No. 23-376

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PATRICK DARNELL DANIELS, JR., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(3), which prohibits any person "who is an unlawful user or addicted to any controlled substance" from possessing a firearm, violates the Second Amendment as applied to Mr. Daniels.

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BRIEF IN OPPOSITION

Title 18, Section 922(g)(3) prohibits any person "who is an unlawful user or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))" from possessing or using firearms. The statute does not define "unlawful user." The statute contains no due process provisions to identify who is disarmed and for how long. Conviction under § 922(g)(3) is a felony and carries a sentence of up to fifteen years. *See* 18 U.S.C. § 924(a)(8). As a result, § 922(g)(3) is, for all practical purposes, a complete and permanent ban on the exercise of a person's Second Amendment rights. *See* 18 U.S.C. § 922(g)(1).

In the question presented, the Government seeks a determination on the facial validity of 18 U.S.C. § 922(g)(3). The Court of Appeals, however, issued a narrower ruling, holding only that § 922(g)(3) was unconstitutional *as applied* to Respondent Patrick Darnell Daniels, Jr.

The Court of Appeals properly applied *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and *District of Columbia v. Heller*, 554 U.S. 570 (2008), in its holding that 18 U.S.C. § 922(g)(3) was unconstitutional *as applied* to Mr. Daniels, utilizing "the historical record compiled by the parties." *Bruen*, 142 S. Ct. at 2130 n. 6; Pet. App. at 12a-34a. The Court of Appeals first determined that Mr. Daniels was one of "the people" protected by the Second Amendment, making his conduct – possession of a firearm – presumptively constitutional. Pet. App. at 7a-9a.

After reviewing the Government's proffered historical analogues, the Court of Appeals concluded that the Government had failed to meet its burden to present sufficient proof that the "Nation's historical tradition of firearm regulation" supports the complete and total restriction on Second Amendment rights set forth in § 922(g)(3). *Bruen*, 142 S. Ct. at 2126; Pet. App. at 34a. Accordingly, § 922(g)(3) was unconstitutional *as applied* to Mr. Daniels. Pet. App. at 34a.

The Government's position in this case is the same one it has taken in *United States v. Rahimi*, *cert. granted*, 143 S. Ct. 2688 (2023) (No. 22-915). The Government seeks to undermine *Bruen*'s history and tradition test by substituting general "principles" for the "distinctly similar" or "relevantly similar" historical analogues that *Bruen* requires. Pet. at 5 (stating that "[t]he Second Amendment allows Congress to disarm persons who are not law-abiding, responsible citizens, and Section 922(g)(3) falls comfortably within that principle."); *Bruen*, 142 S. Ct. at 2131-33 (discussing the "distinctly similar" and "relevantly similar" standards). Adopting this position would diminish the "right of the people to keep and bear arms" under the Second Amendment and reduce the *Bruen* test to a discretionary exercise even more permissive than the means-end scrutiny that this Court has rejected. U.S. CONST., amend. II; *Bruen*, 142 S. Ct. at 2129 (quoting *Heller*, 554 U.S. at 634) (holding that "[w]e declined to engage in means-end scrutiny because "[t]he very enumeration of the right 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."). Alternatively, the Government argues that the Court of Appeals erred in its interpretation of the historical analogues that the Government presented. Pet. at. 15-18. The Government's stated reasons for granting certiorari do not require an exercise of this Court's supervisory power. *See* SUP. CT. R. 10. For these reasons, this Court should deny the petition.[1]

STATEMENT

A. The Court of Appeals' decision

The Court of Appeals cited the following relevant facts in its opinion: In April 2022, two law enforcement officers stopped Mr. Daniels for driving without a license plate. Pet. App. at 2a. One of the officers, a DEA agent, smelled marijuana as he approached the vehicle. *Id.* at 2a. The agents searched the car and found "several marihuana cigarette butts" and two firearms. *Id.* at 2a-3a. In a post-*Miranda* statement, Mr. Daniels admitted that he had been a regular marijuana user. *Id.* at 3a. However, "[a]t no point that night did the DEA administer a drug test or ask Daniels

[1] The Government's petition for writ of certiorari requests that this Court grant certiorari but hold the petition pending the outcome of this Court's decision in *Rahimi*, (No. 22-915). Mr. Daniels' case raises additional questions not at issue in *Rahimi*, including due process and vagueness arguments, discussed *infra*. If the Court grants the Government's petition, for the reasons set forth in this Brief in Opposition, Mr. Daniels respectfully requests that the Court hear the case this term.

if he was under the influence; nor did the officers note or testify that he appeared intoxicated." *Id.* at 3a.

The Court of Appeals began its analysis by identifying the two components of the *Bruen* test: (1) "whether the Second Amendment applies by its terms"; and (2) "whether a given gun restriction is 'consistent with the Nation's historical tradition of firearm regulation.'" *Id.* at 5a (citing *Bruen*, 142 S. Ct. at 2129-30). After determining that Mr. Daniels was one of "the people" protected by the Second Amendment, the Court of Appeals applied *Bruen*'s history and tradition test. Pet. at 7a-9a.

The Government proffered three different historical analogues for the court's consideration: "(1) statutes disarming intoxicated individuals; (2) statutes disarming the mentally ill or insane; and (3) statutes disarming those adjudged dangerous or disloyal." *Id.* at 12a. The Court of Appeals analyzed each of the Government's arguments in detail. The Court of Appeals held that the historical analogues addressing alcohol were most similar to § 922(g)(3), but it also gave serious consideration to the Government's argument that Mr. Daniels' marijuana use rendered him similar to the mentally ill or insane. Pet. App. at 12a-22a.[2] The Court

[2] The Court of Appeals opted to utilize the "relevantly similar" standard of analogical reasoning. Pet. App. at 9a-11a. For purposes of this Brief in Opposition only, Mr. Daniels applies the "relevantly similar" standard in his argument.

of Appeals correctly concluded that those historical analogues, which had limited restrictions on the *use* of firearms did not comport with § 922(g)(3)'s complete and total ban on firearm *possession and use* as applied to Mr. Daniels. Pet. App. at 14a, 16a, 18a, and 22a. The Court of Appeals found the Government's dangerousness argument even less persuasive, noting that the reason for disarming those found to be dangerous or disloyal was based on concerns about political violence, not concerns about an individual's level of responsibility. *Id.* at 32a.

Because the Government's proffered analogues failed to satisfy the *Bruen* test, the Court of Appeals issued a narrow decision holding that § 922(g)(3) was unconstitutional as applied to Mr. Daniels. *Id.* at 34a.

B. Additional facts

Because the Court of Appeals emphasized the "narrowness" of its decision on Mr. Daniels' as applied challenge to § 922(g)(3), it alluded to but did not reach a decision on Mr. Daniels' due process and vagueness arguments.[3] Pet. App. at 18a-19a, 22a. For example, the Court of Appeals discussed how § 922(g)(3) burdened

[3] Mr. Daniels challenged the statute's lack of any procedural due process mechanism in the Court of Appeals. He argued that section 922(g)(3) is unlike many other provisions of § 922(g) that do require some form of due process – including § 922(g)(1) (felon in possession) and § 922(g)(8) (domestic violence restraining orders) – before restricting Second Amendment rights. Initial Brief of Appellant at 29-39, *United States v. Daniels*, No. 22-60596, 2023 WL 1929809, *29-39 (5th Cir. Feb. 3, 2023); Reply Brief of Appellant at 14-15, *United States v. Daniels*, No. 22-60596, 2023 WL 271428, *14-15 (5th Cir. March 27, 2023).

Second Amendment rights in comparison to the historical analogues presented. Pet. App. at 18a. The Court of Appeals held that "[t]he statutory term 'unlawful user' captures regular users of marihuana, but its temporal nexus is vague – it does not specify how recently an individual must 'use' drugs to qualify for the prohibition." Pet. App. at 18a.

Ultimately, the Court of Appeals declined to address those questions. Pet. App. at 4a, n. 1. However, in the event this this Court grants certiorari in this case, Mr. Daniels preserves those questions for review. Mr. Daniels asserts that the due process and vagueness arguments bear on the constitutionality of the statute under the Second Amendment. Additionally, those issues provide an opportunity for this Court to address some of the due process questions raised during oral argument in *Rahimi*. *See* Transcript of Oral Argument at 23, 27, 36-37, 65-57, *United States v. Rahimi*, (No. 22-915).

In support of those preserved questions, Mr. Daniels submits the following additional facts established in the record but not addressed in the Court of Appeals' decision:[4]

1. As the Government stated in its petition, the Court of Appeals noted that law enforcement officers found "several marihuana cigarette butts" in the ashtray of Mr.

[4] These additional facts are pulled from trial testimony and exhibits. That evidence is part of the record before the Court of Appeals, but it is not yet part of the record before this Court.

Daniels' truck. At trial, the Government's forensic expert testified that the weight of the plant material found in the cigarette butts was 0.446 grams, but her report also showed substances other than THC. The presence of other substances indicated that the amount of THC was actually even lower.

2. Mr. Daniels admitted to a history of regular use, but he also told law enforcement that he had not used marijuana for undefined period before the traffic stop due to his living situation and financial difficulties.

3. There is no evidence that Mr. Daniels was under the influence at the time of the traffic stop. "At no point [during the duration of Mr. Daniels' arrest and interrogation] did the DEA administer a drug test or ask Daniels whether he was under the influence; nor did the officers note or testify that he appeared intoxicated." Pet. App., 2a-3a.

4. The fact that Mr. Daniels possessed marijuana, which is legal for medicinal purposes in 38 states and the District of Columbia and is legal recreationally in 24 states and the District of Columbia is significant. *See* https://www.businessinsider.com/legal-marijuana-states-2018-1 (last visited November 19, 2023). The Government portrays drug use and firearms possession as dangerous based on reasons that have no bearing on questions of cognition or sobriety. In reality, marijuana and most prescription drugs that fall under the

Controlled Substances Act are not purchased "on the street" in "drug deals" but in pharmacies and dispensaries.

REASONS TO DENY THE PETITION

This Court should deny the Government's petition for certiorari for the following reasons: First, the Court of Appeals correctly applied the *Bruen* test in Mr. Daniels' case and issued a narrow decision that addressed only the as applied challenge. Second, the Government's arguments regarding application of the *Bruen* test are identical to the arguments it has made in *Rahimi* (No. 22-915). To the extent that the questions presented in *Rahimi* overlap with those in Mr. Daniels' case, this Court can address those questions in *Rahimi* without granting certiorari in this case.

If, however, the Court grants certiorari in this case, Mr. Daniels requests that the Court hear the case this term, alongside *Rahimi*, to address the due process and vagueness challenges that Mr. Daniels raised in the courts below.

I. The Court of Appeals correctly applied *Bruen* in holding Section 922(g)(3) unconstitutional as applied to Mr. Daniels.

While this Court has not specifically resolved the question of whether 18 U.S.C. § 922(g)(3) unconstitutionally infringes upon the Second Amendment, this Court's decisions in *Heller* and *Bruen* provide clear guidance on how courts should approach challenges to statutes like § 922(g)(3). The Court of Appeals' well-reasoned decision is consistent with this Court's precedent in *Heller* and *Bruen*.

Accordingly, the Court need not grant certiorari to review this case. *See* SUP. CT. R. 10.

A. Mr. Daniels is among "the people" protected by the Second Amendment.

The Court of Appeals first held that Mr. Daniels was among "the people" whose conduct is presumptively protected by the Second Amendment. App. at 6a-8a. The Court of Appeals based its analysis primarily on *Heller*. App. at 6a-7a.

In *Heller*, this Court held that "the right of the people" – as the phrase is used in the First, Second, Fourth, and Ninth Amendments to the United States Constitution – codifies an individual right. *Heller*, 554 U.S. at 579. The other three provisions of the Constitution that refer to "the people" – the preamble, section 2 of Article I, and the Tenth Amendment – "deal with the exercise of powers, not rights." *Id.* at 579-80. In all cases, however, the term "the people" "unambiguously refers to all members of the political community, not an unspecified subset." *Id.* at 580.

The Government's position, both in the Court of Appeals and, in part, in its petition, was that only "law-abiding, responsible citizens" are entitled to the protections of the Second Amendment. Pet. App. at 7a ("The government seizes on that language and insists that the Second Amendment does not extend to Daniels because he is a criminal."); Pet. at 6 (incorporating the Government's briefing in *Rahimi*, (No. 22-915), which states in part, "[m]any precursors to the Second Amendment described the class of persons entitled to keep and bear arms using

synonyms for 'law-abiding, responsible citizens.'" Pet.'s Br. at 16, *Rahimi*, (No. 22-915.).

Mr. Daniels notes that the Government appears to have retreated from this position, at least in part. The Government now argues that "responsible" means persons who do not pose an "unusual danger, beyond the ordinary citizen, with respect to harm to themselves or others." Transcript of Oral Argument at 6, 7, 12, 28, *United States v. Rahimi*, (No. 22-915). The Government argued in *Rahimi* that it distinguished those laws disarming groups such as loyalists and rebels (and, foreshadowing this case, "drug addicts") from those laws disarming enslaved people or Native Americans. Transcript of Oral Argument at 4, *United States v. Rahimi*, (No. 22-915). With respect to the latter, the Government argued that those laws "speak to a distinct principle and the textual hook that at the particular point in time those categories of people were viewed as being not among the people protected by the Second Amendment in the first instance." Transcript of Oral Argument at 7, *United States v. Rahimi*, (No. 22-915). However, when Justice Jackson asked about prospective restrictions that legislatures might seek to pass, the Government argued that "*Bruen* requires a close look at history and tradition and analogue to the extent that they exist and are relevant for purposes of articulating the principle. But once you have the principle locked in . . . then I don't think it's necessary to effectively

repeat that same historical analogical analysis. . . .” Transcript of Oral Argument at 55-56, *United States v. Rahimi*, (No. 22-915).

The Government conceded at the *Rahimi* oral argument that “not responsible” and “dangerous” “are essentially getting at the same concept,” as long as the Court did not “backtrack[]” from the principle that “you can disarm those who are not law-abiding, responsible citizens.”[5] Transcript of Oral Argument at 28-29, *United States v. Rahimi*, (No. 22-915). Accordingly, Mr. Daniels raises the point here to preserve his opposition to the Government’s argument that the scope of the Second Amendment is limited in this manner. Mr. Daniels will address the Government’s argument regarding dangerousness in depth in his historical analogue discussion, *infra*.

Regardless of the Government’s current position, the Court of Appeals noted this Court’s use of the phrase “law-abiding, responsible citizens” in both *Heller* and *Bruen* and considered it in determining whether Mr. Daniels is one of “the people” entitled to Second Amendment protection. The Court of Appeals concluded that this Court’s “chosen epithet” (Pet. App. at 6a-7a) did not override the overarching principle set forth in *Heller*, which holds, “[w]e start therefore with a strong

[5]The Government also argued that it preferred the term “responsible” because it did not impose culpability or bad intent on groups like minors or the mentally ill. Transcript of Oral Argument at 12, 28, 29, *United States v. Rahimi*, (No. 22-915).

presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Heller*, 554 U.S. at 581.

Interpreting "the people" broadly represents far more than consistency with *Heller*'s strong presumption regarding the scope of the Second Amendment. The Court of Appeals' reasoning serves two other purposes. First, focusing on the conduct at issue and limiting the analysis of who is among "the people" to the question of whether a particular individual is part of the political community protects the Second Amendment's status. It prevents the Second Amendment from becoming "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the [Fourteenth Amendment's] Due Process Clause." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion). Second, limiting the analysis protects the scope of the other rights that utilize the phrase "the right of the people" – namely the First Amendment's Assembly-and-Petition Clause, the Fourth Amendment's Search-and-Seizure Clause, and the Ninth Amendment's reservation of "other rights retained by the people." *See Heller*, 554 U.S. at 579; U.S. CONST., amend. I, IV, and IX.

By concluding that Mr. Daniels was entitled to Second Amendment protection, even if he qualified as an "unlawful user" under § 922(g)(3), the Court of Appeals faithfully followed this Court's Second Amendment precedent.

B. The Nation has no history or tradition of completely and permanently disarming those who use intoxicants.

In its petition, the Government argues three different theories to support its position that § 922(g)(3) is constitutional. First, the Government makes the "law-abiding, responsible citizen" argument cited *supra* and incorporates its "principle" concept that Congress may disarm those it perceives to be dangerous.[6] Pet. at 4-13.

Second, the Government argues that the Court of Appeals misapplied the historical intoxication statutes. Pet. at 14-15. The Government contends that the temporary and partial restrictions of those historical analogues supports § 922(g)(3)'s complete ban because "unlawful users" are dangerous, even in their sober periods.

Third, the Government presents a different approach to the mentally ill argument it presented to the Court of Appeals. The Government now contends that the historical firearms regulations related to alcohol are not analogous to § 922(g)(3)

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[6] The Government argued to the Court of Appeals, as it does in its petition to this Court, that the phrase "law-abiding, responsible citizen" encompasses a "principle" that courts may utilize in evaluating Second Amendment cases. Pet. at 6-13. Applying that "principle", the Government argues that Mr. Daniels and other people who use marijuana are neither law-abiding nor responsible, so the ban on firearm possession is constitutional. The Government also asserted in its briefing of *Rahimi* (incorporated into its petition here) and at oral argument in *Rahimi* that the "law-abiding, responsible citizen" "principle" is akin to "sensitive places" or "dangerous and unusual weapons" concepts. Petitioner's Brief at 10-11, *United States v. Rahimi*, (No. 22-915); Transcript of Oral Argument at 10-12, 14, 19, 49, *United States v. Rahimi*, (No. 22-915).

because "[d]rinking was legal at the Founding," and so the dangers presented were different than those presented by substance users. Pet. at 15. Alternatively, the Government now contends, for the first time, that there is a historical tradition of committing "habitual drunkards" to asylums and that many states currently "prohibit firearm possession by alcoholics." Pet. at 15-18. The Government posits that *Heller*'s proclamation regarding "longstanding prohibitions on the possession of firearms . . . by the mentally ill" applies whether a person is exhibiting symptoms or not and that, by extension, the Government may disarm "unlawful users" who are sober. Pet. at 17-18 (citing *Heller*, 554 U.S. at 626).

1. The Government's "principle" argument regarding "law-abiding, responsible citizens" undermines the *Bruen* test.

The Government's "principle" argument constitutes the majority of its petition, which also incorporates a significant portion of its merits briefing in *Rahimi*. Pet. at 4-13. That argument can be summarized as follows: (1) At the time of the Founding, the government disarmed those categories of people it found to be dangerous. Those categories included Loyalists and rebels. In the 19th century, the government also disarmed "vagrants." Pet. at 6 (incorporating Petitioner's Brief at 7, 22, 25., *United States v. Rahimi*, (No. 22-915)). (2) Because the Government now declares "unlawful users and drug addicts" to be dangerous, the Government may disarm that entire category of people otherwise entitled to protection under the Second Amendment. Pet. at 6-7.

The Government's position, however, undermines the foundation of the *Bruen* test, which requires the Government "to justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129-30. This Court explained in *Bruen* that *Heller* and *McDonald* identify two "features that render regulations relevantly similar under the Second Amendment" – the "how and why" a particular regulation burdens the Second Amendment right. *Bruen*, 142 S. Ct. at 2132-33. "Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* at 2133 (quoting *McDonald*, 561 U.S. at 767 and *Heller*, 554 U.S. at 599) (internal quotation marks omitted) (emphasis in original).

Bruen specifically warns against the "principle" argument that the Government makes in its petition (and in *Rahimi*). The Government argues that the history and tradition test is not "a regulatory straightjacket" and does not require a "historical twin." Pet. at 13-14; Petitioner's Brief at 38, 42, 46, *United States v. Rahimi*, (No. 22-915) at 38, 42, 46 (quoting *Bruen*, 142 S. Ct. at 2133). However, the Government essentially ignores the other side of the equation.

Bruen also warns that the history and tradition test is "not a regulatory blank check" and that "courts should not 'uphold every modern law that remotely

resembles a historical analogue,' because doing so 'risks[s] endorsing outliers that our ancestors never would have accepted." *Bruen*, 142 S. Ct. at 2133 (quoting *Drummond v. Robinson*, 9 F. 4th 217, 226 (3d Cir. 2021)).

The Government's "principle" argument ignores this Court's admonishment that courts must engage in analogical reasoning that considers whether modern regulations are "relevantly similar" by utilizing the "how and why" metrics. *Bruen*, 142 S. Ct. at 2132-33. Even if courts could adopt a "principle" of "dangerousness" based on the historical analogues disarming Loyalists, rebels, and vagrants, it must also apply the reasoning underpinning those historical analogues. To do otherwise would be to create an exception that swallows the rule.

Bruen's discussion of the "sensitive places" doctrine is illustrative on this point. In *Bruen*, the government (the New York Police) defended a statute that made it a crime to carry a concealed firearm without a license. *See Bruen*, 142 S. Ct. at 2122-23. Under the statute, a license would only issue upon a showing of "proper cause and a "special need for self-protection." *See id.* This Court rejected the government's argument that New York's restriction on concealed carry was proper under the "sensitive places" principle. *See id.* at 2133. This Court opined that, in the 18th and 19th centuries, there were very few places designated as sensitive places that prohibited firearms altogether. This Court identified "legislative assemblies, polling places, and courthouses." *See id.* This Court stated that there could be other

"sensitive places" akin to those that were restricted at the Founding, but it rejected the government's argument that a "sensitive place" could be defined as "all places of public congregation." *See id.* at 2133-34. Adopting that analogical reasoning "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 142 S. Ct. at 2134.

Justice Jackson recognized the flaw in the Government's "principle" argument during oral argument in *Rahimi*, when she questioned the ability to apply the dangerousness "principle" to the *Bruen* test at such a high level of generality. Transcript of Oral Argument at 15, *United States v. Rahimi*, (No. 22-915). If, as the Government argued in *Rahimi*, modern day regulations are "not controlled by Founding-Era applications of the principle" (Transcript of Oral Argument at 18, *United States v. Rahimi*, (No. 22-915)), then, as Justice Jackson asked, "what's the point of going to the Founding Era? I mean, I thought it was doing some work. But, if we're still applying modern sensibilities, I don't really understand the historical framing." Transcript of Oral Argument at 18-19, *United States v. Rahimi*, (No. 22-915).

2. The Court of Appeals correctly utilized the intoxication historical analogues in its holding that § 922(g)(3 was unconstitutional as applied to Mr. Daniels.

Justice Jackson's questions ring particularly true in Mr. Daniels' case because there are close historical analogues (the intoxication statutes) that set the outer limits

for what the Founders considered to be reasonable restrictions on firearms in the context of substance use. Pet. App, at 18a, 22a .The Government contends that the Court of Appeals' analysis was flawed because the court should either have applied the dangerousness "principle" or should have analogized the mentally ill and intoxication statutes differently. Pet. at 13-18. Had the Court of Appeals taken either of those approaches, however, it would have run afoul of *Bruen*.

Bruen cautions against such improper analogical reasoning: "a green truck and a green hat are relevantly similar if one's metric is 'things that are green.' They are not relevantly similar if the applicable metric is 'things you can wear.'" *Bruen*, 142 S. Ct. at 2132 (quoting F. Schauer & B. Spellman, *Analogy, Expertise, and Experience*, 84 U. Chi. L. Rev. 249, 254 (2017)). The Court of Appeals rejected the dangerousness and mentally ill analogues utilizing the "why" metric of the *Bruen* test for good reason. Pet. App. at 18a. The logic of those proffered analogies failed in the face of historical intoxication statutes, whose "why" highlighted the similarities between those who use alcohol and those who use other substances. *Id.* at 18a.

The Court of Appeals faithfully applied the "how" and "why" metrics of *Bruen* to the Government's other proffered historical analogues. With respect to the mentally ill analogy, the Court of Appeals reasoned as follows: "We must ask, in *Bruen*-style analogical reasoning, which is Daniels more like: a categorically

"insane" person? Or a repeat alcohol user?" Pet. App. at 22a. The answer, clearly, is a repeat alcohol user, and so the mentally ill analogue failed.

Similarly, the Court of Appeals reasoned as follows on the question of dangerousness: the Government "posits that Daniels—a repeat marihuana user—was presumptively dangerous enough to be disarmed. Although there is some historical evidence for the government's underlying principle, the historical examples of danger-based disarmament do not justify § 922(g)(3)'s application here." Pet App. at 23a. Those "historical examples" – "political traitors" and "religious dissidents" who were perceived to be "potential insurrectionists" – posed a very different type of danger.[7] *Id.* at 32a.

Had the Court of Appeals adopted the Government's general "principle" argument, particularly when the closely analogous historical intoxication statutes were part of the record before the Court of Appeals, then its decision would have undermined the *Bruen* test and turned the *Bruen* analysis into a different version of the means-end scrutiny test. As this Court held in *Bruen*, "Analogical reasoning

[7] The Court of Appeals noted but also rejected the odious, discriminatory disarming of minorities, such as enslaved people and Native Americans, as the Founders' reasoning was largely based in the same fear – "violent revolt." Pet. App. at 32a. At oral argument in *Rahimi*, the Government explained that it had dropped those comparisons from its briefing to this Court in that case, both because such disarmaments were discriminatory and because they pointed to exclusion from "the people" rather than the dangerousness "principle." Transcript of Oral Argument at 7, *United States v. Rahimi*, (No. 22-915).

requires judges to apply faithfully the balance struck by the founding generation to modern circumstances, and contrary to the dissent's assertion, there is nothing '[i]roni[c]' about that undertaking. It is not an invitation to revise that balance through means-end scrutiny." *Bruen*, 142 S. Ct. at 2133, n. 7.

3. The Government's "mentally ill" and "common drunkard" analogies fail.

In its petition, the Government presents a new variation on the analogy it proffered regarding mental illness. The Government now argues that the intoxication statutes are not analogous because "[d]rinking was legal at the Founding and thus did not pose the same types of dangers as the use of illegal drugs does today."[8] Pet. at 15. The Government then argues that the historical practice of "locking up" "lunatics" is sufficient to satisfy *Bruen*'s relevantly similar test because there are 19th century historical analogues for committing "habitual drunkards" to asylums, which deprived them of their liberty and property – including their firearms. Pet. at 15-16. The Government also cites modern state statutes that prohibit alcoholics from owning firearms. Pet. at 15-16.

[8] The Government's argument ignores two facts: (1) Congress's decision to include all substances under the Controlled Substances Act means that § 922(g)(3) encompasses both legal and illegal substances. As it is currently written, § 922(g)(3) can be applied to restrict Second Amendment rights for people who are "unlawful users" of legal prescription drugs. (2) Marijuana, while still considered illegal under the Controlled Substances Act, is legal in most states, either medicinally or recreationally. Mr. Daniels was found with marijuana only, and he has brought only an as applied challenge.

The Government posits these theories because it cannot establish that § 922(g)(3) poses a burden comparable to the burden imposed in the historical intoxication statutes. *See Bruen*, 142 S. Ct. at 2133; *McDonald*, 561 U.S. at 767; *Heller*, 554 U.S. at 599. Utilizing the historic intoxication statues as a stand-alone analogy fails the *Bruen* test because they imposed a significantly smaller burden on Second Amendment rights than § 922(g)(3) imposes.

First, the Government's proffered intoxication statutes disarmed people *only while they were actually under the influence* of alcohol. *See, e.g.*, Kansas Gen. Stat., Crimes & Punishment § 282 (1868) ("under the influence of intoxicating drink"); Mo. Laws 76, § 1 ("intoxicated or under the influence of intoxicating drinks"); 1883 Wis. Sess. Laws 290, Offenses Against Lives and Persons of Individuals, ch. 329 § 3 ("in a state of intoxication"); 1899 S.C. Acts 97, No. 67 ("under the influence of intoxicating liquors"). *See also* 1 Hening, Statues at Large; Being a Collection of All the Laws of Virginia, of those from the First Session of the Legislature 401-02 (prohibiting"shoot[ing] any guns at drinking").[9]

Some of the intoxication statutes were even more limited in their restriction of Second Amendment rights. Mississippi's law penalized the person who sold a firearm to an intoxicated person, not the person in possession of that firearm. *See*

[9] All these statutes are compiled on the Duke Center for Firearms Law website under the Repository of Historical Gun Laws tab. *See* https://firearmslaw.duke.edu/ (last visited November 18, 2023).

1878 Miss. Laws 175-76 § 2. And Oklahoma's law applied only to public officials, not ordinary citizens. *See* 1890 Okla. Sess. Laws 495, art. 47, § 4.

Second, those colonial-era and 19th-century firearms regulations were misdemeanors, not felonies. *See, e.g.*, Kansas Gen. Stat., Crimes & Punishment § 282 (1868). Punishment for violating these statutes was limited primarily to the payment of a fine. *See id.*; *see also* 1883 Mo. Laws 76, § 1. Imprisonment, if applicable, was generally limited to a period of three to six months. *See, e.g.*, Kansas Gen. Stat., Crimes & Punishment § 282 (1868); 1883 Mo. Laws 76, § 1. Notably, the Missouri case that the Government cited below as "influential" resulted in a fine of $10 and no jail time. *See State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886). None of the statutes upon which the Government relied below even mention a permanent ban on a person's right to keep and bear arms.

Unlike those historical intoxication statutes, 18 U.S.C. § 922(g)(3) does apply to persons who are not under the immediate influence of a substance. Mr. Daniels was convicted even though the Government did not present any evidence that Mr. Daniels was impaired. Pet. App. at 3a, 19a. And because § 922(g)(3) is a felony, it is not a temporary restriction of Second Amendment rights. Every person convicted under § 922(g)(3) is completely and permanently stripped of his Second Amendment rights.

For these reasons, the Court of Appeals correctly concluded that the Government's proffered historical intoxication statutes did not satisfy the *Bruen* test.

The Government's reliance on 19th century commitment statutes and modern disarmament statutes for "habitual drunkards" is also insufficient to establish a history and tradition of disarming those who use intoxicants or other substances. Pet. at 16, n. 8, 17 n. 10. *Bruen* provides that "late-19th-century" and "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154 n.28. The historical intoxication statutes contradict the new, more recent analogues that the Government proffers in its petition.

II. If this Court grants certiorari, Mr. Daniels opposes the Government's request to hold the petition pending the outcome of *United States v. Rahimi*.

The Government has requested that this Court hold the certiorari petition pending the outcome of *Rahimi*, citing an overlap of issues and at least one other pending petition under § 922(g) – *Range v. Attorney General United States* (No. 23-374). While this case does share issues in common with *Rahimi* regarding the proper application of *Bruen*'s history and tradition test, § 922(g)(3) differs significantly from both § 922(g)(8) (*Rahimi*) and § 922(g)(1) (*Range*) on one important constitutional issue: the procedural due process challenge that Mr. Daniels raised as part of his vagueness challenge to § 922(g)(3). Both § 922(g)(1) and § 922(g)(8)

provide an opportunity for due process before Second Amendment rights are restricted.

In § 922(g)(3), however, Congress failed to provide any mechanism for notice and a right to be heard. Additionally, there is no context for who qualifies as an "unlawful user." No related statute provides a clarifying definition, as with § 922(g)(4)'s definition of "fugitive from justice" or § 922(g)(5)'s "illegal alien" status. The term has no common law or specialized meaning, and the ordinary meaning of the word "user" is particularly unhelpful. The dictionary definition of a user is "one that uses." https://www.merriam-webster.com/dictionary/user (last visited November 19, 2023). Black's Law Dictionary supplies a similar definition: "[s]omeone who uses a thing." Black's Law Dictionary (11th ed. 2019). Determining what conduct is covered by § 922(g)(3), then, becomes an unconstitutional exercise in making "wholly subjective judgements without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 553 U.S.285, 306 (2008).

As a result, persons who may fall under the scope of § 922(g)(3)'s restriction have no clear understanding of how long they may be deprived of their Second Amendment rights, placing them at risk of permanent deprivation if they are charged and convicted under § 922(g)(3). Resolution of the issues in *Rahimi* and *Range* (if this Court chooses to grant certiorari in that case) will not resolve the due process

issues created by § 922(g)(3). For this reason, if this Court grants the Government's petition, Mr. Daniels requests that the case be heard this term.

CONCLUSION

This Court should deny the Government's petition. Alternatively, if the Court grants certiorari, it should hear the case this term to adequately address the additional challenges to § 922(g)(3) that Mr. Daniels raised and preserved in the Court of Appeals.

Respectfully submitted,

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NOVEMBER 20, 2023