second Amendment commands when analyzing firearm regulations. 142 S. Ct. 2111, 2126-27 (2022). Analyzing a regulation limiting firearms only requires one question: is it "consistent with this Nation's historical tradition of firearm regulation?" *Id.* at 2026. If the government cannot bear its burden to prove an affirmative "yes," then the regulation violates the Second Amendment and must be struck down.

In this case, Petitioner cannot prove that the regulation at issue is consistent with the historical tradition of the Second Amendment as required by *Bruen*. As thoroughly argued by Respondents, the historical tradition does not contain any sufficient analogue to 18 U.S.C. § 922(g)(8). Furthermore, the Founders would have never tolerated Congress

passing a law restricting firearm ownership.

The court of appeals below correctly applied *Bruen* by reviewing the historical tradition and finding no analogue to § 922(g)(8). This Court should affirm the well-reasoned and thorough opinion of the court below.

ARGUMENT

I. The Historical Tradition of the Second Amendment.

A. The starting point for the historical tradition in English History.

In *Bruen*, this Court reiterated that we have inherited the right to private ownership of firearms from our English ancestors. The Court cautioned, however, that "courts must be careful when assessing evidence concerning English common-law rights" due to their development over time. *Id.* at 2027. This is particularly important in the Second Amendment context because English history leading up to the adoption of the English Bill of Rights in 1689 shows a fraught back and forth as restrictions were levied for political purposes. See Leonard Levy, *Origins of the Bill of Rights* 137 (1999).

The English Bill of Rights guaranteed that "the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." English Bill of Rights (Dec. 16, 1689), *reprinted in* 5 *The Founders' Constitution* 210 (Phillip Kurland & Ralph Lerner eds., 1987). While the language initially limited the right to

Protestants, England's population was 98 percent Protestant at the time, so the provision granted a nearly universal right to possess personal defense weaponry over which the king had no control.

Later, Sir William Blackstone described the right in his *Commentaries on the Laws of England* as the "right of the [citizens] . . . of having arms for their defense," which flowed from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." W. Blackstone, I *Commentaries on the Laws of England* 139 (U. Chi. Fascsimile Ed. 1979) (1765). The colonial Americans exported this tradition to the colonies just in time, for as observed by St. George Tucker in his American edition of Blackstone's *Commentaries*, "In England, the people have been disarmed, generally, under the specious pretext of preserving the game." This was done by interpreting the words "suitable to their conditions" in the English Bill of Rights "to authorize the prohibition of keeping a gun or other engine for the destruction of game, . . . So that not one man in five hundred can keep a gun in his house without being subject to a penalty." St. George Tucker, *View of the Constitution of the United States* 239 (Clyde Wilson ed. Liberty Fund 1999) (1803).

B. The historical tradition of the Second Amendment in early American history.

Well aware of England's history concerning the degradation of the right to bear arms, Americans did not want to see the same history repeated in

their newfound country. They had already experienced the British penchant for disarming the people firsthand during the Revolution.

In fact, the battles that initiated the war at Lexington and Concord in Massachusetts began when the British ordered troops to march to Concord and seize a gunpowder reserve and cannon. *See* Thomas Fleming, *Liberty: The American Revolution* 105-106 (1997). Three days after "the shot heard round the world," General Thomas Gage tricked the people of Boston into turning in their arms, an "open violation of honour" that the Second Continental Congress complained of in the *Declaration of the Causes and Necessity of Taking Up Arms* which it approved on July 6, 1776. *See* Stephen P. Halbrook, "The Original Understanding of the Second Amendment," *in The Bill of Rights: Original Meaning and Current Understanding*, at 118-120 (Eugene Hickcock, Jr. ed., 1991).

The colonies' first-hand experience with the importance of arms ownership during the Revolutionary War led them to include the right to bear arms in their new state constitutions. Gun ownership was so ubiquitous among Americans that, during the debates on the Constitution, James Madison attempted to assuage fears that the new federal government could become tyrannical:

> Besides *the advantage of being armed, which the Americans possess over the people of almost every other nation*, the existence of subordinate governments, to which the people are attached and by which the militia

> officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist No. 46, at 247 (Carey & McClellan eds., 2001) (emphasis added).

Likewise, Noah Webster sought to calm the same fears of the Constitution leading to tyranny by stating that "The supreme power in America cannot enforce unjust laws by the sword; *because the whole body of the people are armed*, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. "An Examination of the Leading Principles of the Federal Constitution," (1787) *reprinted in* 1 *The Debate on the Constitution*, at 155 (Bernard Bailyn ed., 1993) (emphasis added).

II. The Founders Would Have Never Tolerated a Restriction on Arms by the Federal Government.

While Federalist assurances may have rested on the incontrovertible fact that there was widespread gun ownership in America, the critics of the nascent Constitution were not convinced. One such critic, writing under the pseudonym "Common Sense," declared that "the chief power will be in Congress, and that what is to be left of our government is plain, because a citizen may be deprived of the privilege of keeping arms for his own defence, he may have his property taken without a trial by jury." "Common Sense," *New York Daily Advertiser* (April 21, 1788).

The deprivation of arms was intolerable because, as stalwart Anti-Federalist Richard Henry Lee intoned in one of his "Federal Farmer" letters, "to preserve liberty, it is essential that the whole body of the people always possesses arms." Letter XVIII (January 25, 1788), *in An Additional Number of Letters From the Federal Farmer to the Republican* 170 (1788).

These Anti-Federalist sentiments were echoed in the state ratifying conventions by those who opposed the Constitution. George Mason was the father of the Virginia Bill of Rights and a Constitutional Convention delegate who refused to sign the final document in part because of its lack of a Bill of Rights. In the Virginia Ratifying Convention, he expressed his belief that "divine providence has given to every individual the means of self-defense" and that "disarm[ing] the people [is] the best and most effectual way to enslave them." Virgina Ratifying Convention (June 14, 1788), *as reprinted in CBR*, at 193-94. Given the importance of this right, he wondered aloud, "Why should we not provide against this danger. . .?" *Id.* Vocal critic of the Constitution, Patrick Henry agreed with Mason, rehearsing what the point would be of having an amendment on the topic: "The great object is that every man be armed. . . . Everyone who is able may have a gun . . . ." *Id.* at 198.

Anti-Federalist concerns found their official expression in the proposals for additions to the Constitution made by the ratifying conventions. Five of the eight states whose convention majority or minority submitted proposals related to arms

included the states that "the people have a right to keep and bear arms," and all five separated the statement from any mention of the militia. *See CBR*, at 181-82. While the proposals differed, the final adopted language makes clear that the states ratified the Constitution on the understanding that "Congress shall make no law" restricting the right of firearm ownership and possession.

As a federal law passed by Congress, § 922(g)(8) restricts firearm possession throughout the entire United States. The Founders who ratified the Constitution on behalf of their respective states would have never tolerated such a restriction.

CONCLUSION

Following this Court's instruction in *Bruen* to analyze firearm regulations under the single step inquiry of whether the regulation is "consistent with this Nation's historical tradition of firearm regulation," the court of appeals below found that U.S.C § 922(g)(8) violates the Second Amendment. Their decision is a thorough and faithful application of the Founders' original understanding of the Second Amendment's "right to bear arms."

This Court should affirm the decision below.

Respectfully submitted,

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