No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALI DANIAL HEMANI

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. 922(g)(3), the federal statute that prohibits the possession of firearms by a person who "is an unlawful user of or addicted to any controlled substance," violates the Second Amendment as applied to respondent.

RELATED PROCEEDINGS

United States District Court (E.D. Tex.):

United States v. *Hemani*, No. 23-cr-18 (Feb. 1, 2024)

United States Court of Appeals (5th Cir.):

United States v. *Hemani*, No. 24-40137 (Jan. 31, 2025)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is available at 2025 WL 354982. The order of the district court (App., *infra*, 3a-4a) is available at 2024 WL 5375143. The report and recommendation of the magistrate judge (App., *infra*, 5a-39a) is available at 2023 WL 9659173.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2025. On April 21, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 2, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix. App., *infra*, 40a.

INTRODUCTION

In the decision below, the Fifth Circuit held that 18 U.S.C. 922(g)(3), the federal statute that prohibits unlawful users of controlled substances from possessing firearms, violates the Second Amendment in the vast majority of its applications. This Court should review and reverse that decision.

The Second Amendment's right to keep and bear arms is a fundamental right that is essential to ordered liberty. Unjustifiable restrictions on that right present a grave threat to Americans' most cherished freedoms. Courts should exercise the utmost vigilance in guarding that right from legislative or regulatory infringement. There are, however, narrow circumstances in which the government may justifiably burden that right, and Section 922(g)(3) provides such a circumstance.

In fact, there are compelling legal and historical reasons to uphold Section 922(g)(3). By disqualifying only *habitual* users of illegal drugs from possessing firearms, the statute imposes a limited, inherently temporary restriction—one which the individual can remove at any time simply by ceasing his unlawful drug use. This restriction provides a modest, modern analogue of much harsher founding-era restrictions on habitual drunkards, and so it stands solidly within our Nation's history and tradition of regulation. And habitual illegal drug users with firearms present unique dangers to society—especially because they pose a grave risk of armed, hostile encounters with police officers while impaired.

For these reasons, Section 922(g)(3) plays a key role in a statutory scheme that "probably does more to combat gun violence than any other federal law." *Rehaif* v. *United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). As this Court has stated, "drugs and guns are a dangerous combination." *Smith* v. *United States*, 508 U.S. 223, 240 (1993). Section 922(g)(3) addresses that danger in a measured way, prohibiting the possession of firearms only by *habitual* users of illegal drugs and allowing a person to regain the ability to possess firearms simply by ceasing his habitual illegal drug use. Moreover, any constitutional concerns about the application of Section 922(g)(3) in marginal cases can and should be addressed by filing a petition to the Attorney General under 18 U.S.C. 925(c), which permits judicial review—not by covertly violating the statute, as respondent did here.

The Fifth Circuit's decision invalidating Section 922(g)(3) satisfies this Court's usual criteria for certiorari. By restricting the statute's application to users who were actually impaired at the time of possessing the firearm, the Fifth Circuit held an Act of Congress unconstitutional in most of its applications. The court's decision forms part of a three-way circuit conflict; the Seventh Circuit has upheld Section 922(g)(3), while the Eighth Circuit has struck it down, albeit on a different rationale and in a different set of applications than the Fifth Circuit. The decision below also has significant practical consequences, given the frequency of Section 922(g) prosecutions. Moreover, at least 32 States and territories have enacted similar laws restricting the possession of firearms by drug users and drug addicts. This Court should grant the petition for a writ of certiorari and reverse the Fifth Circuit's judgment.

STATEMENT

A federal grand jury indicted respondent for possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3). App., *infra*, 1a. The U.S. District Court for the Eastern District of Texas dismissed the indictment on the ground that Section 922(g)(3) violates the Second Amendment as applied to respondent. *Id.* at 3a-4a. The Fifth Circuit affirmed. *Id.* at 1a-2a.

1. Respondent Ali Danial Hemani is a dual citizen of the United States and Pakistan whose actions have drawn the attention of the Federal Bureau of Investigation (FBI). See C.A. ROA 376. In 2019, a search of his phone at a border crossing revealed communications suggesting that he was poised to commit fraud at the direction of suspected affiliates of the Iranian Revolutionary Guard Corps, a designated foreign terrorist organization. See *id.* at 414-417. In 2020, respondent and his parents traveled to Iran to participate in a celebration of the life of Qasem Soleimani, an Iranian general and terrorist who had been killed by an American drone strike the month before. See *id.* at 368-370. Respondent's mother was captured on video telling an Iranian news agency that she prayed that her two sons, including respondent, would become martyrs like Soleimani. See *id.* at 367, 371. Respondent also maintains weekly contact with his brother, who attends an Iranian university that the U.S. government has designated as having ties to terrorism. See *id.* at 362-364. And respondent has told law-enforcement officials that, if he knew about an imminent terrorist attack by "a Shia brother" that would kill innocent people, he would not report it to the authorities. *Id.* at 423.

Respondent also is a drug dealer who uses illegal drugs. Text messages recovered from his phone showed that he used and sold promethazine and that he found that substance addictive. See C.A. ROA 378-379. He also used cocaine and marijuana. See *id.* at 379-380.

The FBI obtained a warrant to search respondent's family home. See C.A. ROA 378. Agents found a Glock 9mm pistol, 60 grams of marijuana, and 4.7 grams of cocaine. See *id.* at 379-380. Respondent told the FBI that he used marijuana about every other day. See *id.* at 381. He also told the FBI that the cocaine, which had been found in his mother's room, belonged to him. See *id.* at 397-398.

2. A grand jury charged respondent with violating 18 U.S.C. 922(g)(3), which makes it unlawful for any person who "is an unlawful user of or addicted to any controlled substance" to possess a firearm in or affecting commerce. *Ibid.*; see App., *infra*, 1a. The courts of appeals have uniformly concluded that the word "user" means someone who engages in the habitual or regular use of a controlled substance.[1] And a "controlled substance" is a drug that is listed in one of the schedules of the Controlled Substances Act, 21 U.S.C. 801 *et seq.* See 18 U.S.C. 922(g)(3); 21 U.S.C. 802(6). This prosecution rests on respondent's habitual use of marijuana. See Gov't C.A. Br. 7 n.2.

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[1] See *United States* v. *Marceau*, 554 F.3d 24, 30 (1st Cir.), cert. denied, 556 U.S. 1275 (2009); *United States* v. *Augustin*, 376 F.3d 135, 138-139 (3d Cir. 2004); *United States* v. *McCowan*, 469 F.3d 386, 392 (5th Cir. 2006); *United States* v. *Bowens*, 938 F.3d 790, 793-794 (6th Cir. 2019), cert. denied, 140 S. Ct. 814, and 140 S. Ct. 2572 (2020); *United States* v. *Cook*, 970 F.3d 866, 874 (7th Cir. 2020); *United States* v. *Purdy*, 264 F.3d 809, 812 (9th Cir. 2001).

Respondent moved to dismiss the indictment on the ground that Section 922(g)(3) violates the Second Amendment on its face. See App., *infra*, 5a. A magistrate judge recommended granting the motion. *Id.* at 5a-39a. In her view, the statutes cited by the government were "insufficient historical analogues" for Section 922(g)(3). *Id.* at 23a.

Soon after the magistrate judge issued her report and recommendation, the Fifth Circuit held in *United States* v. *Daniels*, 77 F.4th 337 (2023), vacated, 144 S. Ct. 2707 (2024), that Section 922(g)(3) violates the Second Amendment as applied to a defendant who was not "under an impairing influence" while possessing the firearm. *Id.* at 349. Respondent amended his motion to dismiss to assert an as-applied challenge under *Daniels*. See App., *infra*, 3a. The government conceded that respondent's case could not be distinguished from *Daniels* but preserved the argument that *Daniels* was wrongly decided and that Section 922(g)(3) is valid as applied to respondent. See *id.* at 3a-4a. The district court granted respondent's amended motion and dismissed the indictment on the ground that Section 922(g)(3) violates the Second Amendment as applied here. See *id.* at 4a.

3. After the district court issued its decision in this case, this Court vacated the Fifth Circuit's decision in *Daniels* and remanded that case for reconsideration in light of *United States* v. *Rahimi*, 602 U.S. 680 (2024). See *United States* v. *Daniels*, 144 S. Ct. 2707 (2024). The Fifth Circuit, however, soon reinstated essentially the same interpretation of the Second Amendment in another case, *United States* v. *Connelly*, 117 F.4th 269 (2024). The court concluded in *Connelly* that "there is

no historical justification for disarming a sober citizen not presently under an impairing influence." *Id.* at 276.[2]

The government conceded before the Fifth Circuit that *Connelly* controlled this case but preserved its argument that *Connelly* was wrongly decided. See Pet. App. 2a & n.2. Relying on *Connelly*, the Fifth Circuit summarily affirmed the district court's dismissal of the indictment. See *id.* at 1a-2a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit erred in holding that the Second Amendment precludes Congress from restricting the possession of firearms by habitual users of illegal drugs. The court's decision invalidates an important federal statute in the vast majority of its applications and exacerbates a multi-sided circuit conflict. This Court should grant the petition for a writ of certiorari and reverse.

A. The Fifth Circuit Erred In Holding Section 922(g)(3) Unconstitutional As Applied To Respondent

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. The Second Amendment secures a "general right" to possess and carry arms for lawful purposes such as self-defense. *NYSRPA* v. *Bruen*, 597 U.S. 1, 31 (2022). That right is among the "fundamental rights necessary to our system

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[2] The government did not file a petition for a writ of certiorari in *Connelly*. In a report submitted under 28 U.S.C. 530D, the Solicitor General explained that, "[b]ecause of factual developments since the filing of the appeal," the government was "no longer confident that it would be able to prove beyond a reasonable doubt that the defendant violated Section 922(g)(3)." Letter from Elizabeth B. Prelogar, Solicitor Gen., to Mitch McConnell, Minority Leader, U.S. Senate (Nov. 15, 2024), https://justice.gov/oip/media/1379361/dl?inline.

of ordered liberty." *McDonald* v. *City of Chicago*, 561 U.S. 742, 778 (2010). The founding generation believed that, when that right is infringed, "liberty, if not already annihilated, is on the brink of destruction." *District of Columbia* v. *Heller*, 554 U.S. 570, 606 (2008) (citation omitted). Today, "millions of Americans" rely on that right in possessing and carrying arms for the "defense of self, family, and property." *Id.* at 624 n.24, 628.

When the government regulates that right, it bears a significant burden in justifying its regulation. See *Bruen*, 597 U.S. at 17. To carry that burden, the government must show that the challenged regulation "is consistent with this Nation's historical tradition of firearm regulation." *Ibid.* That is a rigorous test, not a "regulatory blank check." *Id.* at 30. That test permits certain narrow restrictions but prohibits laws that "broadly restrict arms use by the public generally." *United States* v. *Rahimi*, 602 U.S. 680, 698 (2024).

In *Rahimi*, this Court recognized that our Nation's tradition of firearm regulation permits the "temporary disarmament" of persons who pose a "clear" danger of "misusing firearms." 602 U.S. at 690, 699; see *Kanter* v. *Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) ("History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns."). *Rahimi* involved one element of that tradition: "prohibition[s] on the possession of firearms by those found by a court to present a threat to others." 602 U.S. at 698.

This case involves a different element: "laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse," limited to the duration of that danger. *Rahimi*, 602 U.S. at 698. "[F]ounding-era legislatures categorically dis-

armed groups whom they judged to be a threat to public safety"—including loyalists, rebels, and persons convicted of certain crimes. *Kanter*, 919 F.3d at 458 (Barrett, J., dissenting); see *id.* at 454-458. American legislatures continued to enact such laws after the founding, restricting the possession of arms by groups such as persons of unsound mind, vagrants, and fugitives. See Gov't Br. at 24-26, *Rahimi*, *supra* (No. 22-915). And *Heller* described bans on the possession of firearms by "felons and the mentally ill" as "presumptively lawful regulatory measures." 554 U.S. at 626, 627 n.26.

In applying that principle, courts should not simply defer to a legislature's judgment that a given category of persons is dangerous or that particular individuals can be disarmed forever. That approach would give legislatures the type of "regulatory blank check" that this Court has rejected. *Bruen*, 597 U.S. at 30. Courts should instead review the restriction using the usual tools of Second Amendment interpretation: "pre-ratification history, post-ratification history, and precedent." *Rahimi*, 602 U.S. at 719 (Kavanaugh, J., concurring).

Under that standard, Section 922(g)(3) complies with the Second Amendment. That provision targets a category of persons who pose a clear danger of misusing firearms: habitual users of unlawful drugs. Moreover, Section 922(g)(3) bars their possession of firearms only temporarily and leaves it within their power to lift the restriction at any time; anyone who stops habitually using illegal drugs can resume possessing firearms. Founding-era history, post-ratification history, and precedent all support the congressional judgment underlying that restriction.

1. Restrictions on firearm possession by habitual illegal drug users are analogous to founding-era laws restricting the rights of drunkards

Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," the most important historical evidence of the Second Amendment's meaning dates to the founding era. *Heller*, 554 U.S. at 634-635; see *Rahimi*, 602 U.S. at 719-723 (Kavanaugh, J., concurring). Section 922(g)(3) is closely analogous to—indeed, less restrictive than—founding-era laws restricting the rights of "drunkards," *i.e.*, persons who habitually abused alcohol. Three types of historical laws are relevant here: vagrancy laws, civil-commitment laws, and surety laws.

Laws prohibiting vagrancy "have been a fixture of Anglo-American law at least since the time of the Norman Conquest." *City of Chicago* v. *Morales*, 527 U.S. 41, 103 (1999) (Thomas, J., dissenting). During the 18th century, many American legislatures classified "common drunkards" as vagrants, subjecting them to imprisonment or confinement in workhouses.[3] States continued to enact such laws through the 19th century, including during the period surrounding the adoption of the Fourteenth Amendment.[4] A prominent 19th-century

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[3] See Act of Oct. 1727, *The Public Records of the Colony of Connecticut from May, 1727, to May, 1735, inclusive* 128 (Charles J. Hoadly ed., 1873); Act of June 29, 1700, ch. 8, § 2, 1 *Acts and Resolves of the Province of Massachusetts Bay* 378 (1869); Act of May 14, 1718, ch. 15, 2 *Laws of New Hampshire* 266 (Albert Stillman Batchellor ed., 1913); Act of June 10, 1799, §§ 1, 3, *Laws of the State of New-Jersey* 473-474 (1821).

[4] See Act of Dec. 15, 1865, No. 107, § 1, 1865-1866 Ala. Acts 116; Act to Establish a Penal Code § 1014, *Revised Statutes of Arizona* 753-754 (1887); Act of Feb. 14, 1872, § 647, 2 *The Codes and Statutes of the State of California* 1288 (Theodore H. Hittell ed., 1876); Act

criminal-law treatise recognized that multiple States had enacted "statutes against being a common drunkard." 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 267, at 196 (1859). And toward the end of the century, this Court described the "restraint" of "habitual drunkards" as a well-established aspect of the States' power to protect "public safety, health, and morals." *Lawton* v. *Steele*, 152 U.S. 133, 136 (1894).

Other jurisdictions addressed alcohol abuse through civil-commitment laws rather than criminal vagrancy laws. Over the course of the 19th century, Congress (legislating for the District of Columbia) and multiple States enacted laws providing for "habitual drunkards" to be committed to asylums or placed under guardians in the same manner as "'lunatics.'" *Kendall* v. *Ewert*, 259 U.S. 139, 146 (1922) (citation omitted).[5]

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of Feb. 4, 1885, § 1, 1884-1885 Idaho Terr. Gen. Laws 200; Act of Feb. 22, 1825, ch. 297, § 4, 1825 Me. Pub. Acts 1034; Act of Feb. 22, 1881, § 1, 1881 Mont. Terr. Laws 81-82; Act of Mar. 7, 1873, ch. 114, § 1, 1873 Nev. Stat. 189-190; Act of June 2, 1871, No. 1209, § 2, 1871 Pa. Laws 1301-1302; Act of Mar. 15, 1865, ch. 562, §§ 1-2, 1865 R.I. Acts & Resolves 197; Act of Feb. 18, 1876, § 378, *The Compiled Laws of the Territory of Utah* 647 (1876).

[5] See, *e.g.*, Act of Mar. 30, 1876, ch. 40, § 8, 19 Stat. 10 (District of Columbia); Ark. Rev. Stat., ch. 78, § 1, at 456 (William M. Ball & Sam C. Roane eds., 1838); Act of Apr. 1, 1870, ch. 426, § 2, 1869-1870 Cal. Stat. 585-586; Act of July 25, 1874, ch. 113, § 1, 1874 Conn. Pub. Acts 256; Ga. Code pt. 2, tit. 2, ch. 3, Art. 2, § 1803, at 358 (R.H. Clark et al. eds., 1861); Act of Feb. 21, 1872, § 1, 1872 Ill. Laws 477; Act of May 1, 1890, ch. 42, § 1, 1890 Iowa Acts 67; Act of Mar. 2, 1868, ch. 60, § 5, *The General Statutes of the State of Kansas* 553 (John M. Price et al. eds., 1868); Act of Mar. 28, 1872, ch. 996, §§ 10-11, 1872 Ky. Acts, Vol. 2, at 523-524; Act of July 8, 1890, No. 100, § 1, 1890 La. Acts 116; Act of Mar. 5, 1860, ch. 386, §§ 6-7, 1860 Md. Laws 607-608; Act of June 18, 1885, ch. 339, §§ 1-3, 1885 Mass. Acts 790; Act of Apr. 12, 1827, § 1, 1827 Mich. Terr. Laws 584-585; Minn. Terr.

Surety laws, meanwhile, originated more than a millennium ago and were "[w]ell entrenched in the common law." *Rahimi*, 602 U.S. at 695. Under those laws, magistrates could compel certain persons who posed a risk of future misbehavior to post bond. See *ibid.* A person who failed to post bond would be jailed, while a person who posted bond and then misbehaved would forfeit the bond. See *ibid.* Importantly for present purposes, surety laws extended to "common drunkards." 4 William Blackstone, *Commentaries on the Laws of England* 256 (10th ed. 1787). American justice-of-the-peace manuals from the founding era explained that magistrates could require "common drunkards" to post bond for good behavior.[6]

Section 922(g)(3) resembles those historical laws in both "why and how" it burdens arms-bearing conduct. *Rahimi*, 602 U.S. at 698. Like its historical precursors, Section 922(g)(3) addresses the risks posed by persons who habitually use intoxicating substances. Courts defined a "drunkard" as "one who is in the habit of getting drunk." *State* v. *Pratt*, 34 Vt. 323, 324 (1861). Section

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Rev. Stat. ch. 67, § 12, at 278 (1851); Act of Mar. 31, 1873, ch. 57, §§ 1, 3, 1873 Miss. Laws 61-62; Act of Mar. 3, 1853, ch. 89, § 1, 1853 N.J. Acts 237; Act of Feb. 7, 1856, ch. 26, § 1, 1855-1856 N.M. Terr. Laws 95 (1856); Act of Mar. 27, 1857, ch. 184, § 9, 1857 N.Y. Laws, Vol. 1, at 431; Act of Jan. 5, 1871, § 1, 68 *Ohio General and Local Laws and Joint Resolutions* 68 (1871); Act of Feb. 1, 1866, No. 11, § 10, 1866 Pa. Laws 10; Act of Aug. 18, 1876, ch. 112, § 147, 1876 Tex. Gen. Laws 188; Act of Mar. 17, 1870, ch. 131, § 1, 1870 Wis. Gen. Laws 197.

[6] See Eliphalet Ladd, *Burn's Abridgement, Or The American Justice* 406 (2d ed. 1792) (N.H.); James Parker, *Conductor Generalis* 422 (1764) (N.J.); James Parker, *Conductor Generalis* 348 (Hugh Gaine prtg. 1788) (N.Y.); James Parker, *Conductor Generalis* 348 (Robert Campbell prtg. 1792) (Pa.).

922(g)(3) similarly applies to individuals who are in the habit of using unlawful drugs. If anything, Section 922(g)(3) rests on an even stronger justification than laws about drunkards. Habitual users of drugs, which are unlawful, pose a greater danger than habitual users of alcohol, which was legal at the founding and remained legal for most of American history.

The burden that Section 922(g)(3) imposes also fits within our regulatory tradition. Vagrancy and civil-commitment laws subjected drunkards to confinement in prisons, workhouses, or asylums. *Rahimi* reasoned that, if "imprisonment was permissible to respond" to a problem at the founding, then "the lesser restriction of temporary disarmament" will often also be permissible to respond to a similar problem today. 602 U.S. at 699; see *id.* at 772 (Thomas, J., dissenting) ("imprisonment * * * involved disarmament"). Surety laws similarly imposed temporary restrictions on drunkards' rights. *Rahimi* concluded that the burden imposed by surety laws is comparable to the burden of "temporary disarmament." *Id.* at 699 (majority opinion).

Section 922(g)(3), moreover, provides more robust procedural protection than its historical forbears. See *Rahimi*, 602 U.S. at 696 (treating procedural protection as an aspect of the burden). Founding-era vagrancy laws allowed a justice of the peace to determine, in a summary criminal proceeding, whether the defendant was a drunkard. See *District of Columbia* v. *Clawans*, 300 U.S. 617, 624 (1937). Civil-commitment laws and surety laws provided for the adjudication of the defendant's status in a civil proceeding. See, *e.g.*, *Rahimi*, 602 U.S. at 696-697. Under Section 922(g)(3), by contrast, respondent has a right to a full criminal trial in which the government bears the burden of proving to a jury, be-

yond a reasonable doubt, that he was a habitual user of an unlawful drug when he possessed the firearm.

In sum, the category regulated by Section 922(g)(3), habitual drug users, is closely analogous to another category, habitual drunkards, that was subject to similar or more onerous restrictions at the founding. That history suffices to establish the statute's constitutionality.

2. Legislatures have restricted drug users' possession of firearms for more than a century

Post-ratification history confirms Section 922(g)(3)'s validity. Although post-ratification history cannot supersede the text of the Second Amendment or founding-era evidence, it can nevertheless play an "important" role in elucidating the scope of Second Amendment freedoms in cases of uncertainty about the Amendment's original meaning. *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring). Because Section 922(g)(3) has a clear founding-era analogue, this Court need not turn to post-ratification history here. But to the extent that post-ratification history is relevant, that history supports the statute's restriction on habitual drug users.

As the Fifth Circuit has acknowledged, early Americans "were not familiar" with the widespread use of illegal drugs or with "the modern drug trade." *United States* v. *Daniels*, 77 F.4th 337, 343 (2023), vacated, 144 S. Ct. 2707 (2024). American society instead began to appreciate the harmful effects of drug use only in the late 19th century, and legislatures began to regulate drugs only in the early 20th century. See Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 985-987 (1970). Around the same time, legislatures also started addressing the risks posed by

the combination of drugs and guns. In the 1920s and 1930s, legislatures started to prohibit drug addicts or drug users from possessing, carrying, or purchasing handguns.[7] In 1932, Congress prohibited the sale of pistols to drug addicts in the District of Columbia. See District of Columbia Dangerous Weapons Act, ch. 465, § 7, 47 Stat. 652. And in 1968, Congress enacted Section 922(g)(3), disarming drug users and addicts nationwide. See Gun Control Act of 1968, Pub. L. No. 618, § 102, 82 Stat. 1220. Today, at least 32 States and territories have laws restricting the possession of firearms by drug users or addicts.[8]

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[7] See Act of Apr. 6, 1936, No. 82, § 8, 1936 Ala. Gen. Laws 52; Act of June 19, 1931, ch. 1098, § 2, 1931 Cal. Stat. 2316-2317; Act of Feb. 21, 1935, ch. 63, § 6, 1935 Ind. Laws 161; Act of Apr. 29, 1925, ch. 284, § 4, 1925 Mass. Acts & Resolves 324; Act of Mar. 30, 1927, ch. 321, § 7, 1927 N.J. Acts 745; Act of June 11, 1931, No. 158, § 8, 1931 Pa. Laws 499; Act of July 8, 1936, No. 14, § 2, 1936 P.R. Acts & Res. 128; Act of Mar. 14, 1935, ch. 208, § 8, 1935 S.D. Laws 356; Act of Mar. 23, 1935, ch. 172, § 8, 1935 Wash. Sess. Laws 601.

[8] See Ala. Code § 13A-11-72(b); Ark. Code Ann. § 5-73-309(7)(A); Cal. Penal Code § 29800(a)(1); Colo. Rev. Stat. § 18-12-203(1)(f); Del. Code Ann. tit. 11, § 1448(a)(3); D.C. Code § 7-2502.03(a)(4)(A); Fla. Stat. § 790.06(2)(e) and (f); Ga. Code Ann. § 16-11-129(b)(2)(I) and (J); 10 Guam Code Ann. § 60109.1(b)(5) and (6); Haw. Rev. Stat. § 134-7(c)(1); Idaho Code § 18-3302(11)(e); 720 Ill. Comp. Stat. § 5/24-3.1(a)(3); Ind. Code § 35-47-1-7(5); Kan. Stat. Ann. § 21-6301(a)(10); Ky. Rev. Stat. Ann. § 237.110(4)(d); Md. Code Ann., Public Safety, § 5-133(b)(5); Mass. Gen. Laws ch. 140, § 131(d)(iii)(A); Minn. Stat. § 624.713(10)(iii); Mo. Rev. Stat. § 571.070.1(2); Nev. Rev. Stat. § 202.360.1(f); N.J. Stat. Ann. § 2C:58-3.c.(3); N.Y. Penal Law § 400.00.1(e); N.C. Gen. Stat. § 14-415.12(b)(5); 6 N. Mar. I. Code § 10610(a)(3); Ohio Rev. Code Ann. § 2923.13(A)(4); P.R. Laws Ann. tit. 25, § 462a(a)(3); R.I. Gen. Laws § 11-47-6; S.C. Code Ann. § 16-23-30(A)(1); S.D. Codified Laws § 23-7.7.1(3); Utah Code Ann. § 76-10-503(b)(iv); V.I. Code tit. 23, § 456a(a)(3); W. Va. Code § 61-7-7(a)(3).

The practice of disarming drug users, in short, is as old as legislative recognition of the drug problem itself. And that practice applies a general principle that formed part of the Amendment's original meaning (legislatures may temporarily restrict the possession of firearms by certain categories of persons who pose a clear danger of misuse) to a modern problem that the founders did not directly confront (illegal drugs). To the extent that this Court consults post-ratification history, therefore, that history provides further support for Section 922(g)(3)'s validity.

3. Precedent and common sense confirm that habitual drug users pose a clear danger of misusing firearms

This Court has repeatedly recognized that "drugs and guns" are a "dangerous combination."[9] Armed drug users endanger society in multiple ways.

First, habitual drug users have a demonstrated propensity to violate the criminal law. Simple possession of a controlled substance is a crime, see 21 U.S.C. 844, and a habitual drug user is in the habit of committing that crime. Habitual drug users thus pose a greater danger of misusing firearms than do "ordinary, law-abiding citizens." *Bruen*, 597 U.S. at 9.

Habitual drug users also pose a danger of misusing firearms because of "drug-induced changes in physiological functions, cognitive ability, and mood." *Harmelin* v. *Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment). For instance, the physiological, cognitive, and mood-

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[9] See *Rosemond* v. *United States*, 572 U.S. 65, 75 (2014); *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998); *Smith* v. *United States*, 508 U.S. 223, 240 (1993); see also *Richards* v. *Wisconsin*, 520 U.S. 385, 391 n.2 (1997) ("This Court has encountered before the links between drugs and violence.").

based effects of many illegal drugs—such as cocaine, methamphetamine, heroin, PCP, and fentanyl—present grave risks of firearm misuse. See, *e.g.*, *Ochoa* v. *City of Mesa*, 26 F.4th 1050, 1057 (9th Cir. 2022); *Avena* v. *Chappell*, 932 F.3d 1237, 1243-1244 (9th Cir. 2019); *Hill* v. *Mitchell*, 400 F.3d 308, 312 (6th Cir.), cert. denied, 546 U.S. 1039 (2005). Similarly, the effects of marijuana intoxication include an altered "perception of time," "decreased short-term memory," and "impaired perception and motor skills." National Academies of Sciences, Engineering, and Medicine, *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* 53 (2017) (*Health Effects*). At higher doses, marijuana can cause "panic attacks, paranoid thoughts, and hallucinations." *Ibid.*

Drug users, moreover, often "commit crime in order to obtain money to buy drugs"—and thus pose a danger of using firearms to facilitate such crime. *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment). Before Section 922(g)(3)'s enactment, President Lyndon B. Johnson and both Houses of Congress recognized that drug use often motivates crime.[10] And this Court's opinions are replete with examples of crimes prompted by drug habits.[11]

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[10] See H.R. Doc. 407, 89th Cong., 2d Sess. 7 (1966) (presidential message) ("Drug addiction * * * drives its victims to commit untold crimes to secure the means to support their addiction."); H.R. Rep. No. 1486, 89th Cong., 2d Sess. 8 (1966) ("Narcotic addicts in their desperation to obtain drugs often turn to crime in order to obtain money to feed their addiction."); S. Rep. No. 1667, 89th Cong., 2d Sess. 13 (1966) (drug users are driven "to commit criminal acts in order to obtain money with which to purchase illegal drugs").

[11] See, *e.g.*, *Ramirez* v. *Collier*, 595 U.S. 411, 458 (2022) (Thomas, J., dissenting) ("brutal slaying of a working father during a robbery spree to supply a drug habit"); *Andrus* v. *Texas*, 140 S. Ct. 1875,

In addition, "violent crime may occur as part of the drug business or culture." *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment). For example, violence frequently results from "disputes and ripoffs among individuals involved in the illegal drug market." Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Drugs & Crime Data—Fact Sheet: Drug-Related Crime* 3 (Sept. 1994). Firearms increase the likelihood and lethality of drug violence. See *Smith* v. *United States*, 508 U.S. 223, 239 (1993) ("[The] introduction [of firearms] into the scene of drug transactions dramatically heightens the danger to society.") (citation omitted). Again, this Court's opinions are replete with examples.[12]

Finally, armed drug users endanger the police. "[D]ue to the illegal nature of their activities, drug users and addicts would be more likely than other citizens to have hostile run-ins with law enforcement officers," and such encounters "threaten the safety" of the officers "when guns are involved." *United States* v. *Carter*, 750

1877 (2020) (per curiam) (committed crimes to "fund a spiraling drug addiction"); *Wong* v. *Belmontes*, 558 U.S. 15, 15-16 (2009) (per curiam) ("bludgeoned [the victim] to death, * * * stole [her] stereo, sold it for $100, and used the money to buy beer and drugs"); *Smith* v. *Texas*, 543 U.S. 37, 41 (2004) (per curiam) ("regularly stole money from family members to support a drug addiction"); *Bell* v. *Cone*, 535 U.S. 685, 703 (2002) ("committed robberies" in an "apparent effort to fund [a] growing drug habit"); *Burford* v. *United States*, 532 U.S. 59, 62 (2001) ("robberies" "motivated by her drug addiction").

[12] See, *e.g.*, *Rahimi*, 602 U.S. at 687 ("The first [shooting] * * * arose from Rahimi's dealing in illegal drugs."); *Brumfield* v. *Cain*, 576 U.S. 305, 327 (2015) (Thomas, J., dissenting) ("fatal shooting of a fellow drug dealer in a deal gone bad"); *Rosemond* v. *United States*, 572 U.S. 65, 67 (2014) (shooting arising from "a drug deal gone bad"); *Moore* v. *Texas*, 535 U.S. 1044, 1045 (2002) (Scalia, J., dissenting) ("three brutal killings during the course of a drug deal").

F.3d 462, 469 (4th Cir.) (citation omitted), cert. denied, 574 U.S. 907 (2014); see *Michigan* v. *Summers*, 452 U.S. 692, 702 (1981) ("[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence."). Law enforcement officers thus face grave risks from confrontations with habitual drug users, and those risks are greatly enhanced when the habitual users are armed.

4. Section 922(g)(3) complies with Second Amendment constraints on legislatures' regulatory authority

The authority to impose temporary restrictions on the possession of firearms by certain classes of persons —even restrictions supported by founding-era history, post-ratification history, or precedent—is not limitless. Even a law with a historical analogue could still amount to an unconstitutional infringement of the right if (among other reasons) it serves an illegitimate purpose, burdens the right to bear arms more severely than necessary to serve a valid purpose, or broadly negates the right. See Daniel D. Slate, *Infringed*, 3 J. Am. Const. Hist. 381, 382-387 (2025); William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1489 (2024).

Section 922(g)(3), however, serves a legitimate purpose: preventing the misuse of firearms by illegal drug users. Nothing in the law's text, structure, or operation suggests that it pretextually restricts lawful arms-bearing conduct. Cf. Gov't Amicus Br. at 10-13, *Wolford* v. *Lopez* (No. 24-1046) (May 1, 2025). Section 922(g)(3) also applies only to habitual or regular users of illegal drugs, not to those who use drugs only occasionally. Cf. *Ludwick* v. *Commonwealth*, 18 Pa. 172, 174 (1851) ("Occasional acts of drunkenness * * * do not make one an habitual drunkard."). And because the statute applies

only to a person who "*is* an unlawful user or addicted to any controlled substance," 18 U.S.C. 922(g)(3) (emphasis added), the restriction lasts only as long as the habitual drug use continues. The habitual drug user, in other words, always has the option of restoring his own right to keep and bear arms by simply forgoing the habitual use of unlawful drugs. But if he lacks the motivation or will to comply with the law because of addiction or other factors, that fact alone provides powerful evidence of society's interest in keeping him disarmed.

Further, Section 922(g)(3) imposes only a limited burden on the right to keep and bear arms. It applies to a discrete category of individuals; like the law upheld in *Rahimi*, and unlike the laws struck down in *Bruen* and *Heller*, it "does not broadly restrict arms use by the public generally." *Rahimi*, 602 U.S. at 697. Although the statute imposes a significant restriction on a category of people—namely, habitual users of illegal drugs—the restriction does not last forever. Like the law upheld in *Rahimi*, the law here provides for "temporary" disarmament. *Id.* at 699. The statute, moreover, leaves the duration of the restriction in the individual's control; a person can regain his ability to possess arms at any time by ending his habitual use of illegal drugs. In that sense, Section 922(g)(3) imposes a less onerous burden than the law upheld in *Rahimi*, which left the duration of the disarmament up to a court rather than to the individual. See *ibid.*

5. Section 925(c) provides the appropriate mechanism for addressing concerns about specific applications of Section 922(g)(3)

To the extent Section 922(g)(3) raises constitutional concerns in marginal cases, 18 U.S.C. 925(c) provides the appropriate mechanism for addressing those con-

cerns. Under that statute, a person may apply to the Attorney General for relief from federal firearms disabilities. See *ibid.* The Attorney General may grant relief if the applicant shows that "the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety" and if "the granting of the relief would not be contrary to the public interest." *Ibid.* If the Attorney General denies relief, the applicant may seek judicial review in district court. See *ibid.*

That program was effectively disabled from 1992 until 2025 because the authority to grant relief had been delegated to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and appropriations statutes have included provisos barring ATF from using funds to act on Section 925(c) applications. See *United States* v. *Bean*, 537 U.S. 71, 74 (2002). Recognizing that the appropriations bar applies only to ATF, however, the Attorney General recently withdrew the delegation of authority to ATF and revitalized the Section 925(c) process. See *Withdrawing the Attorney General's Delegation of Authority*, 90 Fed. Reg. 13,080 (Mar. 20, 2025). An individual who seeks an exception to one of Section 922(g)'s categorical restrictions could invoke that process and, if the Attorney General denies his application, seek judicial review. That process provides a more workable mechanism for granting exceptions than a court-administered regime of as-applied challenges brought by those engaged in criminal conduct.

Section 925(c), to be sure, was not operative at the time of respondent's offense conduct. But respondent has not argued that he would have satisfied Section 925(c)'s standard—*i.e.*, that his record and reputation

show that he is unlikely to "act in a manner dangerous to public safety" and that granting relief "would not be contrary to the public interest." 18 U.S.C. 925(c). Nor did respondent file a civil suit seeking "protection from prosecution under [Section 922(g)(3)] for any future possession of a firearm." *Range* v. *Attorney General*, 124 F.4th 218, 232 (3d Cir. 2024) (en banc). He instead "violated the law in secret," "tried to avoid detection," and raised an as-applied challenge as a defense to a criminal charge after he was caught. *United States* v. *Gay*, 98 F.4th 843, 847 (7th Cir. 2024). Section 922(g)(3) raises no constitutional concerns as applied to him.

6. The Fifth Circuit's contrary analysis is unsound

The Fifth Circuit found "no historical justification for disarming a sober citizen not presently under an impairing influence." *United States* v. *Connelly*, 117 F.4th 269, 275-276 (2024). But history shows that legislatures may temporarily restrict the possession of arms by "categories of persons" who "present a special danger of misuse." *Rahimi*, 602 U.S. at 698. Illegal drug users present such a danger even when they are not intoxicated. As discussed above, *habitual* drug users are, by definition, likely to become intoxicated or impaired repeatedly in the near future; they are breaking the law by using controlled substances; they often commit crimes to fund their drug habits; they engage in violence as part of the drug trade; and they have hostile run-ins with the police. See pp. 18-19, *supra*.

Even focusing on the risk that illegal drug users will misuse firearms while intoxicated, the Fifth Circuit's analysis is unsound. As a practical matter, drug users who are under impairing influences are unlikely to put away their firearms until they regain their sobriety. To the contrary, intoxication can prompt drug users to en-

gage in violence. See, *e.g.*, *Florence* v. *Board of Chosen Freeholders*, 566 U.S. 318, 332 (2012) ("The use of drugs can embolden [individuals] in aggression.").

The Fifth Circuit's analysis also conflicts with the historical evidence marshaled above. For example, founding-era laws restricted the rights of drunkards, even during sober intervals, based on their habitual use of alcohol. And for about as long as legislatures have regulated drugs, they have prohibited the possession of arms by drug users and addicts—not just by persons under the influence of drugs. The Fifth Circuit did not address those laws in its historical analysis.

B. The Decision Below Warrants This Court's Review

1. This Court should grant review because the Fifth Circuit has held an Act of Congress unconstitutional. Judging the constitutionality of a federal statute is "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Accordingly, "when a lower court has invalidated a federal statute," the Court's "usual" approach is to grant certiorari. *Iancu* v. *Brunetti*, 588 U.S. 388, 392 (2019). The Court has recently and repeatedly reviewed decisions invalidating federal statutes even in the absence of a circuit conflict. See, *e.g.*, *Kennedy* v. *Braidwood Management, Inc.*, No. 24-316 (argued Apr. 21, 2025); *SEC* v. *Jarkesy*, 603 U.S. 109, 120 (2024); *Rahimi*, 602 U.S. at 690; *Vidal* v. *Elster*, 602 U.S. 286, 292 (2024).

The Fifth Circuit's approach, moreover, invalidates Section 922(g)(3) in the lion's share of its applications. Invoking that approach, the Fifth Circuit has already issued four decisions holding Section 922(g)(3) invalid as applied to defendants who were not proved to have been under an impairing influence while possessing the

firearm. See App., *infra*, 1a-2a; *United States* v. *Sam*, No. 23-60570, 2025 WL 752543, at *1 (Mar. 10, 2025); *United States* v. *Daniels*, 124 F.4th 967, 970 (2025); *Connelly*, 117 F.4th at 272.

2. The decision below also warrants further review because it forms part of a three-way circuit conflict. One court, the Seventh Circuit, has held that Section 922(g)(3) complies with the Second Amendment, at least as a general matter. In *United States* v. *Yancey*, 621 F.3d 681 (2010), the Seventh Circuit concluded that the Amendment allows Congress to disarm "categories" of "presumptively risky people" and that "habitual drug abusers" form one such category. *Id.* at 683; see *id.* at 682-687. Although *Yancey* predated *Bruen*, it relied on the history-and-tradition test that *Bruen* approved, not on the levels-of-scrutiny approach that *Bruen* rejected. See *id.* at 683-686 (drawing analogies to historical laws imposing categorical restrictions). District courts in the Seventh Circuit have accordingly continued to follow *Yancey* even after *Bruen*.[13]

A second court, the Eighth Circuit, has declared that Section 922(g)(3) violates the Second Amendment in a wide range of applications. It has concluded that "[n]othing in our tradition allows disarmament simply because [a defendant] belongs to a category of people, drug users, that Congress has categorically deemed dangerous." *United States* v. *Cooper*, 127 F.4th 1092, 1096 (8th Cir. 2025). In its view, the Second Amendment

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[13] See, *e.g.*, *United States* v. *Swiger*, No. 22-CR-38, 2024 WL 4651054, at *3 (N.D. Ind. Nov. 1, 2024); *United States* v. *Holcomb*, No. 24-CR-15, 2024 WL 4710612, at *10-*12 (E.D. Wis. Aug. 22, 2024); *United States* v. *Overholser*, No. 22-CR-35, 2023 WL 4145343, at *2 (N.D. Ind. June 23, 2023); *United States* v. *Posey*, 655 F. Supp. 3d 762, 773 (N.D. Ind. 2023).

instead requires some form of "individualized assessment." *Ibid.* Under the Eighth Circuit's approach, the government may apply Section 922(g)(3) only if it can make a case-by-case showing that drug use caused the defendant to "pose a credible threat to the physical safety of others," to act like someone who is "mentally ill," or to "induce terror." *Ibid.* (citation omitted). Applying that approach, the Eighth Circuit has vacated two Section 922(g)(3) convictions, remanding the cases for the district courts to decide in the first instance whether disarming the defendants "line[s] up with the case-by-case historical tradition." *Id.* at 1097; see *United States* v. *Baxter*, 127 F.4th 1087, 1090-1092 (8th Cir. 2025).

The Fifth Circuit has adopted an even stricter test. On its approach, the government generally may apply Section 922(g)(3) only to those who were "intoxicated at the time" they possessed firearms. *Connelly*, 117 F.4th at 272. The court also has left open the possibility that the government could "[p]erhaps" apply the statute in a case where the drugs were "so powerful" that they left someone "permanently impaired in a way comparable to severe mental illness." *Id.* at 277.

3. The practical consequences of the decision below underscore the need for this Court's review. Section 922(g) "is no minor provision." *Rehaif* v. *United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting). Section 922(g)(3), in turn, is one of Section 922(g)'s frequently applied provisions. District courts "adjudicate § 922(g)(3) prosecutions daily across the country." *Daniels*, 124 F.4th at 979 (Higginson, J., concurring). Since the creation of the federal background-check system in 1998, Section 922(g)(3) has resulted in more denials of firearms transactions than any provision apart from Sections 922(g)(1) (felons) and (g)(2) (fugitives). See Crim.

Justice Info. Servs. Div., FBI, U.S. Dep't of Justice, *Federal Denials—Reasons Why the NCIS Section Denies, November 30, 1998 – April 30, 2025*.

The question presented also extends well beyond the federal government. As noted above, at least 32 States and territories have enacted laws that restrict the possession of firearms by drug users or addicts. See p. 15, *supra*. The interpretation of the Second Amendment adopted in this case may have implications for those statutes as well.

4. Finally, this case is an ideal vehicle for resolving the question presented. The government preserved its defense of Section 922(g)(3) in both the district court and the court of appeals. See App., *infra*, 2a n.2, 3a-4a. And because this case arises on a motion to dismiss the indictment, it does not involve any factual disputes; at this stage, a court must accept as true the indictment's allegation that respondent possessed a firearm as an unlawful user of a controlled substance. Indictment 1; see *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 343 n.16 (1952).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-40137

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ALI DANIAL HEMANI, DEFENDANT-APPELLEE

[Filed: Jan. 31, 2025]

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:23-CR-18-a

Before HAYNES, HIGGINSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:*

A grand jury charged Ali Danial Hemani with possessing a firearm while being an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3). The district court granted Hemani's motion to dismiss the indictment, and the Government appealed. In the meantime, various decisions have occurred and, most relevant at this point, our court in *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), ruled on an "as-ap-

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

plied" case similar to this one. As here, *Connelly* concerned a motion to dismiss the indictment where the government did not seek to prove that Connelly was unlawfully using a controlled substance at the time she was found in possession of a firearm. Our court concluded that, because there was no effort to show that Connelly, despite being a regular drug user, was intoxicated at the time she was arrested possessing a firearm, applying § 922(g)(3) to her was unconstitutional as applied.[1] Following that decision, Hemani filed a Rule 28(j) letter stating we should affirm the court's dismissal. Based on that same case, the Government filed a motion for summary affirmance (joined by Hemani) because, despite disagreeing with that case, it concluded that it applies here and is not relevantly distinguishable.[2] Thereafter, another panel of our court issued an opinion in *United States v. Daniels*, No. 22-60596, applying *Connelly* in the context of a § 922(g)(3) conviction. 2025 WL 33402 (5th Cir. Jan. 6, 2025). There, our court held that Daniels's conviction was unconstitutional because of jury instructional error. *Daniels* did not address whether the government's evidence was deficient, holding only that the jury was improperly instructed. Here, the Government concedes its evidence is deficient under *Connelly*'s binding precedent and that this deficiency is dispositive.

Given the parties' agreement on summary affirmance and the application of our precedent here, we AFFIRM.

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[1] It denied the facial challenge.

[2] While seeking summary affirmance, it reserves the right for further review.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Crim No. 4:23-cr-18-ALM-KPJ-1

UNITED STATES OF AMERICA

v.

ALI DANIAL HEMANI (1)

Filed: Feb. 1, 2024

AGREED ORDER

A grand jury charged Defendant Ali Danial Hemani in a single-count indictment charging him with a violation of 18 U.S.C. § 922(g)(3), possession of a firearm by a user of a controlled substance. Hemani originally filed a motion to dismiss the indictment on the ground that 18 U.S.C. § 922(g)(3) is unconstitutional on its face. Dkt. No. 12. Hemani later filed an amended motion to dismiss the indictment on the ground that 18 U.S.C. § 922(g)(3) is unconstitutional as applied to Hemani. Dkt. No. 71. The government filed a response to the amended motion stating that, in light of the Fifth Circuit's decision in *United States v. Daniels*, 77 F.4th 337

(5th Cir. 2023),[1] dismissal of the indictment is appropriate on the ground raised by Hemani's amended motion —that 18 U.S.C. § 922(g)(3) is unconstitutional as applied to Hemani but that the government believes that *Daniels* was wrongly decided and that 18 U.S.C. § 922(g)(3) is valid under the Second Amendment. Dkt. No. 72. The government further reserved the right to file a notice of appeal in the case to preserve for further review the argument that *Daniels* was wrongly decided. *Id.*

The parties agree, and the Court ORDERS, as follows:

The Court GRANTS Hemani's amended motion to dismiss the indictment on the ground that 18 U.S.C. § 922(g)(3) is unconstitutional as applied to Hemani (Dkt. No. 71). In light of this finding, the Court DENIES without prejudice as moot Hemani's motion to dismiss the indictment on the ground that 18 U.S.C. § 922(g)(3) is unconstitutional on its face (Dkt. No. 12).

The Court accordingly DISMISSES the indictment (Dkt. No. 1).

The government preserves its right to file a notice of appeal in this case and preserves the argument that *Daniels* was wrongly decided and that 18 U.S.C. § 922(g)(3) is valid as applied to Hemani.

Signed this 1st day of February, 2024.

/s/ AMOS MAZZANT
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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[1] The United States has filed a petition for writ of certiorari before the Supreme Court in *Daniels*, No. 23-376, which remains pending.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Crim No. 4:23-cr-18-ALM-KPJ-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALI DANIAL HEMANI (1), DEFENDANT

Filed: July 31, 2023

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendant Ali Danial Hemani's ("Defendant") Motion to Dismiss Indictment (the "Motion") (Dkt. 12), wherein Defendant requests the Court dismiss the "sole count of the indictment 18 U.S.C. § 922(g)(3), possession of a firearm while being a drug user, . . . as unconstitutionally vague and violative of his Second Amendment Right. . . . " Dkt. 12 at 1. On May 17, 2023, the Motion (Dkt. 12) was referred to the undersigned. Upon consideration, the Court recommends the Motion (Dkt. 12) be **GRANTED**.

I. BACKGROUND

The Government alleges that in August 2022, Defendant, knowing that he was an unlawful user of a con-

trolled substance as defined in 21 U.S.C. § 802, knowingly possessed a Glock 19 9mm pistol bearing serial number BRWX640. *See* Dkt. 1 at 1. On February 8, 2023, the Grand Jury returned a single count Indictment charging Defendant with violation of 18 U.S.C. § 922(g)(3). *See* Dkt. 1. On February 10, 2023, Defendant was arrested, and on February 13, 2023, he made an initial appearance before the undersigned. *See* Minute Entry for February 10, 2023; Dkt. 4.

On February 15, 2023, Defendant filed the Motion (Dkt. 12) arguing *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023) renders 18 U.S.C. § 922(g)(3) unconstitutional. *See* Dkt. 12 at 9. Defendant argues the Second Amendment's plain text covers Defendant's possession of the Glock 19 9mm pistol and he is a member of "the people" as he "is an American citizen who has resided in the United States his entire life. . . . " *Id.* Defendant further argues the Government cannot show 18 U.S.C. § 922(g)(3) has a sufficient historical analogue and, thus, the statute places "an unconstitutional burden on [Defendant's] Second Amendment right." Dkt. 12 at 11 and n.11 (collecting cases). Defendant additionally argues 18 U.S.C. § 922(g)(3) is unconstitutionally vague because the statute "(1) fails to define 'unlawful user' or 'addict', and (2) fails to provide a temporal nexus between the unlawful drug use and the possession of the firearm." Dkt. 12 at 12.

On February 23, 2023, the Government filed its response (Dkt. 18) arguing *Bruen* "does not change the result as to [18 U.S.C. §] 922(g)(3)" because Defendant is "outside the scope of the Second Amendment's text" and "§ 922(g)(3)'s temporary prohibition of gun possession

. . . comfortably fits a longstanding historical tradition of disarming groups considered dangerous or unvirtuous." Dkt. 18 at 3. The Government argues "[a]nyone who violates § 922(g)(3) is, by definition, not a law-abiding, responsible citizen who enjoys the Second Amendment's protection under *Heller* and *Bruen*." Dkt. 18 at 7. The Government asserts this is because 18 U.S.C. § 922(g)(3) requires "a defendant's illegal drug use be both (1) 'with regularity and over an extended period of time'; and (2) close in time to the gun possession." Dkt. 18 at 7 (quoting *United States v. McCowan*, 469 F.3d 386, 392 (5th Cir. 2006)). The Government also argues that *Bruen*'s endorsement of "shall-issue" permitting regimes "denying the right to carry to drug abusers are constitutional." Dkt. 18 at 8 (citing *Bruen*, 142 S. Ct. at 2138 & n.9; *id.* at 2162 (Kavanaugh, J., concurring)).

The Government further argues that "[e]ven if the Second Amendment's plain text covers [Defendant's] conduct, his Second Amendment claim fails because § 922(g)(3) 'is consistent with the Nation's historical tradition of firearm regulation.'" Dkt. 18 at 9 (quoting *Bruen*, 142 S. Ct. at 2130). The Government asserts that there are longstanding historical analogues to 18 U.S.C. § 922(g)(3), including laws restricting gun rights of groups to promote public safety and laws restricting the gun rights of those who are intoxicated. *See* Dkt. 18 at 10-15. The Government further asserts that "[o]ne can hardly question Congress's judgment that unlawful drug abusers are, as a class, presumptively dangerous." *Id.* at 16 (citing *United States v. Carter*, 750 F.3d 462, 467-69 (4th Cir. 2014); *United States v. Yancey*, 621 F.3d 681, 685-86 (7th Cir. 2010)). The Government also argues the Court should reject Defend-

ant's facial void-for-vagueness challenge to 18 U.S.C. § 922(g)(3). *See* Dkt. 18 at 17-18.

On May 17, 2023, U.S. District Judge Amos L. Mazzant, III, referred the Motion (Dkt. 12) to the undersigned. *See* Dkt. 42. On May 22, 2023, the Court ordered the parties provide supplemental briefing as to *United States v. Connelly*, — F. Supp. 3d —, 2023 WL 2806324 (W.D. Tex. Apr. 6, 2023). *See* Dkt. 43. On May 28, 2023, Defendant filed his Supplemental Brief in Support of Motion to Dismiss (the "Defendant's First Supplemental Brief") (Dkt. 46). In Defendant's First Supplemental Brief (Dkt. 46), Defendant argues that *Connelly* correctly rejected the Government's "virtuous" or "law abiding" argument in line with the Fifth Circuit's decision in *Rahimi* and also properly rejected the Government's historical analogues that are similarly raised in Defendant's case. *See generally* Dkt. 46.

On June 5, 2023, the Government filed its Supplemental Brief in Support of its Response to Defendant's Motion to Dismiss Indictment (the "Government's First Supplemental Brief") (Dkt. 47), wherein the Government argues *Bruen* and *Rahimi* did not overturn *United States v. Patterson*, 431 F.3d 832 (5th Cir. 2005) and *United States v. May*, 538 F. App'x 465 (5th Cir. 2013) because those "decisions are best understood not as relying on means-end scrutiny, but instead as concluding that [18 U.S.C. §] 922(g)(3) is consistent with the historical understanding of the Second Amendment." Dkt. 47 at 3. The Government argues "[a] panel of the Fifth Circuit, let alone a district court, cannot overrule another [Fifth Circuit] panel's decision without *en banc* reconsideration or a superseding contrary Supreme Court decision." *Id.* at 4 (citing *United States v. King*, 979

F.3d 1075, 1084 (5th Cir. 2020)). The Government reasserts that Defendant is not a "law-abiding responsible citizen" and, unlike the defendant in *Connelly*, Defendant not only uses marijuana but also promethazine and cocaine. Dkt. 47 at 4-5. The Government additionally argues *Connelly* is in the minority of post-*Bruen* 18 U.S.C. § 922(g)(3) cases. Dkt. 47 at 6-7.

On June 15, 2023, the Court held oral argument on the Motion (Dkt. 12), and ordered the Government provide supplemental briefing as to the "how" and "why" the Government's asserted historical analogues are similar to 18 U.S.C. § 922(g)(3). *See* Minute Entry for June 15, 2023; *Bruen*, 142 S. Ct. at 2132-33 ("[W]e do think that [*District of Columbia v. Heller*, 554 U.S. 570 (2008)] and [*McDonald v. City of Chicago*, 561 U.S. 742 (2010)] point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."). The Court also provided Defendant an opportunity to file a response brief. *See* Minute Entry for June 15, 2023.

On June 21, 2023, the Government filed its Supplemental Brief in Support of Its Response to Defendant's Motion to Dismiss Indictment (the "Government's Second Supplemental Brief") (Dkt. 50). In the Government's Second Supplemental Brief (Dkt. 50), the Government argues *Rahimi* does not foreclose the Government's argument that Congress may constitutionally disarm unlawful users of controlled substances on the basis that they are "not law-abiding, responsible citizens." *Id.* at 1. The Government further argues the defendant in *Rahimi* was found not to "fit into" any of the groups as he was subject to a civil protective order and "he was only 'suspected' of other criminal conduct."

Id. at 2 (quoting *Rahimi*, 61 F.4th at 452). The Government argues 18 U.S.C. § 922(g)(3)'s prohibition on firearm possession by unlawful users of controlled substances is analogous to prohibitions on firearms possession by the mentally ill. *See* Dkt. 50 at 4. The Government argues that "[a]lthough being under the influence of a controlled substance is not tantamount to mental illness, both conditions can render a person incapable of safely and responsibly possessing a firearm." *Id.*

The Government additionally argues 18 U.S.C. § 922(g)(3) is analogous to historical laws, both before the passage of the Second Amendment and following the passage of the Fourteenth Amendment, that prohibited carrying a firearm while under the influence of alcohol. *See* Dkt. 50 at 4-6. The Government argues that "[a]s new and often more potent substances proliferated [in the late nineteenth and early twentieth centuries], so too did associated firearms regulations." *Id.* at 7. The Government asserts 18 U.S.C. § 922(g)(3) "imposes a burden 'comparable' to, or even less severe than, the historical laws" raised by the Government and "the reasons such laws existed is the same as for the present law, namely, 'to keep firearms out of the hands of presumptively risky people.'" Dkt. 50 at 9 (quoting *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 113 n.6 (1983)).

Finally, the Government argues 18 U.S.C. § 922(g)(3) "is consistent with [the] Nation's long historical tradition of disarming individuals deemed untrustworthy, potentially dangerous, or otherwise unfaithful to the rule of law." Dkt. 50 at 9. The Government asserts the English Bill of Rights and the Militia Act of 1662 "evidence a historical tradition of disarming both lawbreakers and those deemed to be dangerous." *Id.* at 10.

The Government argues "those who committed serious crimes could be stripped of their right to possess firearms just as they could be stripped of other rights" and "some states required firearm forfeiture even for misdemeanor offenses involving unauthorized or misuse of a gun." *Id.* at 11. The Government further argues "a group of Pennsylvania antifederalists advocated an amendment guaranteeing the right to bear arms 'unless for crimes committed, or real danger of public injury'" and "although the proposal did not prevail at the Pennsylvania convention, it was vindicated four years later through the adoption of the Bill of Rights. . . . " *Id.* at 11-12 (quoting The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, 1787, *reprinted in* 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 662, 665 (1971)). The Government also argues a law passed by the Commonwealth of Virginia during the French and Indian War "that disarmed Catholics but allowed them to keep their arms if they swore an oath of allegiance to the King" is analogous to 18 U.S.C. § 922(g)(3). Dkt. 50 at 11-12. The Government further argues a law passed by Connecticut that disarmed anyone who libeled or defamed the Continental Congress or the Connecticut General Assembly and laws passed by six states that disarmed the "disaffected" who refused to take an oath of allegiance to those states at the recommendation of the Continental Congress are also relevant historical analogues. *Id.* at 12-13. The Government further argues the disarmament of "a tramp's possession of a firearm" found constitutional by the Ohio Supreme Court in 1900 is analogous to 18 U.S.C. § 922(g)(3). *See* Dkt. 50 at 13 (citing *State v. Hogan*, 58 N.E. 572 (Ohio 1900)).

On June 27, 2023, Defendant filed his Response to Government's Supplemental Brief Responding to Motion to Dismiss ("Defendant's Second Supplemental Brief") (Dkt. 55). In Defendant's Second Supplemental Brief (Dkt. 55), Defendant argues that the applicability of Reconstruction-era state laws postdating the adoption of the Second Amendment by nearly one hundred years is "certainly limited," as the *Bruen* Court emphasized courts must "'guard against giving postenactment history more weight than it can bear.'" Dkt. 55 at 2 (citing *Bruen*, 142 S. Ct. at 2136). Defendant further argues that the Government's argument as to "dissidents, lunatics, or those who demonstrated a proclivity for violence . . . harkens back to its prior arguments that 'the people' in the Second Amendment refers only [to] law-abiding and responsible citizens" and that this argument was rejected by *Rahimi*. *Id.* at 2-3. Defendant argues that scholarship found disarmament regulations in the Thirteen Colonies and Vermont between 1607 and 1815 were "largely reserved for people of color and those whose allegiance was questioned; the colonies and early states consistently did not curb the *ownership* of guns by citizens." *Id.* at 4 (citing Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America*, 25 LAW & HIST. REV. 139, 142-143 (2007)) (emphasis in original). Defendant argues the laws cited by the Government as to possession of intoxicated people "reveal that § 922(g)(3) regulates 'possession' in a manner not historically used at the time of the founding of the Nation" because these statutes "regulated the use of firearms during a certain time period, most often when a person was actively under the influence, rather than disqualifying those imbibing from ownership or possession." Dkt. 55 at 5-6.

Finally, Defendant argues that 18 U.S.C. § 922(g)(3) "operates as a lifetime restriction of Second Amendment rights" because a felony conviction would in turn result in Defendant becoming "subject to 18 U.S.C. § 922(g)(1) and [being] prevented from possessing arms forever." Dkt. 55 at 6. Defendant argues, "[i]t makes no difference whether, for example, at the time of conviction, the person charged under § 922(g)(3) has not used drugs for months or years prior to his conviction." *Id.*

II. LEGAL STANDARD

Federal Rule of Criminal Procedure 12 allows a party to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." FED. R. CRIM. P. 12(b)(1). Challenges alleging a "defect in the indictment or information" include "failure to state an offense." FED. R. CRIM. P. 12(b)(3)(B)(v). "'The propriety of granting a motion to dismiss an indictment . . . is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact . . . If a question of law is involved, then consideration of the motion is generally proper.'" *United States v. Guthrie*, 720 F. App'x 199, 201 (5th Cir. 2018) (per curiam) (quoting *United States v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011)).

III. ANALYSIS

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Before *Bruen*, "the Courts of Appeals [had] coalesced around a 'two-step' framework for analyzing Second Amendment

challenges that combine[d] history with means-end scrutiny." *Bruen*, 142 S. Ct. at 2125. However, the *Bruen* court declined to follow this approach and instead required courts engage in a two-step analysis of (1) whether the Second Amendment's plain text covers an individual's conduct; and, if so, (2) then the Government "must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. As *Bruen* explained, "[i]n keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. If such conduct is covered, the Government must "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 2133 (emphases in original).

Defendant and the Government dispute whether Defendant's conduct is covered by the Second Amendment and whether *Bruen* affected the constitutionality of 18 U.S.C. § 922(g)(3). The Court concludes Defendant's conduct is covered by the Second Amendment's plain text and 18 U.S.C. § 922(g)(3) is not consistent with the Nation's history and tradition of firearm regulation under *Bruen*'s test. Accordingly, the Court recommends finding 18 U.S.C. § 922(g)(3) unconstitutional.

A. Intervening Changes and Defendant's Void-for-Vagueness Challenge

The Court must briefly address two preliminary matters. First, the Government appears to argue the Court should deny Defendant's constitutional challenge on the grounds there has not been superseding caselaw that renders some pre-*Bruen* Fifth Circuit precedent no longer binding and the Court should find the law is con-

stitutional as applied to Defendant. *See* Dkt. 47 at 4 ("A panel of the Fifth Circuit, let alone a district court, cannot overrule another Fifth Circuit panel's decision without en banc reconsideration or a superseding contrary Supreme Court decision." (internal brackets and quotations omitted); *id.* at 5 ("Because 922(g)(3) does not violate the Second Amendment *as applied to* [Defendant], this court should not entertain any facial challenge to the statute.") (emphasis in original).

Rahimi recognized an abrogation of *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). *See Rahimi*, 61 F.4th at 450-51 ("To the extent that the Court did not overtly overrule *Emerson* and *McGinnis*—it did not cite those cases but discussed other circuits' similar precedent—*Bruen* clearly fundamentally changed our analysis of laws that implicate the Second Amendment, rendering our prior precedent obsolete.") (cleaned up). *Patterson*, which denied a defendant's Second Amendment challenge to 18 U.S.C. § 922(g)(3), relies directly on *Emerson* as to the constitutionality of 18 U.S.C. § 922(g)(3), and *May* in turn relies on *Patterson*. *See Patterson*, 431 F.3d at 835 (citing *Emerson*, 270 F.3d at 261); *May*, 538 F. App'x at 466 (citing *Patterson*, 431 F.3d at 836). Thus, the Court finds the Government's argument is incorrect as to whether the Court is foreclosed from considering the constitutionality of 18 U.S.C. § 922(g)(3) following *Bruen*. Additionally, Defendant does not assert an as-applied challenge, and *Rahimi* held that "if a statute is inconsistent with the Second Amendment's text and historical understanding, then it falls under any circumstances." *Rahimi*, 61 F.4th at 453 (citations omitted); *accord Connelly*, 2023 WL 286324, at *15.

Defendant's argument that is couched as a void-for-vagueness challenge—i.e., the statute "as written would mean that anyone who had ever used an illegal drug, at any time, was prohibited from possessing a firearm"—largely conflates vagueness with the argument as to whether Defendant remains one of "the people" of the Second Amendment. Dkt. 18 at 12. Furthermore, it does not appear that *Bruen* can be read to have rendered 18 U.S.C. § 922(g)(3) susceptible to a void-for-vagueness challenge. The burden on Defendant's Second Amendment rights, which courts previously analyzed under the now disavowed two-step inquiry, is a separate analysis from whether the statute is unconstitutionally vague. *See United States v. Edwards*, 182 F.3d 333, 335-36 (5th Cir. 1999) ("On December 6, 1996, the night on which the police recovered the gun forming the basis of this conviction, the police found marijuana and cocaine at [the defendant's] residence. Finally, on September 27, 1997, [the defendant] admitted in a statement to a Bureau of Alcohol, Tobacco & Firearms agent that he used marijuana on a daily basis and had done so for the past two to three years. An ordinary person would understand that [the defendant's] actions establish him as 'an unlawful user of a controlled substance' while in possession of a firearm."); *see also Patterson*, 431 F.3d at 836 (conducting separate analysis of whether Second Amendment right was unconstitutionally burdened and whether statute was unconstitutionally vague). Thus, Fifth Circuit law as to Defendant's void-for-vagueness challenge remains undisturbed and the Court does not appear to have authority to consider such a challenge.

B. The Second Amendment's Text

18 U.S.C. § 922(g)(3) states:

> It shall be unlawful for 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)) . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(3).

Defendant argues "[t]he Second Amendment's plain text covers the conduct of [Defendant] possessing a handgun. It is not in dispute that [Defendant] is an American citizen who has resided in the United States his entire life, which makes him part of the 'national community,' and thus part of 'the people' to which the Second Amendment applies." Dkt. 12 at 9 (citing *Heller*, 554 U.S. at 580; *Bruen*, 142 S. Ct. at 2156). The Government argues that the "Second Amendment's text does not cover possession of a firearm by unlawful drug abusers" and "[i]llegal drug abusers are not among 'the people' whom the Second Amendment protects." Dkt. 18 at 5-6. The Court finds that Defendant's conduct is covered by the plain text of the Second Amendment and Defendant remains one of "the people."

1. Right to Keep and Bear Arms

"In *Heller*, the Supreme Court made clear that the Second Amendment's right to 'keep and bear arms' includes possession of weapons, such as firearms, and 'extends, prima facie, to all instruments that constitute

bearable arms.'" *United States v. Barber*, No. 4:20-CR-384-SDJ, 2023 WL 1073667, at *5 (E.D. Tex. Jan. 27, 2023) (quoting *Heller*, 554 U.S. at 582); *accord United States v. Charles*, — F. Supp. 3d —, No. MO:22-CR-00154-DC, 2022 WL 4913900, at *2 (W.D. Tex. Oct. 3, 2022) ("[T]he Second Amendment's 'keep and bear arms' language plainly encompasses possession [of a firearm]."). The *Heller* Court explained "that the sorts of weapons protected were those in common use at the time" and that this "limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." *Heller*, 554 U.S. at 627 (internal quotations omitted).

In the present case, the burdened conduct is Defendant's possession of a Glock 19 9mm pistol in the closet of his parents' home.[1] The Government does not assert that the Glock 19 9mm pistol is not in common use or that possessing the firearm within the home is not covered by the Second Amendment. Furthermore, the Government has not asserted that there have been any unlawful modifications to the firearm. *Heller* noted that the "American people have considered the handgun to be the quintessential self-defense weapon" and the "most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629; *accord Rahimi*, 61 F.4th at 454 ("[The defendant's] possession of a pistol and a rifle easily falls within the purview of the Second Amendment. The Amendment grants [the defendant] the right 'to keep' firearms, and 'possession' is included within the meaning of 'keep.'"); *cf. United States v. Dixon*, No. 22 CR 140, 2023 WL 2664076, at *3

[1] According to the Pretrial Services Report, Defendant had resided with his parents since April 2016. *See* Dkt. 13 at 2.

(N.D. Ill. Mar. 28, 2023) (finding Glock firearm equipped with a "Glock switch" that converted firearm from semiautomatic to automatic was "dangerous and unusual" for purposes of the Second Amendment).

Accordingly, Defendant's possession of the Glock 19 9mm pistol in the closet of his parents' home is covered by the plain text of the Second Amendment.

2. The People

While the Government does not challenge that generally, the possession of a firearm is covered by the Second Amendment, the Government asserts Defendant is not one of "the people" covered by the Second Amendment due to his alleged drug use. *See* Dkt. 18 at 3, 7; Dkt. 47 at 4-5; Dkt. 50 at 1. Defendant asserts he remains one of "the people" protected by the Second Amendment. *See* Dkt. 12 at 9; Dkt 46 at 5-6; Dkt 55 at 2-3.

The Government's argument, frequently characterized as the "virtuous citizen" theory, asserts that those individuals who have committed a serious criminal offense are excluded from the Second Amendment's protections because such individuals are removed from "the people." Courts across the nation, including within the Fifth Circuit, have been divided over whether an individual accused or convicted of a felony is excluded from "the people." *Compare Barber*, 2023 WL 1073667, at *6 ("The 'virtuous citizen' theory, which excludes certain groups of people—like convicted felons—from the plain text of the Second Amendment, misreads *Heller*."); *United States v. Hicks*, — F. Supp. 3d —, No. W:21-CR-00060-ADA, 2023 WL 164170, at *4 (W.D. Tex. Jan. 9, 2023) (finding the defendant charged under 18 § U.S.C.

922(n) was not outside of "the people" covered by the Second Amendment), *with United States v. Collette*, No. MO:22-CR-00141-DC, 630 F. Supp. 3d 841, 850 (W.D. Tex. 2022) (finding those convicted of felonies are excluded from "the people"); *Charles*, 2022 WL 4913900, at *12 ("[T]his Nation has a longstanding history of excluding felons from the rights of "the people.").

In *Rahimi*, the Fifth Circuit rejected the Government's argument that the "law-abiding qualifier constricts the Second Amendment's reach" as "run[ning] headlong into *Heller* and *Bruen*." *Rahimi*, 61 F.4th at 452. The Fifth Circuit explained that *Heller*'s exposition as to "law-abiding, responsible citizens" is "shorthand in explaining that its holding (that the amendment codifies an individual right to keep and bear arms) should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. . . . '" *Id.* (quoting *Heller*, 554 U.S. at 626-27). Thus, the *Rahimi* court explained, "while [the defendant] was *suspected* of other criminal conduct, [the defendant] was not a convicted felon or otherwise subject to another 'longstanding prohibition[] on the possession of firearms' that would have excluded him" from "the people" within the Second Amendment. *Id.* (quoting *Heller*, 554 U.S. at 626-27) (emphasis in original).

The *Rahimi* court cautioned against an expansive interpretation of "law-abiding," as it could render the phrase so malleable that it may "risk[] swallowing the text of the amendment." *Id.* at 453. The Fifth Circuit held the Government's "proffered interpretation of 'law-

abiding' admits to no true limiting principle" and explained that "[u]nder the Government's reading, Congress could remove 'unordinary' or 'irresponsible' or 'non-law-abiding' people however expediently defined—from the scope of the Second Amendment." *Id.*; *see also Range v. Att'y Gen. U.S.*, 69 F.4th 96, 102-103 (3d Cir. 2023) (en banc) ("At root, the Government's claim that only 'law-abiding, responsible citizens' are protected by the Second Amendment devolves authority to legislators to decide whom to exclude from 'the people.' We reject that approach because such 'extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label.'" (quoting *Folajtar v. Att'y Gen. of the U.S.* , 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J. dissenting))). Therefore, *Rahimi*'s rejection of the Government's "law-abiding" qualifier as a restriction on "the people" forecloses the Government's argument that Defendant is not one of "the people." Defendant is a citizen of the United States, residing in the United States, and has never been convicted of a felony. And while the weight of the evidence against Defendant is strong, he remains *suspected* of unlawful drug use and has not yet been found guilty. *See United States v. Gil*, No. EP-22-CR-773-DB, 2023 WL 4356067, at *4 (W.D. Tex. July 5, 2023) ("Although [the defendant] admitted to unlawful drug use, at the time of his arrest he was not a 'convicted felon or otherwise subject to another longstanding prohibition' on firearm possession." (quoting *Rahimi*, 62 F.4th at 452)).

Furthermore, the Government's argument as to "the people" would render its meaning in the Second Amendment different than its meaning in the First and Fourth Amendments. *See Bruen*, 142 S. Ct. at 2156 ("The constitutional right to bear arms in public for self-defense

is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" (quoting *McDonald*, 561 U.S. at 780)). As *Heller* explained, "the people" of the Second Amendment is the same as that of the First and Fourth, and the "term unambiguously refers to all members of the political community" which "belongs to all Americans." *Heller*, 554 U.S. at 580-81 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). Critically, our Fourth Amendment jurisprudence does not render one outside of "the people" and without constitutional protection once one is suspected of a crime, even when the evidence is great. Thus, the Government's interpretation of the "law-abiding" qualifier to constrict the reach of the Second Amendment would render "the people" of the Second Amendment a malleable meaning that is not present in the First and Fourth Amendments.

Accordingly, Defendant must be found to be among "the people" covered by the Second Amendment.

C. History and Tradition

To sustain 18 U.S.C. § 922(g)(3)'s burden on Defendant's Second Amendment right, "the Government bears the burden of proffering 'relevantly similar' historical regulations that imposed 'a comparable burden on the right of armed self-defense' that were also 'comparably justified.'" *Rahimi*, 61 F.4th at 455 (quoting *Bruen*, 142 S. Ct. at 2132-33). To meet its burden, the Government asserts 18 U.S.C. § 922(g)(3) has historical analogues in statutes penalizing those who use firearms while intoxicated, statutes disarming the mentally ill, and statutes disarming the "untrustworthy" or "potentially dangerous persons." The Court considers each

of these proposed historical analogues in turn and finds these statutes are insufficient historical analogues.

1. Intoxication Laws

In *United States v. Herrera*, the Fifth Circuit adopted the following definition of "unlawful user" as proffered by the Government: "for a defendant to be an 'unlawful user' for § 922(g)(3) purposes, his 'drug use would have to be with regularity and over an extended period of time.'" *United States v. Herrara (Herrara II)*, 313 F.3d 882, 885 (5th Cir. 2002) (en banc) (per curiam). In *Patterson*, the Fifth Circuit clarified this definition includes an element of "contemporaneousness." *Patterson*, 731 F.3d at 838 ("[T]he "pattern of use" language in the inference instruction aligns with the above-quoted "period of time" language considered by the *Herrera II* court; moreover, *the inference instruction properly requires a time frame that coincides with possession of the firearm*.") (emphasis added). Defendant argues that 18 U.S.C. § 922(g)(3) does not require a temporal nexus between drug use and firearm possession.[2] *See* Dkt. 12 at 12. However, Defendant concedes that current Fifth Circuit precedent imposes the contemporaneous requirement. *See id.* at 12 n.12.

As the contemporaneous requirement does not appear disturbed by *Bruen*, in conducting the "how" and "why" analysis, the Court will read 18 U.S.C. § 922(g)(3) to have a contemporaneous element as a limiting princi-

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[2] Defendant cites the same Reconstruction-era laws the Government raises in its Supplemental Brief (Dkt. 50), emphasizing that they all have a contemporaneous requirement by prohibiting intoxication when carrying or using a firearm. *See* Dkt. 12 at 11-12 and n.11.

ple. *See Bruen*, 142 U.S. at 2132-33 ("*Heller* and *McDonald* point to at least two metrics [to determine if a regulation is relevantly similar under the Second Amendment]: how and why the regulations burden a law-abiding citizen's right to armed self-defense."). Even with this limiting principle, the Court finds the Government's cited intoxication laws are not sufficiently analogous to 18 U.S.C. § 922(g)(3).

a. Reconstruction-Era State Laws

The Government presents late-1800s laws from Kansas, Mississippi, Missouri, Wisconsin, Oklahoma, and South Carolina, asserting that they proscribe possession, use, and receipt of firearms by intoxicated people. *See id.* at 5-6. However, all of these laws were passed between 1880 and 1900. *See id*. *Bruen* has made clear that "when it comes to interpreting the Constitution, not all history is created equal" and, as such, the scope of historical analysis is limited. *Bruen*, 142 U.S. at 2136. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634-35. Accordingly, the most persuasive historical analogues for this case are laws that were passed around the same time as the Second Amendment. *See Rahimi*, 61 F.4th at 456 ("We thus afford greater weight to historical analogues more contemporaneous to the Second Amendment's ratification."); *Bruen*, 142 S. Ct. at 2137 (holding courts should generally assume that "the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791."). As the above-listed laws were passed in the Reconstruction Era, these statutes are therefore minimally persuasive. *See*

Bruen, 142 U.S. at 2137 ("[B]ecause post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" (citing *Heller*, 554 U.S. at 614)).[3]

Similarly, the Government's reliance on *United States v. Daniels*, 610 F. Supp. 3d 892, 896 (S.D. Miss. 2022), which in turn relies on *United States v. Yancey*,

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[3] The Government also references laws denying guns to drug addicts enacted in the 1930s. *See* Dkt. 50 at 7. However, as referenced above, *Bruen* considered Reconstruction-era laws to be minimally persuasive, and thus, this reasoning applies in greater force to laws passed in the twentieth century. *See Bruen*, 142 S. Ct. at 2137; *see also Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C. J., dissenting) ("The belated innovations of the mid- to late-19th-century courts come too late to provide insight into the meaning of [the Constitution in 1787]."). In her concurrence, Justice Barrett noted *Bruen* "should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill Rights. On the contrary, the Court is careful to caution against giving postenactment history more weight than it can rightly bear." *Bruen*, 142 S. Ct. at 2163 (Barrett, J., concurring) (citation omitted).

Additionally, the Government's argument that anti-federalists' proposal at the Pennsylvania convention and Samuel Adams's proposal at the Massachusetts convention, regarding limitations on the Second Amendment, is without merit. *See* Dkt. 50 at 12. *Rahimi* made clear that while these proposals were "influential . . . neither became part of the Second Amendment as ratified." *Rahimi*, 61 F.4th at 457 (citation omitted). "Thus, the proposals might somewhat illuminate the scope of firearm rights at the time of ratification, but they cannot counter the Second Amendment's text, or serve as an analogue . . . because, *inter alia*, they were not enacted." *Id.* (citing *Bruen*, 142 S. Ct. at 2137).

621 F.3d 681 (7th Cir. 2010) for its historical analysis, is misplaced. In *Yancey*, the Seventh Circuit relied on two cases upholding statutes from the late nineteenth century that disarmed intoxicated persons and "tramps," which the *Bruen* Court explained would be minimally persuasive. *Yancey*, 621 F.3d at 684-85 (citing *State v. Shelby*, 90 Mo. 302, S.W. 468 (1886); *Hogan*, 58 N.E. 572). Additionally, the *Yancey* court concluded the Second Amendment right "was tied to the concept of a virtuous citizenry and that, accordingly, the Government could disarm 'unvirtuous citizens.'" *Id.* (citing *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)). But, as discussed above, the Fifth Circuit held that the virtuous citizen theory "runs headlong into *Heller* and *Bruen*." *Rahimi*, 61 F.4th at 452.

While these statutes bar the use of firearms by intoxicated people, the violation of these statutes only results in fines and imprisonment—not disarmament. *See* Kansas Gen. Stat., Crimes & Punishments § 282 (1868) (barring intoxicated persons from carrying deadly weapons with the punishment of a fine or imprisonment); 1878 Miss. Laws 175-76, § 2 (forbidding the sale of any weapon to intoxicated people, punishable by fine or hard labor); 1883 Mo. Laws 76, § 1 (prohibiting carrying weapons when intoxicated, punishable by fine and/or imprisonment); 1883 Wis. Sess. Laws 290, Offenses Against Lives and Persons of Individuals, ch. 329 § 3 (barring intoxicated people from carrying guns, punishable by fine or imprisonment); 1890 Okla. Sess. Laws 495, art. 47, § 4 (prohibiting public officers from carrying arms while intoxicated); 1899 S.C. Acts 97, No. 67, § 1 (forbidding intoxicated persons from shooting firearms except on their own premises, punishable by fine or imprisonment). Furthermore, these laws only proscribe carry-

ing or using firearms *while intoxicated*, constraining the length of time of the disarmament. These statutes do not suspend those who have been intoxicated or continue to use intoxicants from carrying guns indefinitely, or from possessing them at all. 18 U.S.C. § 922(g)(3), on the other hand, restricts Second Amendment rights while a person is "an active drug user." And "although this language may, at first glance, appear synonymous, under § 922(g)(3) 'a person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.'" *Gil*, 2023 WL 4356067, at *6 (quoting 27 C.F.R. § 478.11). Courts may infer active use from a positive drug test, conviction, or arrest for a controlled substance up to one year prior. *See id.* Thus, 18 U.S.C. § 922(g)(3) may impose disarmament based on drug use a year prior while the Reconstruction-era laws imposed a fine or imprisonment for use of firearm solely while intoxicated. *See Gil*, 2023 WL 4356067, at *6.

For all of the above reasons, the Court finds the aforementioned state statutes to be unpersuasive as to the "how" and "why." *Accord Connelly*, 2023 WL 2806324 at *8 (holding the same laws as not analogous because "they prevented individuals from using or carrying firearms while intoxicated, rather than preventing users of intoxicants from possessing firearms at all.").

b. State Laws Enacted Around the Adoption of the Second Amendment

The Government presents three historical intoxication laws enacted near the time the Second Amendment was adopted, arguing that they are sufficiently analogous to 18 U.S.C. § 922(g)(3) to allow Defendant's dis-

armament. The Government presents a 1655 Virginia statute that prohibited shooting while drinking at celebrations, a 1771 New York statute that prohibited shooting during the New Year's holiday to prevent drunken harm, and a 1746 New Jersey statute that allowed the militia to disarm any soldier who was intoxicated. *See* Dkt. 50 at 5. As explained below, the Court finds these laws are disanalogous to 18 U.S.C. § 922(g)(3).

i. The Virginia Law

The 1655 Virginia law cited by the Government differs from § 922(g)(3) in how it burdens the right to keep and bear arms. The Virginia law prohibits "shoot[ing] any guns at drinkeing (marriages and ffuneralls onely excepted). . . . " WILLIAM WALLER HENING, 1 *Statutes at Large: Being a Collection of all the Laws of Virginia, from the First Session of the Legislature in the Year 1619*, 401-02, Act XII (1823). Accordingly, the Virginia law prohibited citizens from firing guns *while intoxicated*. *See id.* The Virginia law did not prohibit an individual who had been or was currently intoxicated from possessing a firearm—it only prohibited *firing* guns while intoxicated. *See id.* This Virginia law therefore disarms the intoxicated individual only for the duration of his or her intoxication and only when the individual discharged the firearm while intoxicated. *See id.*; *accord Connelly*, 2023 WL 2806324, at *7 ("[T]he Virginia law prevented individuals from using firearms while actively intoxicated, while § 922(g)(3) prevents users of intoxicants from possessing firearms altogether."); *Gil*, 2023 WL 4356067, at *6 (same).

In addition, the Virginia law was enacted for different reasons than the Gun Control Act, which contains 18 U.S.C. § 922(g)(3). The Virginia law was enacted to en-

sure that citizens would be able to discern alarms for Indian attacks and to prevent waste of valuable gunpowder to be used in case of attack. *See* Hening, *supra*, at 401. In contrast, the purpose of the Gun Control Act was to promote domestic safety by keeping guns out of the hands of persons that were assumed dangerous to the public. *See Huddleston v. United States*, 415 U.S. 814, 824 (1974) ("[Congress] was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest."); *Barrett v. United States*, 423 U.S. 212, 220 (1976) ("[The Gun Control Act's] broadly stated principal purpose was 'to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" (citing S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)).

While there is some similarity to the "why," i.e., the general proposition that both laws are for the purpose of security (though the Virginia law focused on foreign threats), the "how" of the Virginia law remains so disanalogous from the Gun Control Act that the Court cannot find that the Virginia law is relevantly similar. *Accord Connelly*, 2023 WL 2806324, at *7 ("Prohibiting individuals who have used drugs sometime in the last year from owning and keeping a firearm in their homes for self-defense is a much more burdensome infringement on the Second Amendment's 'core protection,' than preventing people from shooting their guns while intoxicated."). Thus, the Court cannot find the Virginia law is sufficiently analogous to 18 U.S.C. § 922(g)(3).

ii. The New York Law

The 1771 New York law differs from § 922(g)(3) in how it burdens the right to keep and bear arms. The New York law forbade the firing of, *inter alia*, any gun or pistol in any building or "before any Door, or in any Garden, street, Lane, or other Inclosure on [the last day of December or the first and second days of January]." Ch. 1501, 5 Colonial Laws of New York 244-245 (1894). Similar to the Virginia law, this law does not restrict the possession of firearms; it merely restricts their firing on three days of the year. *See id.* In contrast, 18 U.S.C. § 922(g)(3) forbids unlawful drug users from possessing firearms—the status of an "unlawful user" has a temporal nexus that allows for disarmament for drug use of up to one year. 18 U.S.C. § 922(g)(3). Additionally, the New York law is concerned with firearm use as to certain locations, i.e., similar to restrictions today regarding sensitive places. *See Connelly*, 2023 WL 2806324, at *7 ("The New York law thus bears a closer similarity to restrictions on the use of firearms 'in sensitive place' than it does to categorial restrictions on firearm possession by classes of people." (citing *Heller*, 554 U.S. at 626-27 & n.26)). In sum, the New York law restricts firearm *use* for only three days and in certain locations, while 18 U.S.C. § 922(g)(3) imposes a categorical prohibition on firearm *possession* while one is a "contemporaneous user." *Compare* Ch. 1501, 5 Colonial Laws of New York 244-245 (1894), *with* 18 U.S.C. § 922(g)(3); *see also Connelly*, 2023 WL 2806324, at *7 ("An inference of current use may be drawn from evidence" of a positive drug test, "provided that the test was administered within the past year. . . . " (citing 27 C.F.R. § 478.11)); *Gil*, 2023 WL 4356067, at *6 (same).

The New York law also differs to some extent from 18 U.S.C. § 922(g)(3) in why it burdened Second Amendment rights. This "why" is related to the "how" in that the legislature cited the "great Damages" and "Mischief" done on New Years "by persons going from House to

House, with Guns and other Fire Arms and being often intoxicated with Liquor" as the reason for restricting gun use. Ch. 1501, 5 Colonial Laws of New York 244 (1894). This reason is narrower in scope than the broad reason for the Gun Control Act to prevent gun violence across the nation. *Compare id.*, *with* Gun Control Act, Pub. L. No. 90-618, § 101, 82 Stat. at 1213. Further, the New York law was only in effect for two years, from 1771 to 1173, before being repealed. *See* Ch. 1501, 5 Colonial Laws of New York 244 (1894). This belies a finding that this statute was a "well-established" part of our Nation's history of firearm regulation. *See Bruen*, 142 S. Ct. at 2133 ("[A]nalogical reasoning requires only that the government identify a well-established and representative historical analogue. . . . "). As such, the Court finds the New York law disanalogous to 18 U.S.C. § 922(g)(3).

iii. The New Jersey Law

The New Jersey law is unlike 18 U.S.C. § 922(g)(3) in how it burdened the right to keep and bear arms. The New Jersey law stated:

> if any solder shall . . . appear in Arm disguised in Liquor, it shall and may be lawful for the caption or Commanding Officer to disarm such Soldier at the Head of his Company, and to set a Centinel over him during the time of the Company's being in Arms, and no longer, or to fine him. . . .

Acts of the General Assembly of the Province of New-Jersey 303 (1752). A clear difference here is that disarmament is not the only prescribed option of punishment; the soldier could be fined instead. In contrast, 18 U.S.C. § 922(g)(3) offers no such option. *Compare id.*, *with* 18 U.S.C. § 922(g)(3). The disarmament only persisted "during the time of the Company's being in Arms, *and no longer*. . . . " Acts of the General Assembly of the Province of New-Jersey 303 (1752) (emphasis added). Clearly, this was not a permanent disarmament, although the law did interfere with gun possession, however briefly. Conversely, the durational scope of 18 U.S.C. § 922(g)(3) is broader and less defined, as one is disarmed so long as one is an "unlawful user." 18 U.S.C. § 922(g)(3).

This decided difference in duration of the disarmament is significant, and therefore "how" the New Jersey law burdens Second Amendment rights is distinct from how 18 U.S.C. § 922(g)(3) does so.

Critically, the New Jersey law is also disanalogous to 18 U.S.C. § 922(g)(3) in "why" it burdened Second Amendment rights. *See* Acts of the General Assembly of the Province of New-Jersey 303 (1752). Noted in the margins of this law is the statement "Officers and Soldiers to behave well when under Arms." *Id.* This note reflects the reason for this law—namely, to preserve order within military ranks. In contrast, the Gun Control Act was created to prevent certain status groups, such as the unlawful users and addicts mentioned in 18 U.S.C. § 922(g)(3), from possessing guns, in order to promote the public interest. *See* Gun Control Act, Pub. L. No. 90-618, § 101, 82 Stat. at 1213; *see also United States v. Roach*, 201 F. App'x 969, 974 (5th Cir. 2006) ("Congress

has an interest in keeping guns out of the hands of drug users, and § 922(g)(3) is rationally related to this interest." (citing *Huddleston*, 415 U.S. at 824)). Once again, the Gun Control Act's "why" is broad, as it applies to the entire public, while the New Jersey law's "why" is narrow and only applies to the militia. *Compare id.*, *with* Acts of the General Assembly of the Province of New-Jersey 303 (1752). Because the "how" and "why" the New Jersey Law burdens Second Amendment rights differ meaningfully from the "how" and "why" 18 U.S.C. § 922(g)(3) burden Second Amendment rights, the New Jersey law is not analogous to 18 U.S.C. § 922(g)(3).

2. Laws Regarding the Mentally Ill

The Government argues that 18 U.S.C. § 922(g)(3) "is analogous to 'longstanding prohibitions on the possession of firearms by . . . the mentally ill' . . . , even as it concedes that "being under the influence of a controlled substance is not tantamount to mental illness." Dkt. 50 at 4 (citing *Heller*, 554 U.S. at 626). Defendant correctly argues that intoxication laws are not analogous to 18 U.S.C. § 922 (g)(3) because intoxication is temporary; however, mental illness, by its definition, is an illness that may afflict one for a longer duration. *See* Dkt. 55 at 5-6.

Laws disarming the mentally ill are not analogous to 18 U.S.C. § 922(g)(3) as they are fundamentally different in kind. Intoxication results when a person ingests a substance such that they are physically or mentally impaired, and it ends when the substance is sufficiently processed out of the body. *See, e.g.*, Tex. Penal Code Ann. § 8.04(d) ("For purposes of this section [defining intoxication as a defense] 'intoxication' means disturbance of mental or physical capacity resulting from the

introduction of any substance into the body."). Conversely, mental illness is a long-term ailment that often requires long-term treatment such as therapy and medication.[4] The difference in duration between intoxication and mental illness is critical.

Criminal law also treats mental illness differently than it does intoxication, showing that the law has not historically equated mental illness and intoxication.[5] As analyzed in the previous section, historically, the law proscribed intoxicated people from discharging firearms for the duration of their intoxication. The same is not true for those deemed insane. The Government cites an English law and an American law that instructed justices to lock up "lunatics" and points to *Heller*'s acceptance of the historic disarmament of the mentally ill. *See* Dkt. 50 at 4. But once again, duration presents a problem. "Lunatics" were not permitted to possess firearms at all. *See Heller*, 554 U.S. at 626. Furthermore, "lunatics" were imprisoned on the principle they were an inherent danger to society. *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1377 (2009). These laws re-

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[4] *See generally* Mayo Clinic, *Mental illness*, https://www.mayoclinic.org/diseases-conditions/mental-illness/diagnosis-treatment/drc-20374974 (last visited July 14, 2023).

[5] *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968) (plurality opinion) are evidence that our criminal law has treated intoxication and mental illness differently. *Compare Robinson*, 370 U.S. at 667 (holding narcotics addiction could not be criminally punished because "it is apparently an illness which may be contracted innocently or involuntarily"), *with Powell*, 392 U.S. at 536-37 (holding intoxication in public is a "condition" that may be criminally published).

lated to mental illness imposed significantly more severe restraints on personal liberty for different purposes than prohibiting the use of firearms by someone who is a contemporaneous user of controlled substances.

As such, laws prohibiting the possession of firearms by the mentally ill are disanalogous from 18 U.S.C. § 922(g)(3).

3. Disarmament Laws

Finally, the Government argues Defendant, as an unlawful user, is a member of a group that has been historically disarmed. The Government points to "a long Anglo-American tradition allowing the [G]overnment to categorically limit the gun rights of untrustworthy or potentially dangerous persons." Dkt. 50 at 9. Defendant argues, on the other hand, that "the laws of the time existed to regulate 'dangerous *uses*' of guns" and did not "restrict the ownership of guns by members of the body politic." Dkt. 55 at 4.

The Government's argument is unavailing because its cited laws are not directed towards a class of people of which Defendant is a member. First, the Government points to pre-Revolution English laws that were later mimicked in America. *See* Dkt 50 at 9-11. Such laws disarmed political enemies and Catholics, among others, as they were deemed to be dangerous. *See id.* at 9-10. Next, the Government points to Revolution-era laws that disarmed felons and those who did not swear allegiance to the newly formed states. *See id.* at 10-11. All of these classes of people, the Government asserts, were deemed dangerous at the time of the laws' passage, and so were disarmed. *See id.* at 9-11. The Court is not convinced by the Government's argument.

The *Rahimi* court, while discussing historical disarmament laws, stated "we question at a threshold level whether colonial and state laws disarming categories of 'disloyal' or 'unacceptable' people present tenable analogues to § 922(g)(8)." *Rahimi*, 64 F.4th at 457. The *Rahimi* court reasoned "[l]aws that disarmed slaves, Native Americans, and disloyal people may well have been targeted at groups excluded from the political community—*i.e., written out of 'the people' altogether*—as much as they were about curtailing violence or ensuring the security of the state. Their utility as historical analogues is therefore dubious, at best." *Id.* (emphasis added). Such laws focused on those presumed to be disloyal or outside "the people" altogether. *See id.* As discussed above, Defendant remains a member of "the people" and *not yet* removed from the Nation's political community. Moreover, allowing for a generalized analogy to "dangerousness" would create a "regulatory blank check," *Bruen*, 142 S. Ct. at 2133, and render the protections of "the people" largely meaningless. *Bruen*, 142 S. Ct. at 2133. To avoid constitutional protections, a legislature would need only declare that a class of individuals, even those within "the people," are "dangerous." Thus, there would be no limiting principle on the legislature's authority to disarm and would in effect short-circuit the Fifth Circuit's reading of "the people." *See Rahimi*, 61 F.4th at 453, 460 461 (rejecting disarmament laws as historical analogues regardless of 18 U.S.C. § 922(g)(8)'s "salutary policy goal" of preventing domestic gun abuse); *but see Gil*, 2023 WL 4356067, at *7 ("Yet the disarmament of unlawful drug users and addicts under § 922(g)(3) more closely resembles these historical laws to serve the preservation of

political and social order rather than protecting an identified person.") (citation omitted).

Furthermore, courts have questioned whether such statutes—focused on race and religion to establish assumptions of disloyalty—can support disarmament today. *See Hicks*, 2023 WL 164170, at *7 ("This Court is also skeptical of using historical laws that removed someone's Second Amendment rights based on race, class, and religion to support doing the same today. Indeed, the Court believes that "rejecting" the discriminatory application of those unconstitutional laws historically—while still arguing those laws should be a basis for the Court's decision—walks too fine a line."); *see also Range*, 69 F.4th at 104-05 ("Apart from the fact that those restrictions based on race and religion now would be unconstitutional under the First and Fourteenth Amendments, the Government does not successfully analogize those groups to [the defendant] and his individual circumstances. That Founding-era governments disarmed groups they distrusted like Loyalists, Native Americans, Quakers, Catholics, and Blacks does nothing to prove that [the defendant] is part of a similar group today.").

The Court recognizes that the strictures of *Bruen*'s test impose a difficult burden on the Government to find analogous statutes from the founding period and the early 1800s. Courts are struggling with the historical analysis that *Bruen* sets forth. *See, e.g.*, *United States v. Quiroz*, 629 F. Supp. 3d 511, 526-27 (W.D. Tex. 2022) ("*Bruen* did not, however, erase societal and public safety concerns—they still exist—even if *Bruen*'s new framework prevents courts from making that analysis. As stated above, the new standard creates unknown un-

knowns, raising many questions."). But the Court must be faithful to *Bruen* and *Rahimi* and, ultimately, it remains the Government's burden to show that Defendant's constitutional rights may be regulated. And, with any constitutional right, liberty comes at the cost of security.

Accordingly, the Government has not met its burden of showing the disarmament laws are a sufficient analogue to 18 U.S.C. § 922(g)(3).

IV. RECOMMENDATION

For the foregoing reasons, the Court recommends the Motion (Dkt. 12) be **GRANTED**; and recommends finding 18 U.S.C. § 922(g)(3) to be unconstitutional after *Bruen*.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

A party filing objections is entitled to a *de novo* review by the district court of the findings and conclusions contained in this report only if specific objections are made, and failure to timely file written objections to any proposed findings, conclusions, and recommendations contained in this report shall bar an aggrieved party from appellate review of those factual findings and legal conclusions accepted by the district court, except on grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *see also Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*,

28 U.S.C. § 636(b)(1) (extending the time to file objections from ten (10) to fourteen (14) days).

So ORDERED and SIGNED this 31st day of July, 2023.

/s/ KIMBERLY C. PRIEST JOHNSON
KIMBERLY C. PRIEST JOHNSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

1. U.S. Const. Amend. II provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

2. 18 U.S.C. 922(g)(3) provides:

Unlawful acts

(g) It shall be unlawful for any person—

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.