No. 24-1234

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ALI DANIAL HEMANI,

Respondent.

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

BRIEF OF SECOND AMENDMENT LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars of firearm regulation and the Second Amendment. They have authored several books and articles on the Second Amendment, and their scholarship has been published in leading law journals and cited by members of this Court and the courts of appeals. Amici have closely followed judicial decisions interpreting and applying *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), and are well suited to explain how our Nation's tradition of firearm rights and regulation protects legislative authority to create categorical prohibitions on firearm possession.

Joseph Blocher is the Lanty L. Smith '67 Professor of Law and Vice Dean at Duke University School of Law. His scholarship on gun rights and regulation has been published in the Harvard Law Review Forum, the Yale Law Journal, the Stanford Law Review, and other leading academic journals. *See, e.g.*, *Guided by History: Protecting the Public Sphere From Weapons Threats Under* Bruen, 98 N.Y.U. L. REV. 1795 (2023) (with Reva Siegel); *Firearm Localism*, 123 YALE L.J. 82 (2013); *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1 (2012). His work has been cited by most federal courts of appeals. *E.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1268 (D.C. Cir. 2011). Professor Blocher co-

[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

authored a casebook with fellow amici Professor Jacob Charles and Professor Darrell Miller, THE SECOND AMENDMENT: GUN RIGHTS AND REGULATION (2025), which includes a comprehensive account of the history, theory, and law of the right to keep and bear arms from its historical roots in England to now.

Jacob D. Charles is an Associate Professor of Law at Pepperdine University Caruso School of Law. His scholarship focuses on Second Amendment doctrine and theory. His scholarship has appeared in the Harvard Law Review Forum, Columbia Law Review, Michigan Law Review, University of Pennsylvania Law Review, Virginia Law Review, and Duke Law Journal. *See, e.g.*, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023); *Violence and Nondelegation*, 135 HARV. L. REV. F. 463 (2022) (with Darrell A. H. Miller); *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581 (2022); *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637 (2022) (with Brandon L. Garrett).

Darrell A. H. Miller is a Professor of Law at the University of Chicago Law School. His Second Amendment scholarship has been published in the University of Chicago Law Review, the Yale Law Journal, the Columbia Law Review, and other leading journals. *See, e.g.*, *Technology, Tradition, and "The Terror of the People,"* 99 NOTRE DAME L. REV. 1373 (2024); *Manufacturing Outliers*, 2022 SUP. CT. REV. 49 (with Joseph Blocher); *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295 (2016) (with Joseph Blocher); *Institutions and the Second*

Amendment, 66 DUKE L.J. 69 (2016); *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2013). His work has been cited by numerous state and federal courts. *E.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1281 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Eric Ruben is an Associate Professor of Law at SMU Dedman School of Law. His scholarship on the Second Amendment has been published in the California Law Review, Duke Law Journal, Georgetown Law Journal, Iowa Law Review, Yale Law Journal, and other prominent publications. *See, e.g.*, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023) (with Joseph Blocher); *Public Carry and Criminal Law After* Bruen, 135 HARV. L. REV. F. 505 (2022); *"Second-Class" Rhetoric, Ideology, and Doctrinal Change*, 110 GEO. L.J. (2022) (with Joseph Blocher); *An Unstable Core: Self-Defense and the Second Amendment*, 108 CALIF. L. REV. 63 (2020); *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433 (2018) (with Joseph Blocher); *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121 (2015) (with Saul Cornell). His work has been cited by this Court as well as federal district courts and courts of appeals.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, this Court determined that the proper analysis for Second Amendment challenges is one "rooted" in that Amendment's text, "as informed by history." 597 U.S. 1, 19 (2022). This test demands "unqualified deference" to the balance "struck by the traditions of the American people." *Id.* at 26.

The Court later provided guidance on the contours of this text- and history-based approach in *United States v. Rahimi*, 602 U.S. 680 (2024), which helped remedy some of the confusion in the lower courts over the *Bruen* analysis, by focusing the inquiry on "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[2] *Id.* at 692. Nevertheless, lower courts have continued to struggle to implement *Bruen* and have sought additional clarity:

- *Bianchi v. Brown*, 111 F.4th 438, 474 (4th Cir. 2024) (Diaz, J., concurring) (noting confusion

[2] Amici also submitted an amicus brief to the Court in *Rahimi*. *See* Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner, *United States v. Rahimi*, 602 U.S. 680 (2024) (No. 22-915). The brief first noted the lower courts' confusion over *Bruen* and the inconsistent outcomes that it had yielded. *Id.* at 5–6. Amici then proposed that that confusion stemmed from a mismatch between some courts' generally expansive view of the scope of the Second Amendment right and their comparatively exacting view of how government regulations fit within our historical tradition. *Id.* at 6–7. Members of the Court cited this brief in *Rahimi*, 602 U.S. at 743 (Jackson, J., concurring), and in *Vidal v. Elster*, 602 U.S. 286, 328 (2024) (Sotomayor, J., concurring).

and an inability to "apply and replicate precedent consistently" when the en banc Fourth Circuit reached "diametrically opposed conclusions about what [] history means" for a law prohibiting the sale and possession of assault weapons), *cert. denied sub nom. Snope v. Brown*, 145 S. Ct. 1534 (2025);

- *United States v. Morton*, 123 F.4th 492, 497 n.2 (6th Cir. 2024) (noting "significant disagreement" about the historical analysis relevant to disarming felons, including questions on the applicable level of generality to understand "laws that forbade Catholics, seditious libelers, Native Americans, loyalists, individuals who had engaged in 'actual rebellion,' and Black people from possessing firearms");

- *Range v. Attorney General*, 124 F.4th 218, 252 (3d Cir. 2024) (Krause, J., concurring) (noting, in case remanded in light of *Rahimi*, that the majority continued to "demand[] that any historical analogue match with high precision," contributing to a lack of a "clear framework by which courts may distinguish between constitutional and unconstitutional applications" of a firearm regulation).

Amici here respectfully submit that *United States v. Hemani* provides an opportunity to build on *Rahimi's* important recognition that legislatures may identify and prohibit "possession of guns by categories of persons" who "present a special danger of misuse." 602 U.S. at 698. The Court in *Rahimi* noted this point but did not need to rely on it because there was an

individualized, judicial determination of dangerousness in that case. *Id.* at 686. The Court has not yet had occasion to consider a purely legislative determination that a class of persons may not possess a firearm because of danger of misuse. This case presents that question. Congress has identified a "special danger" in firearm possession by any person who is an "unlawful user of or addicted to any controlled substance."[3] 18 U.S.C. § 922(g)(3). Such a determination fits neatly within our tradition of firearm regulation.

America's unbroken tradition from the Colonial era through the Revolutionary War, Reconstruction, and beyond permits legislatures to regulate firearm possession by groups whom they judged to present a "special danger." As then-Judge Barrett wrote in *Kanter v. Barr*, "[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing

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[3] Courts have generally interpreted "unlawful users" to refer to those whose use of a controlled substance is habitual or regular. *See, e.g.*, *United States v. Harris*, 144 F.4th 154, 162 (3d Cir. 2025) (an unlawful user "engage[s] in regular use [of drugs] over a period of time proximate to or contemporaneous with the possession of the firearm"); *United States v. Davey*, 151 F.4th 1249, 1255–57 (10th Cir. 2025), *cert. denied*, No. 25-5790, 2025 WL 3132002 (Nov. 10, 2025) ("someone who, on a regular and ongoing basis, uses a controlled substance during the same time as his firearm possession" (internal quotation marks omitted)); *United States v. Veasley*, 98 F.4th 906, 916 (8th Cir. 2024), *cert. denied*, 145 S. Ct. 304 (2024) (noting the requirement of "regular drug use"). The "habitual" construction of § 922(g)(3) results in only a temporary disqualification—"[i]t forbids gun possession only as long as someone is using drugs regularly." *Harris*, 144 F.4th at 163.

guns." 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting). Modern legislatures carried on this tradition, passing laws like the one at issue here. This longstanding legislative regulatory authority is part of the balance "struck by the traditions of the American people" and reflects the relevant historical principle—modern legislatures, like those of the past, retain similar latitude to categorically disarm groups they adjudge dangerous. *See Bruen*, 597 U.S. at 26.

To be sure, legislatures' authority to make such judgments is not free from review. Other constitutional limitations would foreclose abhorrent judgments made on the basis of invidious stereotypes, and courts can test whether a legislature's judgment about the danger posed by particular groups is founded on evidence.

But in holding § 922(g)(3) unconstitutional as to individuals not intoxicated when they possessed a firearm, the Fifth Circuit supplanted its judgment for that of Congress and upset the balance of rights and regulation set by our historical traditions. In attempting to locate a Founding-era comparison to users of marijuana, the Fifth Circuit effectively sought a "historical twin" when this Court requires only a "historical analogue." *Bruen*, 597 U.S. at 30. In this instance, the analogue is Founding-era laws banning firearm possession for certain groups that legislatures adjudged "dangerous" when armed. Reversing the Fifth Circuit would therefore restore a "principle[] that underpin[s] the Nation's regulatory tradition." *Rahimi*, 602 U.S. at 681.

ARGUMENT

In *Bruen*, this Court clarified that the proper inquiry under *Heller* was one grounded in the Second Amendment's text and historical understanding. "[R]eliance on history to inform the meaning of constitutional text," the Court reasoned, was both more "legitimate" and "administrable" than asking judges to engage in the tiered-scrutiny analysis that *Bruen* replaced. *Bruen*, 597 U.S. at 25. *Bruen*'s historical approach requires courts to engage in analogical reasoning, measuring modern justifications for firearms restrictions against historical ones and analyzing relevant principles of similarity between the two. *Id.* at 28–29.

The government's merits brief addresses the similarity between historical and modern categories of dangerous persons under its *Bruen* analysis, comparing habitual drug users to drunkards. Brief for Petitioner at 18–27, *United States v. Hemani*, No. 24-1234 (U.S. Dec. 12, 2025). While this narrow analysis may yield correct results, amici suggest that *Bruen* and *Rahimi* demand an assessment of historical regulatory *principles*. In this case, that principle is the longstanding legislative authority to categorically prohibit dangerous persons from possessing firearms. Section 922(g)(3) represents Congress's determination that firearm possession by habitual drug users or addicts poses a heightened risk of danger. This Court should clarify that such a determination fits well within our tradition of firearm regulation and reflects the "balance struck by the traditions of the American people." *Bruen*, 597 U.S. at 26. That tradition has always included legislative authority to identify categories of dangerous persons

and to prevent them from possessing firearms. To keep the traditional regulatory balance, courts should not readily supplant legislative judgments of dangerousness. So long as legislatures' categorical determinations about increased risk of danger have evidentiary support, their decisions deserve respect.

The Fifth Circuit erred in reading history to forbid categorical judgments about dangerousness. By reasoning that § 922(g)(3) is largely unconstitutional because "not all members of the set 'drug users' are violent," the court engaged in a level of scrutiny foreign to our historical tradition and rejected by eight Members of the Court in *Rahimi*. *United States v. Connelly*, 117 F.4th 269, 278–79 (5th Cir. 2024). Reversing the Fifth Circuit would confirm and conserve our regulatory tradition, which includes respect for categorical determinations of dangerousness. *Rahimi*, 602 U.S. at 690.

I. OUR HISTORICAL TRADITION OF WEAPON REGULATION EMPOWERS LEGISLATURES TO MAKE CATEGORICAL DETERMINATIONS OF DANGER.

Legislatures serve as the People's representatives, charged with making informed policy choices about safety, security, liberty, and public peace. Our tradition of firearms regulation has long respected the legislature's authority to regulate the use of firearms. *See State v. Reid*, 1 Ala. 612, 616–17 (1840) (reasoning that state legislature had the "authority to adopt such regulations of police, as may be dictated by the safety of the people"). Legislatures have routinely exercised this authority to make

categorical determinations about the ability of a group of persons to access firearms. Since 1791 "and for well more than a century afterward[,] legislatures disqualified categories of people" when "they judged that doing so was necessary to protect the public safety." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). Though *Rahimi* only had to address individualized judicial determinations of dangerousness, it too recognized the legislature's authority to prohibit "categories of persons thought by a legislature to present a special danger of misuse" from possessing firearms. 602 U.S. at 698. *Heller* likewise gave historic categorical disarmaments an approving nod, specifically those for "felons and the mentally ill." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

Our history of firearm regulation is replete with examples of legislatures exercising their authority to disarm those believed to present a special danger of misuse.[4] Founding-era legislatures enjoyed substantial power to prohibit certain classes of persons from exercising the right to bear arms, *see Rahimi*, 602 U.S. at 690 ("Since the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms."), even if they often exercised that power in a manner that we now would consider a violation of another constitutional

[4] Other areas of constitutional law share a similar history. The First Amendment from "1791 to the present" has permitted legislatively enacted categorical restrictions upon speech, *United States v. Stevens*, 559 U.S. 460, 468 (2010), which have "never been thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

guarantee, like the Equal Protection Clause. *See, e.g.*, *United States v. Harrison*, 153 F.4th 998, 1028 n.23 (10th Cir. 2025) ("[L]aws disarming Catholics and loyalists would be legally problematic because of how we understand other constitutional provisions, not the Second Amendment. The laws can therefore reveal the original understanding of the Second Amendment.").

On the recommendation of the Continental Congress, the legislatures of Massachusetts, Virginia, and Pennsylvania enacted laws disarming those "disaffected to the cause of America" or who refused to take a loyalty oath. Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION 136 (Joseph Blocher et al. eds, 2023). Despite the fact these individuals were understood to be "squarely within the political community of rights-bearing members," they were disarmed precisely because legislatures believed them to "pose[] an enormous threat to the national security of the new state." Amanda L. Tyler, Rahimi*, Second Amendment Originalism, and the Disarming of Loyalists During the American Revolution*, LAWFARE (Nov. 30, 2023), https://tinyurl.com/vrku89y4.

So too did early legislatures disarm Native Americans, believing them inimical to Colonial safety when armed. *See Kanter*, 919 F.3d at 458 (Barrett, J., dissenting). For instance, New Netherland in 1656 forbade the admission of armed Native Americans into the city to "prevent such dangers of isolated murders and assassinations." Blocher & Carberry, *Historical Gun Laws*, *supra*, at 137. Other laws, like a 1633 law from the Colony of Massachusetts, forbade

the sale of "any gun or guns, powder, bullets, shot [or] lead, to any Indian whatsoever." *Id.* at 137. Later laws passed in the decades leading up to the Revolutionary War likewise forbade sales to Native Americans, with exceptions for sales to those who held licenses or for set amounts of firearms. *Id.* at 139.

Catholics in some places were categorically disarmed not "on the basis of faith," but as a legislative determination that they were unqualified "on the basis of allegiance." *Kanter*, 919 F.3d at 457 (Barrett, J., dissenting) (quoting Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 157 (2007)). In 1776, Massachusetts required men over the age of sixteen who refused to take an oath of loyalty to turn over "all such arms, ammunities and warlike implements." Blocher & Carberry, *Historical Gun Laws*, *supra*, at 141–42. Revolutionary Pennsylvania, notable for having a constitution that strongly protected an individual's right to bear arms, likewise required disarmament of those who refused to swear an oath. *Id.* at 141.

In these examples, legislatures made judgments that we rightly reject today, much as we reject historical judgments about who has the capacity to vote, serve on juries, or hold public office. But these laws demonstrate the principle of legislative judgment: it was the legislature that was "'judg[ing]' the threat to public safety presented by a category of people," not a court or local official. Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 172 (2023). And that "legislative role did not end in 1791."

United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (Easterbrook, J.).

II. COURTS SHOULD HONOR THE TRADITION OF LEGISLATIVE DETERMINATIONS ABOUT CATEGORIES OF DANGEROUS PERSONS.

The Court has said that the object of judicial review is to preserve "the balance struck by the founding generation" and apply that balance to "modern circumstances." *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29); *see also* Darrell A. H. Miller, *Second Amendment Equilibria*, 116 NW. U. L.R. 239, 269 (2021) (analyzing "how a modern rule [that] relates to an initial set of equilibria" enables an understanding of "what makes a certain historical rule . . . constitutionally relevant"). At the Founding, "our regulatory tradition" included the power of legislatures to regulate groups of people deemed dangerous. *Rahimi*, 602 U.S. at 692. To maintain that balance, this Court should confirm that modern legislatures likewise retain authority to disarm categories of people they deem dangerous.

A. Respect for legislative judgment preserves the balance set at the Founding.

Modern legislatures "need not accept [the Framers'] conclusions . . . in order to care about their premises—their reasons for believing" that restrictions against certain groups were constitutional. Blocher & Carberry, *Historical Gun Laws*, *supra*, at 146 (emphasis omitted). The Framers believed gun laws to be constitutional "so long as they

targeted groups of people thought to be dangerous," but the historically targeted groups represent a nonbinding original application. *Id.*; *see also McKee v. Cosby*, 586 U.S. 1172, 1182 (2019) (Thomas, J., concurring) ("law did not remain static after the founding," a fact that "reflected changing policy judgments, not a sense that existing law violated the original meaning" of the Constitution).

Indeed, "originalism does not require" "an updated model of a historical counterpart." *Rahimi*, 602 U.S. at 739–40 (Barrett, J., concurring); *see also id.* at 692 (majority opinion) ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"). Nevertheless, courts continue to fall back on historical literalism when faced with difficulties translating historical regulatory tradition to modern times.

In the § 922(g)(3) context alone, the relevant regulatory tradition identified by lower courts has ranged from:

- Regulations disarming the presently intoxicated. *United States v. Daniels*, 124 F.4th 967, 974–75 (5th Cir. 2025) (unconstitutional as applied to habitual drug user);
- Regulations disarming those who suffer from mental illness. *United States v. Baxter*, 792 F. Supp. 3d 916, 926 (S.D. Iowa 2025) (constitutional as applied to habitual drug user);
- Regulations disarming those believed by the legislature to pose a risk of danger. *Harrison*,

153 F.4th at 1035 (remanding to determine whether habitual drug user "pose[s] a risk of future danger"); or

- A combination of the above. *See United States v. Seiwert*, 152 F.4th 854, 872 (7th Cir. 2025) (holding that § 922(g)(3) was constitutional as applied to drug user under historical tradition of "foreclos[ing] firearm possession for (1) persons who are intoxicated, (2) those who suffer from severe mental illness, and (3) individuals who present a risk of public danger").

Just like its decision in *Rahimi*, the Fifth Circuit's decision in this case, *see infra*, illustrates the misguided results produced by an unduly narrow focus on specific instances of historical regulation. And the different analyses across other circuits emphasize the need for clarity on the relevant historical principle. This Court should "create[] [an] applicable doctrinal rule[] and precedent, crowding out the need for direct historical analysis in future cases." Blocher & Ruben, *Originalism-by-Analogy*, *supra*, at 136.

To provide clarity in this area, and consistent with both our tradition of firearm regulation and "the balance struck by the founding generation," *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29), Second Amendment jurisprudence should recognize the inherent authority that legislatures wield to disarm categories of dangerous persons.

That authority has never been freewheeling. Legislatures historically could act "*only when* they judged that doing so was necessary to protect the

public safety." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting) (emphasis added). Courts therefore retain a critical role in holding legislatures to account.

To be constitutionally permissible, legislative disarmament must advance the principles of historical regulation, with particular attention paid to "how" the laws burden the Second Amendment and "why" the prohibition exists. *Bruen*, 597 U.S. at 29–31. A central consideration in this analysis is whether the burdens imposed are "comparably justified." *Id.* at 29. In other words, legislatures preserve the balance struck at the Founding when they regulate within the boundaries of historical tradition. Categorical prohibitions that lack sound evidentiary footing fail the *Bruen* inquiry.

Finally, while categorical prohibitions from gun possession may, at times, be "overinclusive," the historical tradition supports some degree of overbreadth. *See* Blocher & Ruben, *Originalism-by-Analogy*, *supra*, at 173. Consequently, issues of overbreadth are best addressed by the political branches—either by changes to the challenged statute or "declaratory judgment actions or petition[s] [to] the Attorney General" through 18 U.S.C. § 925(c). *United States v. Harris*, 144 F.4th 154, 163 (3d Cir. 2025).

B. Empirical evidence can demonstrate the validity of legislation that comports with historical principles.

In assessing the similarity between modern and historical burdens and justifications, courts may often find it useful to review empirical evidence supporting modern and historical judgments. While history guides the analysis, "[h]istory alone cannot show the

'burden' that modern gun laws place on 'armed self-defense,' nor why such laws are 'justified.'" Blocher & Ruben, *Originalism-by-Analogy*, *supra*, at 170. Rather, *Bruen*'s analysis invites a continued, limited role for empirical evidence as it relates to the similarity between modern and historic laws, precisely to maintain history as the inquiry's touchstone. In other words, "[e]mpirical studies can still inform meaningful gun policy, but the boundaries that make such studies legally significant are now set by *Bruen*'s text, history, and analogy approach." Darrell A. H. Miller et al., *Technology, Tradition, and the "Terror of the People*," 99 NOTRE DAME L. REV. 1373, 1379 (2024). After *Bruen*, the utility of empirical data may be "shaped not so much by government interests and notions of fit, but by historical analogues and purpose." *Id*.

In the same way the Second Amendment protects arms that were not yet in existence in 1791, it protects modern legislative judgments about dangerousness that do not rely on data from 1791. Modern data on burden and justification helps modern courts maintain the balance struck at the Founding. For example, *Bruen* described New York's "special need" standard to carry a handgun as "demanding," 597 U.S. at 12, a conclusion that could have been grounded in evidence regarding the burden the law imposed. Similarly, data helps compare justifications, like whether a person barred from firearm possession actually presents a "special danger of misuse." *Rahimi*, 602 U.S. at 698–99. Otherwise, courts risk assuming dangerousness based on intuition over data. Such an assumption may be well-founded when danger is apparent, *see id.* at 686–89, but closer calls

may benefit from evidence about dangerousness. In this case, for example, data could help courts assess drug users' and drunkards' propensity for dangerousness, adding a meaningful comparative metric between modern and historical laws that a comparison of labels and our assumptions about them would otherwise lack.

Employing empirical evidence in this manner differs in kind from its erstwhile application in tiered scrutiny. Under that approach, courts employed empirics in tiered scrutiny's second step to do what *Bruen* called weighing the "costs and benefits of firearms restrictions" in a manner untethered to history. 597 U.S. at 25. In essence, courts employed empirics to assess the fit between government interests and challenged regulations. *See Heller v. District of Columbia*, 670 F.3d 1244, 1277–79 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). But employing empirics under *Bruen* is a means of preserving our regulatory tradition and gauging relevant historical similarity, not giving judges carte blanche to second guess duly enacted laws. This is especially so when courts afford proper weight to *legislative* assessments of empirical data.

III. THE FIFTH CIRCUIT'S DECISION DOES NOT RESPECT THE HISTORICAL BALANCE STRUCK BY THE FRAMERS IN THE SECOND AMENDMENT.

By ignoring the historical power of the legislature to make categorical determinations, the Fifth Circuit failed—both in this case and in the cases on which it relied—to reason at the appropriate level of generality and thus to give full effect to "this Nation's historical

tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

The Fifth Circuit summarily affirmed dismissal of Hemani's indictment for a violation of § 922(g)(3) based on that court's precedent in *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024). Petition for Writ of Certiorari at 4, *United States v. Hemani*, No. 24-1234 (U.S. June 2, 2025). In *Connelly*, the Fifth Circuit found § 922(g)(3) unconstitutional as applied, because there was "no indication that [defendant] was intoxicated at the time" she possessed a firearm. 117 F.4th at 272. In reaching that conclusion, the court determined that Founding-era laws disarming "political traitors" and "potential insurrectionists" were not "'relevantly similar' to § 922(g)(3)" because "no class of persons at the Founding" who were subject to the historical laws "were 'dangerous' for reasons comparable to marijuana users." *Id.* at 278. In the United States, however, marijuana did not become "popular as a recreational drug [until] the early 20th century," which soon led to governmental regulation. CONG. RSCH. SERV., R44782, THE EVOLUTION OF MARIJUANA AS A CONTROLLED SUBSTANCE AND THE FEDERAL-STATE POLICY GAP 1 (2022); *see N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7 (1st Cir. 2000) (Marihuana Tax Act of 1937 "made criminal" most transfers of marijuana); *Harris*, 144 F.4th at 158 (noting that "[d]espite speculation that some Founders smoked hemp, it was mainly a source of cloth, paper, and rope, not a drug").

In holding that only the actively intoxicated can be disarmed in accordance with the Constitution, the Fifth Circuit made the same error this Court identified in *Rahimi*: it looked for a "historical twin,"

when *Bruen* requires only a "historical analogue." *Rahimi*, 602 U.S. at 692, 701; *see id.* at 703–04 (Sotomayor, J., concurring) (the government "did not need" to "identif[y] a founding-era or Reconstruction-era law that specifically disarmed domestic abusers"). The Fifth Circuit did not interpret laws disarming possible religious dissidents and political traitors at the same level of generality that the *Rahimi* Court used to interpret going-armed laws. "*Bruen* demands a wider lens." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring); *see id.* at 691–92 (majority opinion) (recognizing the "Second Amendment permits more than just those regulations identical to ones that could be found in 1791," as "[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers").

In employing the "[a]nalogical reasoning" required by *Bruen*, courts must look to the "principle" revealed by "[h]istorical regulations." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). While at times it may be difficult to discern the relevant "principles underlying the Second Amendment," *id.* at 692, that is not so here.

"History shows legislatures can disarm those believed to pose a risk of future danger." *Harrison*, 153 F.4th at 1032. That is not a niche view. Indeed, the *Connelly* court acknowledged "an undeniable throughline run[ning] through [the historical] sources: Founding-era governments took guns away from those perceived to be dangerous." 117 F.4th at 278. That throughline can be discerned from the "different statutes disarming discrete groups of persons throughout history, which suggest an abstract belief that one's right to bear arms could be

stripped if he were legitimately dangerous to the public." *Id.* at 277. That is why the Court in *Rahimi* made clear it was *not* suggesting the "Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse" and instead recognized "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." 602 U.S. at 698, 700.

In looking for a "historical twin" to modern-day marijuana users, the Fifth Circuit fastened a "regulatory straightjacket," which this Court has warned against. *Bruen*, 597 U.S. at 30. *Rahimi* only requires that the regulation be "analogous enough to pass constitutional muster." 602 U.S. at 692. This Court should take the opportunity to reiterate that (a) courts must not supplant reasoned legislative judgments of dangerousness and (b) evaluation of similar laws depends on a historical analogue, not a twin.

In the alternative, the Court should remand this case to the lower courts to inquire whether the government can justify its assertion—based in part on empirical data—that nonintoxicated, habitual drug users pose a risk of danger—*i.e.*, that this aspect of § 922(g)(3) is consistent with the dangerousness "principle[] that underpin[s] our regulatory tradition." *Rahimi*, 602 U.S. at 692. But a more appropriate mechanism for addressing marginal cases that raise constitutional concerns is the process outlined by § 925(c), whereby a person subject to § 922(g)(3) may obtain relief in the event the Attorney General or a district court (if the Attorney General denies relief)

determines the applicant "will not be likely to act in a manner dangerous to public safety," and "the granting of the relief would not be contrary to the public interest."

CONCLUSION

For these reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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