No. 22-76

In the Supreme Court of the United States

KEITH L. CARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Federal law prohibits the possession of a firearm or ammunition by any person who is "an *unlawful user* of or addicted to any controlled substance." 18 U.S.C. § 922(g)(3) (emphasis added).

The question presented is: Whether the government, to establish that the defendant is an "unlawful user" of a controlled substance, must show the defendant's regular or habitual drug use, or instead may establish that element based on a single incident of drug use on the day of arrest.

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because the right to keep and bear arms for self-defense is fundamental. An individual does not forfeit this right by engaging in one-time unlawful drug use.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. 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

The Second Amendment protects the individual right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Last term, this Court held that a government seeking to regulate this individual right "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S. Ct. 2111, 2127). Only if the regulation comports with history and tradition "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126. Yet, in the decision below, the Eighth Circuit's pre-*Bruen* interpretation of the Gun Control Act (GCA) treated the individual right to keep and bear arms as flimsy enough to crumble once the government presents evidence of a single incident of unlawful marijuana use. This interpretation of the scope of Second Amendment rights is untethered from history and tradition and incompatible with *Bruen*.

Before the promulgation of the Gun Control and Controlled Substances Acts, few laws regulated the possession of firearms based on past intoxicant use. Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. Crim. L. 211, 230–31 (2020) (detailing the history of drug and firearm regulation in America, beginning with the original language of the Gun Control Act of 1968). Between 1868 and 1909, a handful of states passed laws addressing the use, sale, and possession of firearms *by* intoxicated individuals rather than by individuals who, at some point in their lives, had been intoxicated or had used prohibited

intoxicants. *See* Robert J. Spitzer, Guns Across America: Reconciling Gun Rules and Rights 185 (2015). Further, the few state laws that existed were narrowly tailored and focused on public safety stemming from the present use of intoxicants. *Id.* at 39. But even the most committed proponent of drug prohibition can't make a serious case that having ever used illegal drugs even once marks someone as a threat to public safety for life. Moreover, the penalties imposed by state laws involving present intoxication were also limited, imposing small fines or short-term imprisonment in the county jail. Lifetime dispossession was certainly not the result.

The Eighth Circuit's holding conflicts with *Bruen* by allowing the government to effectively deprive Petitioner of his Second Amendment rights without "affirmatively proving" that the regulation has sufficient basis in history and tradition. *Bruen,* 142 S. Ct. at 2156. It also leads to constitutionally absurd results: 49 percent of American adults report having tried marijuana at least once. Jeffrey M. Jones, *Nearly Half of U.S. Adults Have Tried Marijuana*, Gallup (Aug. 17, 2021).[2] If one-time use were sufficient to permanently deprive "unlawful users" of their Second Amendment rights, then the only thing preventing the government from dispossessing half the country is the lack of resources required to prosecute and convict the tens of millions of gun owners and who have consumed marijuana. And because the GCA's "unlawful user" prohibition applies to "any controlled substance"—which includes all five schedules of the CSA—a wide range of less-restricted drugs are also covered. Thus, taking Xanax (listed in Schedule IV) once without a

[2] Available at https://bit.ly/3K7Nk5X.

prescription would make someone an "unlawful user" under the Eighth Circuit's test, as would taking a dose of a friend's prescription decongestant. This is why Section 922(g)(3) can't be interpreted with blunt, mechanistic textualism—"unlawful user" means unlawful user—as indeed the majority of circuit courts recognize. If the Eighth Circuit's interpretation were given nationwide effect, over half the country would be at risk of becoming felons because they once sampled a pot-infused brownie or shared a spouse's Ambien to be able to sleep on a long flight. While the government would doubtless argue that it is unlikely prosecutors would go after untold Americans for taking Xanax and sleeping pills, it is equally unlikely that the government would *disclaim* the authority to do so. Like the First Amendment, the Second Amendment requires more.

This Court should grant certiorari not only because the Eighth Circuit was wrong pre-*Bruen*—and certainly wrong post-*Bruen*—but also to ensure that *Bruen* is the standard the government must meet in all settings where it seeks to deprive someone of a firearm. Modern Second Amendment doctrine is still in its infancy—lower courts have shown that they need substantial oversight and direction to get it right. The extensive literature about regulating firearms based on individuals' use of intoxicants, together with the doctrinal developments in *Bruen*, present an ideal opportunity for the Court to articulate and update the relevant analytical framework for lower courts.

ARGUMENT

I. PROHIBITING GUN POSSESSION BASED ON ONE-TIME UNLAWFUL DRUG USE IS UNKNOWN IN THE HISTORY AND TRADITION OF AMERICAN FIREARM REGULATION

The *Bruen* decision instructed lower courts to employ a historical analysis—looking to America's historical tradition of firearm regulation to determine whether an individual's conduct falls outside the Second Amendment's "unqualified command." *Bruen*, 142 S. Ct. at 2126. If the challenged restriction is not consistent with the text, history, and tradition of firearm regulation in America, then it fails under *Bruen*. Forever prohibiting gun ownership or possession by those who have ever used illegal intoxicants falls well outside acceptable historical regulation of firearms.

Congress enacted the Gun Control Act of 1968 with the purpose of "keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *See Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. No. 90-1501, at 22 (1968)). Just two years after the passage of the GCA, Congress enacted the Controlled Substances Act (CSA). The purpose of the CSA was to "combat the heightening drug epidemic" by creating "a unified federal drug policy." Ira P. Robbins, *Guns N' Ganja: How Federalism Criminalizes the Lawful Use of Marijuana*, 51 U.C.D.L. Rev. 1783, 1790 (2018). Section 922(g)(3) of the GCA marries the two acts and targets the possession of firearms by "unlawful users" of controlled substances. 18 U.S.C. § 922(g)(3).

Today, the CSA, through its incorporation in Section 922(g)(3), is one of the main instruments for firearm regulation in America. *See* Stevenson, *supra*, at 215 ("Given that most felony convictions are drug-related, our otherwise-goofy federal drug law ends up being our primary operational form of gun control—nothing else even comes close, except the age requirements for purchasers. Despite the awful problems with the Controlled Substances Act and the mass incarceration it produces, one could argue that the CSA is our main form of gun control right now."). Prior to the enactment of the CSA, federal drug prohibition had been built over time through "a patchwork of regulatory, revenue, and criminal measures." Alex Kreit, *Controlled Substances, Uncontrolled Law*, 6 Alb. Gov't L. Rev. 332, 334 (2013) (internal quotations and citation omitted). It was not until 1914, when Congress functionally banned the sale of opiates and cocaine, that the federal government started taking drug regulation seriously. *Id.* Similarly, the first federal law regulating firearms was not enacted until 1919, "when the Sixty-Sixth Congress imposed an excise tax on imported firearms and ammunition." Ben Ramberg, *Prior Involuntary Institutionalization Does Not Justify a Lifetime Second Amendment Ban: An Originalist Approach to 18 U.S.C. § 922(g)(4)*, 31 Kan. J. L. & Pub. Pol'y 297, 301 (2022).

Before these 20th-century federal statues, few laws existed in America targeting the possession of firearms by users of intoxicants. One of the earliest such laws was enacted in Virginia in 1631 and prohibited individuals from wasting gun powder by firing guns while under the influence of alcohol. 1631 Va. Act. 173 ("No commander of any plantation, shall either himself or suffer others to spend powder unnecessarily, that is to

say, in drinking or entertainments.") (cleaned up). But statutes regulating the use of guns by intoxicated persons were scarce until the late 19th century, when a handful of other states began enacting legislation to regulate alcohol consumption and firearm use. *See* Spitzer, *supra*, at 185 (providing a detailed appendix listing state gun laws enacted between 1607 and 1934).

Between 1868 and 1909, a handful of states passed laws addressing the use, sale, and possession of firearms by intoxicated individuals. *Id.* While the ultimate goal of these statutes was to promote public safety, each law varied in the activities it restricted. *Id.*

In 1868, Kansas enacted a law prohibiting "any person under the influence of intoxicating drink" from carrying a pistol "on his person." 1868 Kan. Sess. Laws 353.[3] Violation of this statute resulted in a fine or imprisonment, but not forfeiture of the weapon. *Id.* At the beginning of the 20th century, Missouri and Idaho enacted similar laws prohibiting possession of a firearm while "intoxicated or under the influence of intoxicating drinks," with Idaho providing an exception for individuals demonstrating a need to possess the weapon for self-defense.[4]

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[3] "A]ny person under the influence of intoxicating drink . . . who shall be found within the limits of this state, carrying on his person a pistol, bowie-knife, dirk or other deadly weapon, shall be subject to arrest upon the charge of misdemeanor, and upon conviction shall be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or both, at the discretion of the court."

[4] 1879 Mo. Laws 224 ("If any person . . . shall have or carry any [firearm or dangerous weapon] upon or about his person when intoxicated or under the influence of intoxicating drinks . .

In 1896, Rhode Island enacted a law prohibiting intoxicated individuals from carrying firearms "concealed upon [their] person" and did, in fact, give the state authority to confiscate the weapon. 1896 R.I. Pub. Laws 232.[5] This statute, however, only prohibited possession of a concealed firearm if the intoxicated person was arrested and charged with a crime "or for being drunk or disorderly." *Id.* The law did not prohibit intoxicated individuals from possessing guns but rather allowed the state to impose fines and confiscate weapons where an individual was intoxicated and being arrested or charged with another crime. *Id.* Moreover, the statute made no indication that the confiscation of the firearm was to be permanent or for longer than it would take for the drunken individual to sober up. *Id.*

In 1907, Arizona enacted a similarly narrow law prohibiting gun possession while intoxicated. The

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. he shall, upon conviction, be punished by a fine of not less than five nor more than one hundred dollars, or by imprisonment in the county jail not exceeding three months, or by both fine and imprisonment."); 1909 Idaho Sess. Laws 6 ("If any person . . . shall carry concealed upon or about his person [a firearm or other dangerous weapon] . . . [and] shall have or carry any such weapon upon or about his person when intoxicated, or under the influence of intoxicating drinks . . . he shall, upon conviction, be punished [by fine or imprisonment]; [p]rovided however, that it shall be a good defense to the charge of carrying such concealed weapons if the defendant shall show that he has been threatened with great bodily harm, or had good reason to carry the same in the necessary defense of his person, family, home or property.").

[5] "Whenever any person shall be arrested charged with any crime or misdemeanor, or for being drunk or disorderly, or for any breach of the peace, and shall have concealed upon his person [a firearm] such person, upon complaint and conviction . . . shall be subject to a fine of not less than five dollars nor more than twenty-five dollars and the confiscation of the weapon so found."

Arizona law specifically focused on police officers and prohibited "any constable or other peace officer, while under the influence of intoxicating liquor of any kind, to carry . . . a pistol, gun, or other firearm while so intoxicated." 1907 Ariz. Sess. Laws 15.[6] Arizona did not prohibit gun possession by intoxicated individuals who were not members of law enforcement. *Id.*

Not all states viewed the mere possession of a weapon by intoxicated individuals as inherently dangerous, and instead restricted people from *using* or *purchasing* firearms while under the influence of alcohol. Thus, for example, Nevada and South Carolina prohibited activities posing obvious threats to public safety, such as drunkenly firing a gun along a public road. 1881 Nev. Stat. 19; 1899 S.C. Acts 97.[7]

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[6] "It shall be unlawful for any constable or other peace officer in the Territory of Arizona, while under the influence of intoxicating liquor of any kind, to carry or have on his person a pistol, gun, or other firearm, or while so intoxicated to strike any person, or to strike at any person with a pistol, gun or other firearm, or to use any vile or abusive language to any person, or for any such officer while under the influence of intoxicating liquor of any kind, to attempt to arrest, or threaten to arrest any person, without a warrant, except for offenses committed at the time in his own view."

[7] 1881 Nev. Stat. 19 ("Any person in this State under the influence of liquor or otherwise, who shall, except in necessary self-defense, maliciously, wantonly or negligently discharge or cause to be discharged any pistol, gun or other kind of firearm, in or upon any public street or thoroughfare . . . shall be deemed guilty of a misdemeanor . . . ."); 1899 S.C. Acts 97 ("[T]hat any person who shall engage in any boisterous conduct, under the influence of intoxicating liquors, or while feigning to be under the influence of such liquors, or without just cause or excuse, shall discharge any gun, pistol or other firearms while upon or within fifty yards of any public road, except upon his own premises, shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of

The use of intoxicants is of course not unique to modern American society, nor is the possession of firearms by those who periodically use intoxicants. *See* Mary B. Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, & Implications for the Acute Care Setting*, 42 Pharmacy & Therapeutics 180, 180 (2017) ("[C]annabis was widely utilized as medicine during the 19th and early 20th centuries.");[8] Mark R. Jones et al., *A Brief History of the Opioid Epidemic & Strategies for Pain Medicine*, 7 Pain & Therapy 13, 15 (2018) ("There was no regulation on the use of cocaine and opioids, resulting in widespread marketing and prescribing for many ailments ranging from diarrhea to toothache.").[9] "When a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131. The use of substances like marijuana and opiates went federally unregulated until the Harrison Narcotics Tax Act of 1914. Jones et al., *supra*, at 15. States, of course, have long regulated the permissible uses of alcohol, and the simultaneous consumption of alcohol and possession of firearms could not have been unusual during the Founding era. In fact, the Founding era was flush with alcohol use. According to one account, "From morning until night, people in the 18th century drank." Amanda Cargill, *What Did the Founding Fathers Eat and Drink as They Started a Revolution?*, Smithsonian Magazine (July 3,

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not more than one hundred dollars or be imprisoned for not more than thirty days."

[8] Available at https://bit.ly/3zYrSwx.

[9] Available at https://bit.ly/3oSMPmx.

2018).[10] And that trend continued in the years after the Founding. W.J. Rodabaugh, *A Nation of Sots: When Drinking Was a Patriotic Duty*, The New Republic (Sept. 29, 1979) ("The average adult drank about three times as much alcohol in the 1820s as adults do now. And the consumption of alcohol had been growing vigorously. Between 1790 and 1830 the annual amount of hard liquor—primarily whiskey—that an average American drank nearly doubled.").[11]

Nevertheless, statutes regulating possession and use of firearms by those engaging in drug or alcohol use were exceedingly rare until the late 19th and early 20th centuries. Prohibitions on merely possessing a firearm based on past use of intoxicants are a novelty of the mid-20th-century and not remotely comparable to the firearm laws of the past.

II. THE EIGHTH CIRCUIT'S INTERPRETATION OF SECTION 922(G)(3) IS AHISTORICAL, UNPOPULAR IN THE CIRCUITS, AND LEADS TO UNCONSTITUTIONAL RESULTS

The Eighth Circuit's interpretation of Section 922(g)(3) takes it even further outside the bounds of analogous historical firearm restrictions by prohibiting anyone who has engaged in the unlawful use of a controlled substance at least one time from possessing a firearm. The existence of a handful of 19th- and 20th-century state laws regulating the possession of firearms by intoxicated persons is not remotely sufficient to justify dispossessing Americans of their right to own a firearm based on one-time drug use. *See Bruen*, 142 S. Ct. at 2154 ("[T]he bare existence of . . . localized

[10] Available at https://bit.ly/2z9YN3T.

[11] Available at https://bit.ly/3TbnHoR.

restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition."); *see also id.* at 2154 ("[L]ate-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."). In determining whether a given firearm regulation is consistent with the Second Amendment, courts must determine "whether modern historical regulations impose a comparable burden on the right of armed self-defense," and "whether that regulatory burden is comparably justified." *Id.* at 2133. The Eighth Circuit's interpretation of Section 922(g)(3) departs from history and tradition by stripping individuals of their Second Amendment rights upon evidence of a single instance of marijuana use.

As discussed above, historically, laws restricting the possession of firearms focused on public safety and were narrowly tailored to address specific and self-evidently hazardous activities. Spitzer, *supra*, at 39. In contrast, Section 922(g)(3) bars anyone who falls within the broad classification of "unlawful user" from possessing a firearm because of the *potential* for danger. *Barrett v. United States*, 423 U.S. 212, 218 (1976) ("The very structure of the [GCA] demonstrates that Congress . . . sought broadly to keep firearms away from the person Congress classified as *potentially* irresponsible and dangerous.") (emphasis added).

The desire to prevent the potentially dangerous individuals from possessing firearms is a compelling government interest. For this reason, lower courts have upheld Section 922(g)(3)'s prohibition as applied to *habitual* drug users under their post-*Heller* framework. *See United States v. Yancey*, 621 F.3d 681, 685–86 (7th Cir. 2010) (describing how habitual drug users,

like felons and the mentally ill, are 'more likely to have difficulty exercising self-control," thus, "making it dangerous for them to possess deadly firearms"); *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) ("Like our sister circuits, we see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so."). Nevertheless, as this Court held in *Bruen*, a compelling interest is not by itself a sufficient justification for stripping individuals of their Second Amendment rights. 142 S. Ct. at 2129 (declining to engage in means-end scrutiny because "the very enumeration" of the right to keep and bear arms "takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon") (quoting *Heller*, 554 U.S. at 624). Even if this Court were to conclude that history and tradition supports a ban on firearm ownership for *habitual* drug users, the Eighth Circuit goes farther still in stripping non-violent citizens of their right to own a firearm for self-defense simply because they engaged in one-time drug use.

Moreover, the Eighth Circuit's conclusion leads to unconstitutional and absurd results. As mentioned above, nearly half of American adults report having tried marijuana at least once. Jones, Gallup poll, *supra*. As of February 3, 2022, 37 states have legalized marijuana for medical use, and as of May 27, 2022, 19 states have enacted measures to legalize marijuana for recreational use. *State Medical Cannabis Laws*, National Conference of State Legislatures (July 18, 2022).[12] And six more states could legalize recreational

[12] Available at https://bit.ly/3SRLfiB.

marijuana by the end of 2022. Jacob Sullum, *Six More States Could Legalize Recreational Marijuana This Fall*, Reason (Aug. 15, 2022).[13] Nevertheless, marijuana remains a Schedule I drug under the CSA, meaning those using marijuana lawfully under state law, medicinally or recreationally, are still prohibited from legally purchasing or possessing a firearm. *See* Stevenson, *supra*, at 213. The federal firearm background-check form, ATF Form 4473, asks buyers whether they are "an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?" The meaning of this question is not clarified—except to remind the applicant that it is irrelevant whether marijuana is legal under his state's laws—and the ATF has stubbornly refused to define or clarify the terms. But lying on the form is still a felony that carries up to a ten-year sentence. 18 U.S.C. § 924(a).

As noted above, and on Form 4473, the GCA's "unlawful user" prohibition applies to "any other controlled substance," such as Robitussin AC, Ambien, and decongestant antihistamines. *See Robbins*, *supra*, at 1791. The Eighth Circuit's decision below would abrogate the constitutional right of a large portion of the population to keep and bear arms based on one-time unlawful use of intoxicants or prescription drugs. This is far from being rooted in the "affirmative proof" of history and tradition that this Court requires.

[13] Available at https://bit.ly/3pFn0Xi.

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY WHAT *BRUEN* MEANS FOR THE LARGE NUMBER OF PEOPLE WHO COULD BE CONSIDERED "UNLAWFUL USERS" OF CONTROLLED SUBSTANCES

"Before the Supreme Court's 2008 opinion in *District of Columbia v. Heller*, the Second Amendment had received little Supreme Court attention." Sarah Herman Peck, Cong. Research Serv., R44618, Post-*Heller* Second Amendment Jurisprudence (2019).[14] And until *Bruen*, lower courts had little guidance on how to interpret and apply the Second Amendment to the myriad state and federal laws regulating the acquisition, possession, and use of firearms. *See Bruen*, 142 S. Ct. at 2111. Besides providing much needed direction to lower courts, the *Bruen* decision clarifies Second Amendment jurisprudence and affirms the importance of looking to history and tradition when examining the constitutionality of firearm regulations.

During the post-*Heller*, pre-*Bruen* era, lower courts consistently upheld Section 922(g)(3) against Second Amendment challenges. *See United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010). *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), *cert. denied*, 562 U.S. 1191 (2011); *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011); *United States v. May*, 538 Fed. App'x 465 (5th Cir. 2013), *cert. denied*, 571 U.S. 1102 (2013); *United States v. Carter*, 750 F.3d 462 (4th Cir. 2014), *cert. denied*, 574 U.S. 907 (2014); *Wilson v. Lynch*, 835 F. 3d 1083 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1396 (2017). Now, post-*Bruen*, courts will necessarily have

[14] Available at https://bit.ly/3wh9Mny.

to apply a different standard, and this Court can help clarify what that new framework is and how it should be applied.

The Eighth Circuit's interpretation of the GCA is not congruent with *Bruen*. The rich historical evidence available about regulating firearms based on an individual's use of intoxicants presents an ideal opportunity for this Court to expand on *Bruen* and elaborate its own analysis for lower courts. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 635.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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