No. 24-1234

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ALI DANIAL HEMANI,

Respondent.

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

BRIEF FOR RESPONDENT

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INTRODUCTION

Like tens of millions of Americans, respondent Ali Hemani owned a handgun for self-defense, keeping it safely secured at home. Like many of those same Americans, he also consumed marijuana a few days a week. According to the government, those two facts alone sufficed to make him an "unlawful user" of a controlled substance who could face criminal penalties under 18 U.S.C. §922(g)(3) just for exercising his fundamental right to keep and bear arms. In reality, §922(g)(3) does not even provide fair notice that it compels that draconian result. But if it does, then it violates the Second Amendment, as the government's own proffered analogues confirm that there is no historical tradition in this Nation of stripping anyone who consumes an intoxicant a few times a week of the right to keep a firearm in the home for self-defense.

At the outset, it is critical to understand what this case is—and is not—about. While the government has much to say about addiction and substances other than marijuana, none of that matters here. The government asked this Court to decide only whether §922(g)(3) "violates the Second Amendment as applied to respondent," Pet.(I), and it charged Mr. Hemani only under the prong of §922(g)(3) that prohibits possession of a firearm by an "unlawful user" of a controlled substance—not under the separate prong covering those "addicted to" one. And, as the government concedes, this prosecution "rests on" allegations of "habitual use of marijuana" alone. U.S.Br.7. So the only question before this Court is whether §922(g)(3) is constitutional as applied to someone who admits to consuming marijuana a few times a week. It is not.

The first problem is that §922(g)(3)'s "unlawful user" prong is void for vagueness. Lower courts have long recognized that it is not clear what the "unlawful user" prong covers *at all*, and some have candidly admitted that it is likely unconstitutionally vague absent at least some sort of temporal connection between drug use and gun possession. But with no guidance from Congress on how to make that sensitive policy judgment, courts unsurprisingly have struggled for decades to reach consensus on (among other things) what that connection should be. Implicitly recognizing that problem, the government offers its own atextual gloss on the statute, inserting the word "habitual." But that does not answer the questions courts have struggled with—*e.g.*, how frequent, recent, or substantial use must be. The better path is to declare the provision void for vagueness, as respondent urged the district court to do below.

Even if the "unlawful user" provision supplied clear notice that it covers the conduct on which this prosecution rests, it could not do so consistent with the Second Amendment. As the government acknowledges, it "may disarm a group" only "if an analogous group was subject to similar or more severe limits at the founding." U.S.Br.13. Yet the only potential historical analogues the government offers here—laws that penalized carrying or using a firearm *while intoxicated* and laws that imposed broader restrictions on "habitual drunkards"—are far afield.

As for the former, the government concedes that laws restricting the *carrying or use* of a firearm by people who are presently intoxicated cannot justify banning people who are *not* presently intoxicated from *possessing* a firearm. As for the latter, the

government's own evidence confirms that the historical conception of "habitual drunkard" did not cover anyone who consumed any quantity of alcohol "habitually," but instead covered only those who habitually *abused* alcohol to the point of frequent intoxication. Indeed, if "habitual drunkard" had been broad enough to encompass anyone who drank beer, wine, or spirits with meals a few days a week, then by the government's logic much of the Founding generation—not to mention tens of millions of Americans today—could have been deprived of the right to keep a firearm in the home for self-defense.

In reality, that was never the case with alcohol use, and it is not even the case with drug use (let alone marijuana use) in most jurisdictions today. Most states that address the issue ban possession of firearms only by people who are "addicted to" a controlled substance, not "unlawful users." And the handful that go further have mostly legalized marijuana use in whole or in part. The federal government's draconian approach thus not only flouts historical tradition, but makes it an outlier today. As most states grappling with the dangers of mixing drugs and firearms have recognized, there are ways to address that serious problem consistent with the Constitution. But prohibiting anyone who regularly consumes any amount of marijuana of the right to keep a firearm in the home for self-defense is not one of them. Because that is the only application of §922(g)(3) this case involves, the Court should affirm.

STATEMENT

A. Statutory Background

"Throughout American history, laws have regulated the combination of guns and intoxicating substances." *United States v. Daniels*, 77 F.4th 337, 340 (5th Cir. 2023). "But at no point in the 18th or 19th century did the government disarm individuals who used drugs or alcohol at one time from possessing guns at another." *Id.* As new intoxicants came on the scene, and people came to better appreciate the concept of addiction, states began to enact laws restricting access to firearms by people in the thrall of addiction. *See, e.g.*, Handbook, Nat'l Conf. of Comm'rs on Unif. State Laws 352 (1929) (drafting model legislation banning the sale of a pistol to any "drug addict"). But, for the most part, states did not strip anyone who simply uses an intoxicant, regardless of the frequency or quantity of use, of the right to keep arms and bear them while sober. Indeed, that remains the case in most states today. *See infra* Part II.D.

Who may keep and bear arms were questions largely left to the states for much of our Nation's history. But Congress entered the fray with the Gun Control Act of 1968 ("GCA"), Pub. L. 90-618, 82 Stat. 1213. Enacted in response to the assassinations of Robert F. Kennedy and Martin Luther King, Jr., the GCA "sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218 (1976). To that end, the statute today contains nine subsections that prohibit the possession of "firearms by any means," *id.*, each of

which carries a maximum term of 15 years of imprisonment. 18 U.S.C. §§922(g), 924(a)(8).

Section 922(g)(3) is the subsection concerning controlled substances. Unlike most state laws on the subject, Congress did not limit its regulatory reach to those "addicted to any controlled substance." It also prohibited anyone who is an "unlawful user of" a controlled substance from possessing a firearm—which encompasses merely owning a firearm safely secured in the home. *Id.* §922(g)(3).

Section 922(g)(3) cross-references the definition of "controlled substance" in the Controlled Substances Act ("CSA"). The CSA also defines "addict" as someone who "habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. §802(1). But neither the GCA nor the CSA contains any definition of "unlawful user," and §922(g)(3) gives no indication of how recent, frequent, or substantial controlled-substance use must be to make someone an "unlawful user" categorically prohibited from exercising Second Amendment rights. With no guidance from Congress on those critical questions, courts have long acknowledged that the "unlawful user" prong "runs the risk of being unconstitutionally vague." *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003); *see also, e.g.*, *United States v. Marceau*, 554 F.3d 24, 30 (1st Cir. 2009).

That concern has become especially acute in recent years with respect to marijuana. Though federal law designates marijuana a "controlled

substance," *see* 21 U.S.C. §812, 40 states have legalized its use to some degree over the past decade, *see* Nat'l Conf. of State Legislatures, *State Medical Cannabis Laws* (June 27, 2025), perma.cc/Z43T-UK5M. And marijuana use has become increasingly common, especially among younger adults. *See* Megan E. Patrick et al., *Monitoring the Future Panel Study Annual Report*, at 29 (2023), perma.cc/5SEQ-723B (28% of adults aged 19 to 30 report having used marijuana in the past 30 days). Indeed, recent studies indicate that there are now more adults who regularly consume marijuana than who regularly consume alcohol. *See* Jonathan P. Caulkins, *Changes in self-reported cannabis use in the United States from 1979 to 2022*, Wiley Online Library (2024), perma.cc/R5WP-CUDW.

The federal government's stance on marijuana has shifted in recent years as well. The CSA classifies controlled substances according to, among other things, their potential for abuse. 21 U.S.C. §812(b). Schedule I is reserved for substances that have a "high potential for abuse," "no currently accepted medical use," and "a lack of accepted safety" even "under medical supervision." *Id.* §812(b)(1). Schedule III, by contrast, is reserved for substances that have "less" "potential for abuse," have "a currently accepted medical use," and carry only a "moderate or low" risk of "physical dependence." *Id.* §812(b)(3). While marijuana is currently classified under Schedule I, in 2023 the Department of Health and Human Services recommended that it be reclassified under Schedule III, Letter from Rachel L. Levine, Assistant Sec'y for Health, Dep't of Health & Hum. Servs. to Anne Milgram, Adm'r, Drug Enf't Admin., (Aug. 29,

2023), perma.cc/SUF6-DTZ9, which would situate it in the same category as substances such as anabolic steroids and certain forms of Tylenol, *see* 21 C.F.R. §1308.13. The Department of Justice proposed a rule to do so the following year. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44,597 (May 21, 2024).

Just this past month, the President issued an executive order directing the Attorney General to "take all necessary steps to complete the rulemaking process related to rescheduling marijuana to Schedule III of the CSA in the most expeditious manner in accordance with Federal law." Exec. Order No. 14,370, 90 Fed. Reg. 60,541, 60,542 (2025). Though marijuana would continue to be a "controlled substance" under the CSA (and thus §922(g)(3)) under that proposal, the executive order confirms that the federal government, like most states, no longer views marijuana as comparable to Schedule I substances like heroin and LSD or Schedule II substances like methamphetamine and cocaine.

B. Factual Background

This case arises out of a single-count indictment charging Mr. Hemani with possession of a firearm by an "unlawful user" of a controlled substance, in violation of 18 U.S.C. §922(g)(3). ROA.12.[1] Before that indictment, Mr. Hemani had no criminal record.

Mr. Hemani was born and raised in the Dallas area. ROA.69. As a teenager, he was an honors student and played for his high school football team.

[1] "ROA" refers to the record on appeal in the Fifth Circuit.

ROA.69. He graduated from the University of Texas at Arlington, where he was a UTA Presidential Scholar. ROA.69. He is a valued member of his local religious community in Dallas. ROA.70. And though the government has long made "terrorism"-related insinuations about Mr. Hemani and his family based on their religious and ethnic identities, *see* ROA.120-23, 138-39, neither he nor any of his family members has ever been charged with any crime in connection with those insinuations.

On August 3, 2022, the Federal Bureau of Investigation executed a search warrant at the Hemani family's home. ROA.387. Like many Texans, Mr. Hemani kept a firearm safely secured in the home for self-defense.[2] He informed the agents of that firearm and surrendered it to them. ROA.380. There is no indication in the record that the agents asked Mr. Hemani any questions about whether or how he had ever carried or otherwise used it.

Mr. Hemani also informed the agents that he consumes marijuana "about every other day" and directed them to approximately 60 grams of marijuana on the property. ROA.293, 385. There is no indication that the agents asked Mr. Hemani how much marijuana he typically consumed on days when he consumed it. The agents also found approximately 0.95 grams of cocaine in Mr. Hemani's parents' closet, which he told them his mother had hidden from him

[2] *See* CBS News, *Gun Ownership by State* (Apr. 14, 2022), perma.cc/7FFX-YMP9 ("In Texas, 45.7% of adults say they live in homes with guns.").

after he purchased it several months earlier.[3] ROA.43, 293, 397-98. The government has never claimed that Mr. Hemani appeared to be intoxicated at the time of the search.

The government did not bring any criminal charges against Mr. Hemani in the immediate wake of the search. It instead apparently spent the next several months trying to unearth evidence of crimes with which he has never been charged. Meanwhile, Mr. Hemani went about his life, continuing to reside with his parents and work in the Dallas area. ROA.69-70.

Six months later, the government charged Mr. Hemani with a single count of unlawful possession of a firearm by an "unlawful user" of a controlled substance, in violation of 18 U.S.C. §922(g)(3). ROA.12. While the government continues to level accusations of (among other things) other drug use or drug-related conduct, it ultimately concedes that this prosecution rests exclusively on Mr. Hemani's "use of marijuana." U.S.Br.7.[4]

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[3] The government's 4.7-gram representation (at U.S.Br.7) incorrectly counts the weight of the packaging; the lab report found only 0.95 grams of cocaine, ROA.293.

[4] Although the government did not charge Mr. Hemani for several months after he surrendered his firearm and admitted his marijuana use, upon his arrest it sought to detain him, largely based on its (unsubstantiated) allegations of other criminal activity. ROA.360-78. As a result, Mr. Hemani spent seven months in pretrial detention. ROA.3-10.

C. Proceedings Below

Mr. Hemani moved to dismiss the indictment, arguing that 18 U.S.C. §922(g)(3) violates the Second Amendment and is void for vagueness. ROA.28-40. The magistrate judge recommended dismissal on Second Amendment grounds but deemed the vagueness argument foreclosed by Fifth Circuit precedent. Pet.App.5a-39a.

Meanwhile, the court of appeals held in another case that applying §922(g)(3) to "disarm[] a sober citizen based exclusively on his past drug usage" violates the Second Amendment. *Daniels*, 77 F.4th at 340. Like this case, *Daniels* involved a defendant who was not alleged to have been under the influence of any controlled substance when he possessed a firearm. The government had instead rested its case solely on the defendant's admission to being "a regular user" of marijuana, consuming it "approximately fourteen days out of a month." *Id.* Given those factual similarities, the government conceded that *Daniels* foreclosed its charge against Mr. Hemani but reserved the right to challenge *Daniels*. ROA.299-300.

After the district court dismissed the indictment, Pet.App.3a-4a, the government asked the court of appeals to summarily affirm, which it did. In a two-page order, the court held the prosecution foreclosed by an intervening circuit precedent that reaffirmed *Daniels* after this Court's decision in *United States v. Rahimi*, 602 U.S. 680 (2024). Pet.App.2a (citing

United States v. Connelly, 117 F.4th 269 (5th Cir. 2024)).[5]

Instead of asking this Court to review that case, or acquiescing in any of the many petitions challenging §922(g)(3), the government then asked the Court to grant this case and hold all others. Because it limited its question presented to whether "§922(g)(3) violates the Second Amendment as applied to respondent," Pet.(I), the Court's review is confined to the context of an individual charged with being an "unlawful user" of a controlled substance based on an admission to using marijuana a few times a week.

SUMMARY OF ARGUMENT

The government's attempt to prosecute Mr. Hemani for exercising his right to keep a firearm in the home for self-defense suffers from two fatal problems. First, 18 U.S.C. §922(g)(3) does not begin to provide the fair notice that due process demands if it really subjects all who use marijuana a few times a week to criminal prosecution for exercising their

[5] While much of the government's brief attacks the position that it may "disarm[] *only* people actively under the influence of alcohol or controlled substances," that is not what "the Fifth Circuit held." U.S.Br.3. To be sure, *Connelly* held that "[t]he history and tradition *before us* supports, at most, a ban on carrying firearms while an individual is presently under the influence." 117 F.4th at 282 (emphasis added). But that was because the only alcohol-related laws the government invoked in that case were laws disarming people while intoxicated. *See id.* at 280-81. The court nowhere ruled out the possibility that the government might identify a tradition supporting banning possession by some group *other than* "nonviolent, occasional drug users when of sound mind." *Id.*

Second Amendment rights. Second, if §922(g)(3) does do so, then it cannot withstand Second Amendment scrutiny, as that would go far beyond anything our Nation's historical tradition of firearms regulation could justify—or anything most states do today. The government's efforts to avoid those conclusions rewrite the statute and ignore the narrow scope of this case.

To start with the due-process problem, courts have recognized for decades that the text of §922(g)(3) does not provide fair notice of what it means to be an "unlawful user" of a controlled substance. How frequently must one use the substance? How recently? In what quantity? The statute does not say. Courts thus have been forced to read into §922(g)(3) what they freely acknowledge are atextual limits—and they have not even been able to agree on what those limits should be. The government crafts an atextual limit of its own, claiming that §922(g)(3) covers only "habitual users" of controlled substances. Setting aside the considerable problem that "habitual" appears nowhere in the statute, that begs all the same questions: Is regular use once a month "habitual"? Once a week? Once a day? Does it matter what the substance is? Or how much of it one "habitually" uses? The government does not say—and neither does the statute.

That abject lack of guidance would be problematic enough in any context. But it is especially inexcusable in a law that operates solely to strip people of a constitutional right. Laws that implicate constitutional rights demand even more clarity, especially when they are accompanied by criminal penalties. Yet when it comes to an "unlawful user,"

§922(g)(3) provides none. Rather than join the long-running struggle to make a policy judgment that Congress did not, this Court should admit what has been staring everyone in the face for decades: The "unlawful user" prong of §922(g)(3) is unconstitutionally vague.

Even if this Court were to conclude that the "unlawful user" provision could be applied consistent with due process, that provision could not be applied to Mr. Hemani consistent with the Second Amendment. While some substances covered by §922(g)(3) may not have been familiar to the Founding generation, the dangers of mixing firearms and intoxicants certainly were. Yet the Founding generation addressed that concern by prohibiting people from carrying or using firearms *while intoxicated*, not by stripping everyone who consumed any quantity of alcohol (or other intoxicants) "habitually" of the right to keep arms.

The government concedes that this historical tradition could not justify this prosecution, so it tries to shoehorn its outlier prohibition into a variety of Founding-era (and later) laws addressing "habitual drunkards." But that effort rests on a category mistake, as the term "habitual drunkard" was never understood as capaciously as the government's proposed (and atextual) "habitual use" element. "[H]abitual drunkard" laws targeted people who regularly *abused* alcohol, not people who regularly *used* it. Those laws might be relevant in a case about §922(g)(3)'s "addicted to" prong. But they have nothing to say about this "unlawful user" case, which rests solely on an admission to consuming marijuana a few times a week. If that were enough to make

someone akin to a "habitual drunkard," then the government's logic would empower it to force the tens of millions of Americans who "habitually" consume alcohol with dinner or on weekends to surrender their firearms too. That sweeping power would have eviscerated the right to keep and bear arms at the Founding—which likely explains why the government musters no evidence that it was ever endorsed.

The government's reliance on post-ratification state laws only further undermines its cause. As the very laws it cites confirm, most states have long tracked the historical distinction between use and abuse, prohibiting possession only by those "addicted to" controlled substances, not those who "unlawful[ly] use[]" them (whatever that means). And most of the handful in the latter camp now either exempt marijuana or have legalized its use in whole or in part, rendering them even less relevant here. The government's argument thus succeeds only in showing that §922(g)(3) is an extreme outlier even today, as almost no states strip all marijuana users of their Second Amendment rights.

None of that means that historical tradition forecloses efforts to address the dangers of mixing firearms and controlled substances. No one disputes that the government may prohibit people from carrying firearms while intoxicated. And, with sufficient clarity and appropriate safeguards, laws that prohibit people who are addicted to drugs or alcohol from possessing firearms may also pass constitutional muster. But there has never been a tradition in this country of stripping anyone who uses an intoxicating substance with some degree of frequency of the right to keep a firearm in the home.

To conclude otherwise would empower the government to deprive tens of millions of Americans who pose little if any risk of firearm misuse of a fundamental constitutional right.

ARGUMENT

I. THE "UNLAWFUL USER" PRONG OF §922(g)(3) IS UNCONSTITUTIONALLY VAGUE.

A. Courts Have Long Struggled in Vain to Define "Unlawful User."

When the government "regulates arms-bearing conduct," it must prove that its regulation is consistent with this Nation's historical tradition of firearms regulation. *Rahimi*, 602 U.S. at 691. That entails examining whether "how" and "why" a modern-day law regulates arms-bearing conduct is consistent with "how" and "why" arms-bearing conduct was regulated historically. *Id.* at 692. To undertake that inquiry, then, courts must first ask how and why a modern-day law regulates.

Ordinarily, the first part of that inquiry is not complicated, as one can typically tell how a law regulates by reading it. But things are not so simple here. The government charged Mr. Hemani under the part of §922(g)(3) that makes it a felony for "an unlawful user of … any controlled substance" to possess a firearm, 18 U.S.C. §922(g)(3). *See* U.S.Br.7. But the statute does not define "unlawful user." Is someone who uses a controlled substance once a year "an unlawful user"? What about someone who uses that substance every six months, or every two weeks? Or who does not have a regular practice of using

controlled substances but will occasionally do so in a social setting? Does it matter how much one consumes, or only how frequently one does so? The statute does not say.

That is a problem—and not just for answering the Second Amendment question the government presented. "The prohibition of vagueness in criminal statutes" is an "essential of due process," required by both "ordinary notions of fair play and the settled rules of law." *Johnson v. United States*, 576 U.S. 591, 595-96 (2015) (citation modified). And "perhaps the most important factor" in shaping "the clarity that the Constitution demands of a law" is whether the law "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982). Just as a law that "interferes with the right of free speech or of association" demands "a more stringent vagueness test," *id.* at 499, so too does a law that prohibits people from possessing the arms the Second Amendment entitles the people to keep. Any other conclusion would reduce the Second Amendment to "a second-class right." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).[6]

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[6] Mr. Hemani pressed a void-for-vagueness challenge below. ROA.38-40. He had no opportunity to develop that argument on appeal, and the court of appeals had no occasion to consider it, because the government requested summary affirmance. But this Court "may affirm on any ground that the law and the record permit." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). And it is hard to see how the Court could resolve the question presented without first determining what, if anything, §922(g)(3) is fairly read to prohibit.

Yet when it comes to what makes someone an "unlawful user," §922(g)(3) comes nowhere near supplying "fair notice of the conduct it punishes." *Johnson*, 576 U.S. at 595. Indeed, courts have long recognized that the "unlawful user" prong "runs the risk of being unconstitutionally vague without a … temporal nexus between the gun possession and regular drug use." *Turnbull*, 349 F.3d at 561. And that is just one of the problems with the meager text, which has left courts struggling to determine how frequent, prolonged, and substantial use must be—and more. But rather than invalidate the provision and "invite Congress to try again," *United States v. Davis*, 588 U.S. 445, 448 (2019), courts have endeavored to supply the guidance Congress did not. As one would expect when it comes to policy judgments beyond the judiciary's ken, however, they have been unable to reach any meaningful consensus.

The Third Circuit, for example, requires "use of drugs with some regularity" that is "sufficiently close in time" to the firearm possession. *United States v. Augustin*, 376 F.3d 135, 139 n.6 (3d Cir. 2004). The Sixth Circuit requires not just regular use, but use "sufficiently consistent and prolonged" and "during a period that reasonably covers" the firearm possession. *United States v. Burchard*, 580 F.3d 341, 352 (6th Cir. 2009). The Eighth Circuit, by contrast, has rejected the argument that §922(g)(3) "require[s] evidence of use over an extended period." *United States v. Carnes*, 22 F.4th 743, 748-49 (8th Cir. 2022). Courts cannot agree on how proximate to firearm possession the use must be either. The Fourth Circuit, for example, concluded that "drug use [two] months earlier" is not enough. *United States v. Jackson*, 280 F.3d 403, 406

(4th Cir. 2002). The Fifth Circuit said it is. *See United States v. McCowan*, 469 F3d 386, 392 (5th Cir. 2006).

The circuits are not always even internally aligned. Both the Fifth and Eighth Circuits have at times superimposed onto "unlawful user" something akin to the CSA's definition of "addict," positing that "an 'unlawful user' is one whose use … falls just short of addiction." *McCowan*, 469 F.3d at 391 (discussing prior circuit caselaw); *see also Turnbull*, 349 F.3d at 561 (affirming jury instruction requiring proof that defendant "lost the power of self-control with reference to the use of [the] controlled substance"). At other times, they have taken a much more capacious view of "unlawful user." *See McCowan*, 469 F.3d at 391-92 ("pattern of use over an extended period of time"); *United States v. Boslau*, 632 F.3d 422, 430 n.7 (8th Cir. 2011) ("actively engaging in … unlawful use"). The Ninth Circuit once suggested that the meaning of "unlawful user" may vary depending on the substance, *United States v. Ocegueda*, 564 F.2d 1363, 1366 (9th Cir. 1977), but it later said what matters is whether "the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm," *United States v. Purdy*, 264 F.3d 809, 813 (9th Cir. 2001).[7]

[7] Many more cases illustrate the widespread confusion and conflicts. *See, e.g.*, *United States v. Caparotta*, 676 F.3d 213, 216 (1st Cir. 2013); *United States v. Yepez*, 456 F.App'x 52, 54-55 (2d Cir. 2012); *United States v. Cook*, 970 F.3d 866, 874 (7th Cir. 2020); *United States v. Bennett*, 329 F.3d 769, 778 (10th Cir. 2003); *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003).

None of those approaches is grounded in the statute's text. They are just "judicially-created" efforts to supply the fair notice that Congress did not, *Turnbull*, 349 F.3d at 561—and conflicting ones, at that. *Cf. Percoco v. United States*, 598 U.S. 319, 333-34 (2023) (Gorsuch, J., concurring in the judgment) (highlighting disarray in lower courts as evidence of vagueness). As a result, whether individuals may be convicted of a crime carrying up to 15 years in prison depends entirely on a diverse array of judge-made, atextual glosses on §922(g)(3).

B. The Government's Effort to Rewrite §922(g)(3) Exacerbates the Problem.

The government itself is of multiple minds about what "unlawful user" means. The Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has long interpreted "unlawful user" to capture anyone with either a positive drug test or a "conviction for use or possession of a controlled substance within the past year." 27 C.F.R. §478.11. But just three days before this brief was set to be filed, ATF announced an interim final rule proposing a new position. *See* Revising Definition of "Unlawful User of or Addicted to Controlled Substance," 91 Fed. Reg. 2,698 (Jan. 22, 2026). The new proposal explains that, although the statutory text has not changed, ATF's views "have evolved." *Id.* Now, ATF says, its longstanding position is "no longer supported under section 922(g)(3)," and sticking to it would "create unnecessary constitutional questions" to boot. *Id.* at 2,702. ATF thus proposes construing §922(g)(3)'s "unlawful user" prong to require "a pattern of ongoing use." *Id.* at 2,703. That said, even under the proposal,

someone may be an "unlawful user" even if she is *not* using "the substance … at the precise time [she] seeks to … possess a firearm." *Id.*

The government also does not embrace ATF's longstanding position. It instead offers its own atextual gloss, claiming that an "unlawful user" is someone who uses a controlled substance "habitually." While that term appears dozens and dozens of times in its brief, it occurs nowhere in §922(g)(3) (or, notably, the new definition ATF proposed). The government has simply rewritten the statute to try (albeit in vain) to solve its vagueness and Second Amendment problems. But the government has no more license than courts to rewrite §922(g)(3). "Only the people's elected representatives in Congress have the power to write new federal criminal laws." *Davis*, 588 U.S. at 447-48. Indeed, even when courts deferred to agency interpretations of statutes, they did not defer to the Department of Justice's interpretation of criminal laws. *See Crandon v. United States*, 494 U.S. 152, 177 (1990). And constitutional avoidance does not help the government here, as its rewrite does not solve either of the constitutional problems. The term "habitually" raises all the same questions about how recent, regular, or substantial the use must be. And if it is broad enough to reach *this* case, then it does not map onto the historical conception of "habitual" *abuse* of intoxicants. *See infra* Part II.B.

To be fair, the government did not pluck "habitually" out of nowhere. It presumably took the term (as some courts have) from the CSA's definition of "addict" as "any individual who *habitually* uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to

the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. §802(1) (emphasis added). But far from helping the government's cause, that resort to §802(1) reveals the textual problems with its effort to rewrite §922(g)(3)'s "unlawful user" prong.

For one thing, §922(g)(3) covers "any person … who is an unlawful user of *or addicted to* any controlled substance." 18 U.S.C. §922(g)(3) (emphasis added). It may well make sense to look to the CSA's definition of "addict" to inform the separate term "addicted to." But it would be awfully strange to read that definition as limiting the disjunctive "unlawful user" prong too. *See Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) ("or" is "almost always disjunctive"). Moreover, if "unlawful user" incorporated the definition of "addict," then that would doom this prosecution, as the government has never suggested that regular marijuana use alone suffices "to endanger the public morals, health, safety, or welfare," or to show that one "is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. §802(1). Indeed, if that were its view, then it presumably would have charged Mr. Hemani with being "addicted to," not just an "unlawful user" of, marijuana. *But see* ROA.12.

In all events, reading "unlawful user" to mean "addict" poses an insurmountable superfluity problem: It would read "unlawful user" out of the statute. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (courts should be "hesitant to adopt an interpretation of a congressional enactment

which renders superfluous another portion of that same law").

Conversely, if what the government *really* means by "habitual user" is someone who uses a controlled substance "habitually" but *not* necessarily "so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction," 21 U.S.C. §802(1), then it has a different superfluity problem: The "addicted to" prong would do no work because the "unlawful user" prong would reach anyone who "habitually uses" a controlled substance, regardless of whether the person additionally satisfies the definition of "addict"—*i.e.*, "habitually uses any narcotic drug *so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction*," *id.* (emphasis added).

Ultimately, the government does not say what it thinks "habitual user" means, other than that it is broad enough to capture Mr. Hemani's marijuana use. The fact that not even the government can explain exactly whom §922(g)(3) subjects to the loss of both Second Amendment rights and liberty is powerful evidence that the statute "fails to give ordinary people fair notice of the conduct it punishes." *Johnson*, 576 U.S. at 595.[8]

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[8] To the extent the government argues in reply that §922(g)(3) may not be vague in *every* case, this Court has emphatically rejected the notion that "a statute is void for vagueness only if it is vague in all its applications." *Johnson*, 576 U.S. at 602-03. To the extent it argues that §922(g)(3) is not vague as applied to Mr.

* * *

Decades of experience struggling to impose clarity where Congress provided none is powerful evidence that interpreting "unlawful user" has long been "a failed enterprise." *Johnson*, 576 U.S. at 601-02. The result is a criminal statute that functions as a "spring trap[] for the unwary." *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, J.). Indeed, §922(g)(3) is an object lesson in why due process prohibits criminal statutes that lack the "definiteness" necessary to prevent "arbitrary and discriminatory enforcement." *Percoco*, 598 U.S. at 331 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)). For instance, the statute has been deployed against people who may have had little reason to think that their marijuana use would render them an "unlawful user" of a controlled substance—especially given the federal government's "half-in, half-out" approach to marijuana, *Standing Akimbo*, 141 S.Ct. at 2236-37. *See*, *e.g.*, *United States v. Bellamy*, 682 F.App'x 447 (6th Cir. 2017) (defendant used marijuana for medicinal purposes in good faith

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Hemani, that does not work either. The statute does not come close to providing fair notice that Mr. Hemani could face prison time for keeping a handgun in his home just because he, like millions of other Americans, consumes marijuana a few times a week—especially given the government's "half-in, half-out" approach of "simultaneously tolerat[ing] and forbid[ding] local use of marijuana." *Standing Akimbo, LLC v. United States*, 141 S.Ct. 2236, 2236-37 (2021) (Thomas, J., respecting the denial of certiorari). Indeed, it is not even clear that Mr. Hemani's conduct would fit the Fifth Circuit's conception of "unlawful user," which is narrower than the government's. *See McCowan*, 469 F.3d at 391-92.

under state law); *United States v. Stacy*, 696 F.Supp.3d 1141, 1142 (S.D. Cal. 2010) (defendant operated a dispensary as permitted under state law).

Making matters worse, §922(g)(3) poses a constant threat to a considerable portion of the population. Most Americans live in jurisdictions where they can readily obtain marijuana for recreational (54%) or medicinal (74%) use. Athena Chapekis & Sono Shah, *Most Americans Now Live in a Legal Marijuana State*, Pew Rsch. Ctr. (Feb. 29, 2024), perma.cc/V7P7-6KRH. And roughly 40% of adults live in households with firearms, while 32% own one. Katherine Schaeffer, *Key Facts About Americans and Guns*, Pew Rsch. Ctr. (July 24, 2024), perma.cc/MVK4-T7SD. Given the substantial overlap between those who use marijuana and those who possess firearms, a law that affords the government discretion to incarcerate "so many for such common behavior" strikes at the core of due process. *United States v. Harris*, 144 F.4th 154, 178 (3d Cir. 2025) (Ambro, J., dissenting). Because the scope of §922(g)(3)'s "unlawful user" prong is discernible only through "guesswork," *Johnson*, 576 U.S. at 602, it is unconstitutionally vague. "[T]he role of" this Court thus "is not to fashion a new, clearer law to take its place," but to treat the provision "as a nullity and invite Congress to try again." *Davis*, 588 U.S. at 448.

II. THE SECOND AMENDMENT FORECLOSES THE GOVERNMENT'S ATTEMPT TO APPLY §922(g)(3) TO MR. HEMANI.

Even if the Due Process Clause permitted this prosecution, the Second Amendment would not. As explained, the question presented is confined to

whether §922(g)(3) can constitutionally be "applied to respondent," Pet.(I), and the government charged Mr. Hemani only under §922(g)(3)'s "unlawful user" prong—a charge that "rests on [his alleged] habitual use of marijuana" alone, U.S.Br.7. So, when it comes to the Second Amendment, the only question here is whether the government may deprive someone of the right to keep a handgun in the home because he consumes marijuana a few times a week.

The government has not come close to proving that §922(g)(3) is consistent with this Nation's historical tradition of firearms regulation as applied in that manner. Granted, there is historical support for prohibiting people from carrying or using firearms while intoxicated. And perhaps some historical laws addressing "habitual drunkenness" may lend support to restricting the possession rights of people who satisfy one of the individualized criteria in the CSA's definition of "addict." But nothing in our historical tradition supports stripping everyone who regularly uses marijuana—a substance that has been legalized to some degree in 40 states and is now regularly consumed by more Americans than alcohol is—of their Second Amendment rights.

A. Laws Prohibiting People From Carrying Firearms While Intoxicated Cannot Justify Banning People Who Use Marijuana From Keeping Them.

The Second Amendment guarantees "the right of the people to keep and bear Arms." U.S. Const. amend. II. The government does not dispute that Mr. Hemani is one of "the people," or that the conduct in which he would engage but for §922(g)(3)—keeping a

handgun in the home for self-defense—is covered by the Second Amendment's plain text. The onus thus falls on the government to "justify its regulation" by proving that it "is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 691-92.

To determine whether the government has done so, courts must reason by analogy, examining the historical record the government marshals. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 29 (2022). While the government must "identify a well-established and representative historical *analogue*, not a historical *twin*," "courts should not uphold every modern law that remotely resembles a historical analogue." *Id.* at 30. "Even when a law regulates arms-bearing for a permissible reason," moreover, "it may not be compatible with the right if it does so to an extent beyond what was done at the founding." *Rahimi*, 602 U.S. at 692. The critical question is whether historical and modern laws are "relevantly similar" in both "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Bruen*, 597 U.S. at 29-30.

Sometimes that question poses "[h]ard[] level-of-generality problems." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). For instance, modern laws "implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach" to historical analogy. *Bruen*, 597 U.S. at 27. But "when a challenged regulation addresses a general societal problem that has persisted since the 18th century," the "lack of a distinctly similar historical regulation addressing that problem" often makes the analysis "fairly

straightforward." *Id.* at 26. That is especially true when "earlier generations addressed the societal problem, but did so through materially different means." *Id.*

That is precisely the case here. The problem §922(g)(3) addresses—the hazards of mixing firearms and intoxicants—was well known to the Founders.[9] "Seventeenth-century and especially 18th-century America was notable for the amount of alcoholic beverages consumed, the universality of their use and the high esteem they were accorded." Harry Gene Levine, *The Discovery of Addiction*, 2 J. Substance Abuse Treatment 43, 44 (1985). Indeed, "[t]he tavern was a key institution in every town, the center of social and political life." *Id.* And as the government's proffered laws confirm, the Founding generation appreciated that firearms can be dangerous in the hands of intoxicated people. Yet while early legislatures certainly addressed that problem, they did so by prohibiting people from *carrying* or *using* a firearm *while* they were intoxicated. They did not prohibit anyone who regularly consumed alcohol from *owning* a firearm.

The government thus concedes, as it must, that its "historical precedent for disarming intoxicated individuals" cannot justify this prosecution—or even

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[9] The government notably does not defend either this prosecution or §922(g)(3) on the theory that "unlawful users" of controlled substances cannot be trusted with firearms because they have broken the law. It instead defends §922(g)(3) only on the theory that people who "habitually use" intoxicants—even legal ones, like its many proffered alcohol analogues—categorically "endanger public safety." U.S.Br.32.

its construction of §922(g)(3) as reaching all "habitual users" of controlled substances. U.S.Br.4. Historical intoxication laws prohibited only carrying or using firearms, not keeping them in the home. And they prohibited that conduct only while someone was intoxicated. The government has never claimed that Mr. Hemani carried or used a firearm while under the influence of a controlled substance. Neither its allegations nor its conception of "habitual user" rests on carrying or using a firearm at all, let alone doing so while intoxicated. The government instead seeks to imprison Mr. Hemani for *possessing* a handgun that was safely secured when the government confiscated it, solely because he admitted to consuming marijuana a few times a week.

Stripping people of the right to *keep* a firearm in the home just because they regularly consume an intoxicating substance is a radical departure from banning *carrying* firearms *while intoxicated*. *Bruen* squarely rejected the notion that historical concealed-carry laws could support modern laws banning all carry. *See Bruen*, 597 U.S. at 48-49, 53-55. *A fortiori*, historical laws that punished carrying or using a firearm while intoxicated cannot begin to support modern laws that criminalize mere possession by people who are *not* intoxicated. Indeed, if those laws could justify stripping Mr. Hemani of his right to keep a handgun safely stored in the home for self-defense, then they could equally justify stripping that right from anyone who frequently has a glass of wine with dinner unless and until they forswear alcohol altogether. That "would eviscerate the general right" the Founders enshrined, *Bruen*, 597 U.S. at 31, which likely explains why even the government is not willing

to embrace such an impoverished view of Second Amendment rights.[10]

B. "Habitual Drunkards" and Regular Marijuana Users are Not Analogous.

Unable to find support in intoxication laws, the government retreats to a higher level of generality, trying to situate §922(g)(3) in a historical tradition of "restrict[ing] the rights of habitual drunkards." U.S.Br.17. But that effort rests on a fundamentally flawed premise—namely, that "habitual drunkards" is "a category closely analogous to habitual drug users." U.S.Br.17. That might be true if the government defined "habitual drug user" the way the CSA defines "addict." *See* 21 U.S.C. §802(1). But mere evidence that someone consumes marijuana a few times a week—with no information about, *e.g.*, how many times a day, in what quantity, or under what circumstances—cannot suffice to render that person analogous to the historical (or even modern-day) concept of a "habitual drunkard."

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[10] While the government concedes that historical intoxication laws support disarming only presently intoxicated people, it claims that a law confined to that conduct would be unworkable. U.S.Br.38-39. It is hard to see why the government thinks that would matter, as it cannot seriously suggest that it may strip sober individuals of their Second Amendment rights because it is too hard to tell who is intoxicated. At any rate, evidence of intoxication is routinely required for other prosecutions. *See, e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 585 (1990). The government identifies no reason why it cannot supply such evidence when it comes to controlled substances. To the contrary, it highlights numerous prosecutions in which it did just that. U.S.Br.33 n.27.

As the government's own examples illustrate, early legislatures sharply distinguished between mere intoxicant *use*—even when frequent—and recurrent intoxicant *abuse*. At the Founding, only the latter sufficed to designate someone a "habitual drunkard." Samuel Johnson's dictionary, for example, defined a "drunkard" as "[o]ne given to *excessive* use of strong liquors." 1 Dictionary of the English Language 4th ed. (1785) (emphasis added); *see also id.* (defining "excessive" as "[b]eyond the common proportion of quantity or bulk").

The judicial authorities the government selectively quotes likewise underscore the distinction between frequent use and the kind of frequent abuse that marked the condition of habitual drunkenness. In *State v. Pratt*, for example, the Vermont Supreme Court explained that "[t]he common term or phrase, *uses liquor to excess*," was "ordinarily understood" to mean one who "gets intoxicated or drunk" generally "about as often as he found an opportunity to do so." 34 Vt. 323, 324-25 (1861). Similarly, in *Ludwick v. Commonwealth*, the Supreme Court of Pennsylvania articulated the test as whether one is "habituated to intemperance whenever the opportunity offered," and explained that "a man who is intoxicated or drunk one-half his time is an habitual drunkard." 18 Pa. 172, 174-75 (1851); *see also Nw. Mut. Life Ins. Co. v. Muskegon Nat'l Bank*, 122 U.S. 501, 507 (1887) (endorsing jury charge requiring finding that "the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence, in excessive fits of intemperance").

The secondary sources the government invokes reflect the same distinction. For example, it relies on

an 1823 manual that differentiates "[t]he crime of drunkenness" from "that of being a common drunkard." U.S.Br.20 (quoting John M. Niles, *The Connecticut Civil Officer* 180 (1823)). Whereas the former focused on whether someone was *presently* intoxicated, the latter focused on *how frequently* someone was intoxicated. These "distinct" offenses, the manual acknowledges, carried wildly divergent penalties, with the latter having far more significant consequences. *Id.*

Early militia laws reinforce this distinction. Some states barred "common drunkards" from militia service altogether. *See, e.g.*, An Act to regulate the Militia, §1, 1844 R.I. Pub. Laws 501, 503 (Knowles & Vose); Act of Apr. 20, 1837, ch. 240, 1837 Mass. Acts 273. But Founding-era legislatures only temporarily disarmed militia members who appeared "in Arms disguised in Liquor." Act of May 8, 1746, ch. 200, §3, Acts of Gen. Assem. N.J. 139, 140 (1776); *see also, e.g.*, Act of Mar. 20, 1780, ch. 902, §45, *in* 2 Military Obligation: The American Tradition, pt.11, at 75, 97 (1947) (similar Pennsylvania law).

Put simply, at the Founding and throughout the 1800s, the label "habitual drunkard" did not attach to anyone who consumed alcohol "habitually." Indeed, to deem anyone who regularly drank alcohol a "drunkard" not only would have been anomalous to early Americans, but would have labeled a significant portion of the populace "drunkards." After all, at the time, "[a]lmost everyone 'habitually' drank moderate amounts of alcoholic beverages." Harry Gene Levine, *supra,* 43. But "only some people habitually drank them to the point of drunkenness." *Id.* Only the latter were considered "habitual drunkards." *See* Jayesh M.

Rathod, *Distilling Americans*, 51 Hou. L. Rev. 781, 795 (2014) (state laws all "contemplate[] consumption of significant amounts of alcohol, with some regularity").

"Habitual drunkard" laws thus might have some purchase in a prosecution under the "addicted to" prong of §922(g)(3). But the government charged Mr. Hemani only as an "unlawful user," based on his admission to consuming marijuana a few days a week. ROA.12. To treat that alone as enough to make him akin to a "habitual drunkard" would read history "at such a high level of generality that it waters down the right" to keep and bear arms. *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). After all, whatever one may think about the recent rise in marijuana use in America, there is no denying that many people in this country consume marijuana in the same way that many consume alcohol—*i.e.*, regularly, or perhaps even frequently, but nowhere near to the point of consuming to excess "whenever the opportunity [is] offered," *Ludwick*, 18 Pa. at 174-75, or having "lost the power of self-control" over whether, when, or how much to consume, 21 U.S.C. §802(1).

By the government's logic, then, it is not just anyone who regularly takes a sleep gummy or drinks cannabis tea a few nights a week, but also anyone who regularly has a beer with dinner, who could be stripped of the right to keep a firearm in the home for self-defense. Any suggestion that that is not an effort to "broadly restrict arms use by the public generally," U.S.Br.23 (quoting *Rahimi*, 602 U.S. at 698), defies common sense.

C. The Government's Proffered Historical Restrictions on "Habitual Drunkards" Are Inapposite.

Even assuming that people who use regularly marijuana could be deemed analogous to "habitual drunkards," the historical regulations the government invokes are not "relevantly similar" in "how" or "why" they addressed habitual drunkenness. *See Rahimi*, 602 U.S. at 692. To the contrary, the government's efforts to situate this criminal prosecution alongside 18th- and 19th-century vagrancy, civil commitment, and surety laws push analogical reasoning well beyond its limits.

At the outset, the government starts with another fundamentally flawed premise—namely, that any historical restriction carrying a threat of confinement is a valid analogue for a modern law that restricts Second Amendment rights. U.S.Br.25-26. While the government invokes *Rahimi* for this proposition, *Rahimi* endorsed only the far narrower principle that "if imprisonment was permissible" as a response to "*the use of guns to threaten the physical safety of others*," then legislatures may also resort to the "lesser restriction of temporary disarmament." 602 U.S. at 699 (emphasis added).

It therefore does not follow that any historical constraint on liberty can justify a modern-day restriction on firearms, no matter how incidental disarmament may have been to the legislature's objectives. Such laws must instead be examined the same way as any other proffered historical analogue—*i.e.*, by assessing whether they imposed "similar restrictions" on Second Amendment rights "for similar

reasons" as the challenged law. *Id.* at 692. The government's proffered analogues flunk that test.

1. Vagrancy laws did not restrict Second Amendment rights.

The government does not claim that the "vagrancy" laws it invokes targeted the misuse of firearms. *See* U.S.Br.18-22. Nor could it. Early American vagrancy laws were a form of economic policy—as evidenced by the fact that they applied to groups like palm-readers and fiddlers alongside "common drunkards." These laws addressed a well-defined policy concern: the perceived economic difficulties created by individuals who entered a community and refused to participate in, or otherwise distorted, the local labor market. *See* William P. Quigley, *Reluctant Charity*, 31 U. Rich. L. Rev. 111, 115 (1997). Consistent with that concern, the restrictions legislatures imposed through vagrancy laws targeted economic activity, not the use of firearms.

Like much of early American law, vagrancy laws find their roots in English practice. In the mid-14th-century, "labor shortages" triggered by "[t]he break-up of feudal estates" led Parliament to pass the Statutes of Laborers, the prototype of centuries of subsequent anti-vagrancy statutes. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972). The goal of the Statutes was to "stabilize the labor force," including by "prohibiting the movement of workers from their home areas in search of improved conditions." *Id.* They did this by "utilizing criminal penalties" to "limit wages and mobility and to punish idleness." Christopher Roberts, *Discretion and the Rule of Law*,

33 Duke J. Compar. & Int'l L. 181, 190 (2023). American vagrancy laws followed that English practice, regulating local labor markets by restricting, conscripting, or expelling impoverished individuals who had entered the community and been deemed insufficiently productive. *See, e.g.*, Risa L. Goluboff & Adam Sorensen, *United States Vagrancy Laws*, *in* Oxford Research Encyclopedias, American History 2 (2018) (explaining that the purpose of vagrancy laws was to "control workers in a changing political economy").

The vagrancy laws the government offers bear out this purpose and operation. Connecticut's law, for example, explains that it arose from the "growing difficulties" imposed by "idle and dissolute persons" who lack "suitable means and place to restrain and imploy them." Act of Oct. 1727, 7 Pub. Recs. Colony Conn., 1727-35, at 127-28. In response, the statute authorized establishment of a "house[] of correction" for the "keeping, correcting, and setting to work" of the "idle." *Id.* Individuals committed to the corrective facility were to be put "to work and labour." *Id.* at 129. The Massachusetts, New Jersey, and New Hampshire statutes the government cites are materially indistinguishable. *See* Act of June 29, 1699, ch. 8, §2, 1 Mass. Bay Acts 378; Act of June 10, 1799, §§1, 3, N.J. Laws 473-74 (1821); Act of May 14, 1718, ch. 15, 2 N.H. Laws 266.[11]

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[11] These jurisdictions were no outliers. Virginia threatened vagrants with incarceration, subject to release on bond for one who could "betak[e] himself to some lawful calling or honest labor." *See* Act for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor

Those statutes are not remotely analogous to §922(g)(3). The restrictions they imposed were not "comparably justified," *Bruen*, 597 U.S. at 29, as they were animated principally by concerns about job and housing markets, not firearm misuse. And the punishments they contemplated—forced labor or expulsion from the local economy—had nothing to do with depriving people of their Second Amendment rights. Most, if not all, historical vagrancy laws also offend modern sensibilities and violate due process, *see Papachristou*, 405 U.S. at 162, which makes their utility for fashioning a shared national consensus highly dubious. *See* Oral Arg. Tr. 62:16-21, *Wolford v. Lopez*, No. 24-1046 (U.S. Jan. 20, 2026) (Deputy Solicitor General Harris: "[I]t is somewhat astonishing that black codes, which are unconstitutional, are being offered as evidence of what our tradition of constitutionally permissible firearm regulation looks like."). But wrongheaded as vagrancy laws were, their basic upshot was to "control workers' economic and political power." Risa L. Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, at 15 (2016). They were not designed to address firearm misuse.

Once again, the government's strained analogy has untenable consequences. While the government focuses on "common drunkards," vagrancy laws swept

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(1776), *in* First Laws of the State of Virginia 44-45 (1982). And South Carolina subjected "all persons wandering from place to place without any known residence" to one year of indentured servitude or a round of lashes followed by banishment. *See* Act for the promotion of Industry, and for the suppression of Vagrants and other Idle and Disorderly Persons (1787), *in* 5 Statutes at Large of South Carolina 41-44 (1939).

much more broadly, imposing restrictions on all persons who "do not provide for themselves," as well as groups such as "persons … juggling," persons "feigning themselves to have knowledge in physiognomy" or "palmistry," "common pipers," and "fidlers." Act of June 29, 1699, ch. 8, §2, 1 Mass. Bay Acts 378.[12] Surely, the government does not mean to suggest that fortune-tellers and street performers may be deprived of their Second Amendment rights because early Americans considered them "vagrants." Yet it offers no theory as to how these wide-reaching vagrancy laws could justify restrictions on the Second Amendment rights of "common drunkards" alone.

2. Civil commitment laws were not relevantly similar to how or why the government seeks to apply §922(g)(3) here.

The government's proffered civil commitment laws fare no better. Notably, the government does not offer a single Founding-era law subjecting "habitual drunkards" to civil commitment; it instead cites only state laws from the second half of the 19th century. U.S.Br.20 n.10. "[L]ate-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 66; *see also id.* at 83 (Barrett, J., concurring) ("[T]oday's decision should not be understood to endorse freewheeling reliance on

[12] *See also, e.g.*, Act of Oct. 1727, 7 Pub. Recs. Colony Conn., 1727-35, at 128 (same); Act of May 14, 1718, ch. 15, 2 N.H. Laws 266 (same); Act of June 10, 1799, §§1, 3, N.J. Laws 473-74 (1821) (similar).

historical practice from the mid-to-late 19th century[.]"). In any event, those late-in-time laws do not begin to support the government's effort to imprison Mr. Hemani for exercising his right to keep a firearm in the home for self-defense.

The civil commitment laws the government cites did not prohibit "habitual drunkards" from owning firearms; they placed them, under limited circumstances, "in the custody of guardians." U.S.Br.21. And a principal aim of these laws was safeguarding property. In response to heightened economic anxieties during the 19th century, states enacted laws that "emphasized the protection of the habitual drunkard's property for the provision of his family." David Korostyshevsky, *Incapable of Managing His Estate*, 43 L. & Hist. Rev. 795, 804 (2025). "These laws contemplated 'a person who, as a result of drinking intoxicating liquor, [wa]s incapable of taking care of himself or his property.'" Rathod, *supra*, at 794. Take, for example, the D.C. statute the government offers. *See* U.S.Br.21 n.12. Enacted by Congress in 1876, it defined a "habitual drunkard" as "any person who, by the use of intoxicating liquors, or other intoxicants, has," among other things, "lost self-control, or become incapable of proper attention to the care and management of his affairs." Act of Mar. 30, 1876, ch. 40, §9, 19 Stat. 10, 10-11.

Like their modern counterparts, *see, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 75-79 (1992), early civil commitment laws also entitled people to individualized determinations about the nature and risks of their alcohol use, with substantial procedural protections before their liberty could be restrained. Again, consider the 1876 D.C. statute, which provided

"[t]hat any justice of the supreme court of the District of Columbia, upon petition or complaint, … shall proceed thereupon to appoint a commission to inquire into the case," and that "[t]he person charged with being an inebriate shall have notice to be present himself, or by counsel, before such commission, and to defend himself from such charge." 19 Stat. at 10-11. And the charge was not merely "habitual" consumption of alcohol, but abusive consumption such that one "has lost self-control, or become incapable of proper attention to the care and management of his affairs, or habitually or periodically neglectful thereof, or dangerous to himself or others." *Id.* Furthermore, guardianship cases in early America typically "triggered a complex and expensive legal process that charged juries with defining the thresholds of habitual drunkenness and mental capacity as they deliberated which men to exclude from full citizenship, one case at a time." Korostyshevsky, *supra*, at 802.

In short, these laws permitted civil commitment only after an individualized "judicial determination[]," (accompanied by substantial process), *see Rahimi*, 602 U.S. at 699, that one's alcohol consumption posed a threat to person or property. Perhaps that individualized inquiry bears at least some resemblance to the individualized qualifiers found in the CSA's definition of "addict." *See* 21 U.S.C. §802(1). But it looks nothing like the government's attempt to deprive all who consume marijuana a few days a week of their Second Amendment rights.[13]

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[13] To the extent the government relies on historical laws that permitted the temporary incarceration of people intoxicated in public, U.S.Br.38 & n.32, that analogy fails for a different reason:

3. The surety laws the government invokes do not resemble §922(g)(3) in their "why" or "how."

While surety laws at least were at a very high level animated by public safety concerns, they did not operate anything like §922(g)(3) either. Rooted in centuries-old English practice, surety laws gave communities a way to deter "individuals suspected of future misbehavior." *Rahimi*, 602 U.S. at 695. To achieve this, they required those whom a magistrate found "probable ground to suspect of future misbehavior" to "post bond" that would be forfeit if they "broke the peace." *Id.* (quoting 4 Blackstone, *Commentaries* 251, 253 (1787)).

Some of those laws "targeted the misuse of firearms." *Id.* at 696. But the government does not appear to rely on the surety laws this Court focused on in *Bruen* and *Rahimi*, which were triggered by a showing that an individual had misused firearms or posed a credible threat of doing so. It instead focuses on laws that "required drunks to post bonds for their good behavior." U.S.Br.22. In that context, however, surety laws had no connection whatsoever to the keeping or bearing of arms, as sureties were not triggered by, and did not impose any restrictions on, the exercise of Second Amendment rights. And the bare fact that "habitual drunkards" could be forced to post a bond to keep the peace does not show that the

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Those laws targeted public inebriation, not keeping a firearm in the home. And they addressed public inebriation by confining intoxicated individuals until they sobered up, not by depriving them of their Second Amendment rights indefinitely.

early Americans would have countenanced stripping them of their Second Amendment rights.

Moreover, even in contexts where surety laws did implicate Second Amendment rights, they did not impose categorical, preemptive constraints. Rather, to use the government's own words, "such … surety laws[] called for case-by-case judgments," Br. for the United States 43, *United States v. Rahimi*, No. 22-915 (U.S. Aug. 14, 2023), and "often offered the accused significant procedural protections," *Rahimi*, 602 U.S. at 696. Once a concerned community member made a "complaint" to a "judge or justice of the peace," the court would take evidence and give the accused an opportunity to respond. *Id.* at 696-97. Ultimately, whether to impose a surety hinged on an individualized "judicial determination[] of whether a particular defendant would likely threaten or had threatened another with a weapon." *Id.* at 699. While comparable protections *are* found in §922(g)(8), the provision this Court upheld in *Rahimi*, *see id.* at 696-99, they are *not* found in the "unlawful user" prong of §922(g)(3), which is all this case concerns.

Surety laws also had substantive limitations that distinguish them from §922(g)(3) (and especially its "unlawful user" prong). They were "intended merely for prevention," and "not meant as any degree of punishment." *Bruen*, 597 U.S. at 57 (quoting 4 Blackstone, *Commentaries* 249 (1769)). Reflecting this, "surety statutes and criminal statutes" often co-existed during the 19th century, with an "overlapping scope" but distinct policy objectives. *Id.* at 59. Surety bonds also constrained individuals only for a "limited duration." *Rahimi*, 602 U.S. at 699; *see also id.* at 697 (under Massachusetts law, bond could be required for

just "six months at a time"). Equally important, the surety system did not require complete disarmament, even in the context of those charged with actual or intended misuse of a firearm; those subject to a bond could "obtain an exception" for "self-defense or some other legitimate reason." *Id.* at 697.

Setting aside the unlikelihood that the Founding generation would have thought to deploy surety laws against people who consumed intoxicants a few times week, that regime does not bear even a passing likeness to this prosecution. Surety laws established criteria that could be used to make an individualized assessment of dangerousness. By contrast, the government apparently reads §922(g)(3) as a categorical prohibition on firearms possession by any regular user of a controlled substance, without any process to assess the nature and extent of their use, much less a judicial determination of whether that use poses a danger to the public. Further, unlike the surety laws, §922(g)(3) brooks no exceptions for self-defense. And its vague text leaves open the possibility that someone could continue to face criminal liability for exercising Second Amendment rights even if she subsequently abstains from consumption. *Accord* U.S.Br.37. In short, if the surety system sought to protect public safety with a scalpel, §922(g)(3) wields an axe.

* * *

At bottom, what the government brands as "laws restricting the rights of habitual drunkards," U.S.Br.10, are a hodgepodge of dissimilar regulatory regimes, most of which have nothing to do with the "misuse of firearms," *Rahimi*, 602 U.S. at 696, and

none of which "impose[d] a comparable burden on the right of armed self-defense," *Bruen*, 597 U.S. at 29, as the government's effort to strip anyone who consumes marijuana a few days a week of Second Amendment rights.

D. The Government's Proffered Post-Ratification History Is Unavailing.

Unable to identify historical laws that remotely resemble its sweeping reading of §922(g)(3), the government resorts to "[p]ost-ratification history," and suggests that "[e]arly Americans" did not adopt similar laws because they "were not familiar with drug use." U.S.Br.27 (citation modified). That move fails (at least) twice over.

Of course, the government certainly may apply restrictions that are *consistent* with historical tradition to substances that were not known or widely available at the Founding. *Cf. Bruen*, 597 U.S. at 30 ("[C]ourts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous places." (emphasis added)). But as the government itself acknowledges, U.S.Br.27, it cannot throw historical tradition out the window just because a particular intoxicant did not come along until later. And though early Americans were quite familiar with the dangers of alcohol—and other intoxicants as well, *see United States v. Veasley*, 98 F.4th 906, 911-12 (8th Cir. 2024) (discussing the breadth of the opium problem at the Founding)—that did not lead them to strip all who regularly consumed intoxicating substances of their Second Amendment rights.

At any rate, the government's post-ratification evidence confirms only that §922(g)(3) is an "extreme outlier" even today. *See Bruen*, 597 U.S. at 78 (Alito, J., concurring). As the government notes, the model legislation drafted in the 1920s banned only the sale of a pistol to a "drug addict," not the possession of a firearm by an "unlawful user" of narcotics. *See* Handbook, Nat'l Conf. of Comm'rs on Unif. State Laws 352 (1929). Consistent with that advice, of the nine laws from the 1920s and 1930s that the government claims "prohibit[ed] drug addicts or drug users from possessing, carrying, or purchasing handguns," U.S.Br.29 & n.17, eight covered *only* "a drug addict," and only one of those (California's) banned possession (albeit only of "any pistol, revolver or other firearm capable of being concealed upon the person"), *see* Act of June 19, 1931, ch. 1098, §2, 1931 Cal. Stat. 2316-17. The ninth law (Massachusetts') prohibited issuing a license to "carry a pistol or revolver" to (among others) someone "convicted of a felony or of the unlawful use or sale of drugs." Act of Apr. 29, 1925, ch. 284, §4, 1925 Mass. Acts 324.

As for the 27 jurisdictions that the government claims presently "ban possession of all firearms or handguns by habitual drug users," U.S.Br.30 & nn.19-20, only one (Maryland) employs the term "habitual user,"[14] and only seven (Maine, Minnesota, Nevada, New York, Utah, West Virginia, and the Virgin Islands) have "unlawful user" provisions.[15] Two of

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[14] Md. Code Ann., Pub. Safety §5-133(b)(7).

[15] While Kansas's law employs the term "unlawful user," it covers only someone "who is *both* addicted to *and* an unlawful user of a

those eight jurisdictions explicitly exempt cannabis,[16] and the rest have all legalized marijuana use in whole or in part, leaving it unclear to what extent (if any) their possession bans cover it.[17] The remaining 19 laws the government invokes cover *only* those "addicted to" a controlled substance or a comparable formulation, *see, e.g.*, Mo. Rev. Stat. §571.070.1(2) (covering persons "habitually in an intoxicated or drugged condition").[18]

Beyond that, the government cites only laws "restrict[ing] issuance of concealed-carry permits or otherwise limit[ing] … rights to *carry* firearms," U.S.Br.30 & n.22 (emphasis added), not to *possess* them. Moreover, 15 of those 23 jurisdictions cover only people "addicted to" narcotics, and six of the remaining eight have legalized marijuana use in whole or in part.[19] So even as to concealed-carry

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controlled substance." Kan. Stat. Ann. §21-6301(a)(10) (emphasis added).

[16] Me. Stat. tit. 15, §393(1)(G); Minn. Stat. §624.713(10)(iii).

[17] Nev. Rev. Stat. §678D.200(1); N.Y. Penal Law §222.05(1); Utah Code Ann. §58-37-3.9(2); W. Va. Code §16A-3-2; V.I. Code Ann. tit. 19, §785.

[18] Several also employ an even more demanding conception of addiction than §802(1) does. *See, e.g.*, R.I. Gen. Laws §11-47-6 (someone "who has been adjudicated or is under treatment or confinement as a drug addict"). And two cover only individuals who have been convicted of operating a vehicle while intoxicated. 18 Pa. Cons. Stat. §6105(c)(3); Wash. Rev. Code §9.41.040(2)(a)(i)(D).

[19] Colo. Const. art. 18, §16(3); La. Stat. Ann. §40:1046.1(B); Mont. Code Ann. §16-12-106(1); N.D. Cent. Code §19-24.132(1); Va. Code Ann. §4.1-1100(A); *see also* Jim Pillen, Governor, *State of Nebraska Proclamation Certifying Measures 437 and 438* (Dec. 12, 2024), perma.cc/8RYU-T4D6. Only 2 have an "unlawful user"

permits, only a handful of states restrict "unlawful users" of marijuana. Those are hardly the makings of a broad "practice of disarming drug users," U.S.Br.31, let alone of disarming marijuana users.

That highlights another problem with the government's argument: While it has much to say about the perils of "drug use" writ large, U.S.Br.32-35, it makes no real attempt to connect those concerns to marijuana use, which is the only kind of "drug use" at issue here. Many of its policy arguments focus on the perils of addiction, U.S.Br.33-35, which are separately addressed by §922(g)(3)'s "addicted to" prong. And the most the government has to say about marijuana in particular is that it has "physiological, cognitive, and mood-based effects," and that sometimes people under the influence of it commit crimes (though most of its examples involve other substances too). U.S.Br.32-33 & n.27. Of course, the same could be said of alcohol; indeed, some of those examples involve alcohol use as well. Yet that did not lead the Founding generation to strip all "habitual" consumers of alcohol of their Second Amendment rights. And those concerns have led almost no states to strip recreational marijuana users of their rights either.

The government's desire to avoid talking about marijuana is understandable. The government itself has recognized that marijuana is not so dangerous or addictive that it cannot be used responsibly and in

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provision and have not legalized marijuana at all. Idaho Code §37-2732(e); Tenn. Code §§39-17-415, 418(a). The government includes N.C. Gen. Stat. §14-415.12(b)(5), but that law was recently amended to drop its "unlawful user" provision. *See* 2025 N.C. Sess. L. 2025-51.

moderation. Just this past month, the President issued an executive order to reclassify marijuana from a Schedule I to a Schedule III controlled substance. *See* Exec. Order No. 14,370, *supra*; U.S.Br.23. Schedule III substances, as the order recognizes, are so classified in part because they have less "potential for abuse" and "physical dependence" than Schedule I or II substances. 21 U.S.C. §812. The government thus has recognized that marijuana does not present the same dangers as the kinds of drugs on which it prefers to focus here. That makes it even more difficult to claim that people who consume any type or quantity of marijuana a few days a week pose a categorically constant threat of misusing a firearm.

None of that is to say that the Second Amendment forbids *any* categorical restrictions on who may possess firearms, or even any categorical restrictions when it comes to controlled substances. *See Rahimi*, 602 U.S. at 698. But "the government does not get a free pass simply because Congress has established a categorical ban." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (citation modified). The government seems to recognize as much, as it notably does not argue that it has some free-floating right to deprive any group Congress deems "dangerous" or "irresponsible" of Second Amendment rights. *Cf. Rahimi*, 602 U.S. at 701 ("[W]e reject the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'"); *supra* n.9. It instead accepts that it "may disarm a group of dangerous individuals" only "if an analogous group was subject to similar or more severe limits at the founding." U.S.Br.13.

As explained, that effort fails here because the lone purportedly "analogous group" the government identifies—"habitual drunkards"—was far narrower than its capacious conception of a "habitual drug user" as encompassing anyone who consumes an intoxicant a few times a week. *See supra* Part II.A-B. But it fails for the additional reason that the government itself no longer seems to view marijuana as the kind of substance that is so inherently dangerous or addictive that it might justify a categorical deprivation of the Second Amendment rights of all who consume any type or quantity of it with any degree of regularity.

E. Rights-Restoration Paths Do Not Cure §922(g)(3)'s Constitutional Infirmities.

Ultimately, even the government admits that §922(g)(3) may raise "constitutional concerns" in some cases. U.S.Br.40. But it suggests that those concerns are assuaged by the existence of paths for seeking the restoration of Second Amendment rights. To state the obvious, the prospect that rights may be restored has no bearing on whether the government may take them away in the first place. At any rate, the government's argument is irrelevant here, as it does not suggest that there is any path through which *Mr. Hemani* could have "restored" the Second Amendment rights that it claims §922(g)(3) takes away from him.

The government first highlights 18 U.S.C. §925(c), which provides that "[a] person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws." The government concedes that §925(c) "was not operational at the time of

respondent's offense conduct." U.S.Br.42. That is an understatement: The §925(c) process has been on ice for over 30 years. *See United States v. Bean*, 537 U.S. 71, 74-75 (2002). And while the government claims to have "recently revitalized" §925(c), U.S.Br.40, to this day the Department of Justice website promises only that "[a]n initial version of the application" for rights restoration "will be available online soon," pending the release of a "final rule."[20]

Moreover, while it is easy to envision how such a process might work for, *e.g.*, individuals with felony convictions, it is much more difficult to envision it providing meaningful relief for "unlawful users" of controlled substances. Setting aside the problem that §922(g)(3) fails to provide fair notice of what makes someone an "unlawful user," *see supra* Part I, invoking the (as-yet-inoperable) §925(c) process would require an individual to voluntarily inform the government that she not only is presently engaged in, but wishes to continue engaging in, conduct that is "unlawful" under federal law, as the government insists that §922(g)(3) ceases to apply of its own force "as soon as [one] stops habitually using drugs." U.S.Br.3.

For precisely that reason, the government concedes that people covered by §922(g)(3) would be "presumptively ineligible for relief" under the rule that has been proposed (but still not adopted) for establishing a §925(c) process. U.S.Br.41 (citation modified). A rights-restoration process that would not even be available to Mr. Hemani cannot plausibly

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[20] U.S. Dep't of Just., *Federal Firearm Rights Restoration*, perma.cc/8VHD-7NY5.

have any bearing on the constitutionality of the government's effort to strip him of those rights here.

The government's off-hand suggestion (at 42) that Mr. Hemani should have filed a lawsuit seeking a shield against prosecution under §922(g)(3) makes even less sense. The only way Mr. Hemani could have secured that relief is by proving that §922(g)(3) cannot constitutionally be applied to him, which is precisely what he has argued here. While individuals are certainly free to affirmatively challenge laws they believe unconstitutionally restrain their conduct, they do not forfeit their ability to raise constitutional defenses to criminal prosecution under such laws by declining to do so—especially when, as here, the law in question does not even provide clear notice as to whether it renders their proposed conduct unlawful.

* * *

Nobody disputes that "drugs and guns" can be a "dangerous combination." *Smith v. United States*, 508 U.S. 223, 240 (1993). But even the most serious of societal problems must be addressed by laws that provide fair notice of what they prohibit—especially when they criminalize the exercise of fundamental rights. And even the most serious of societal problems involving firearms must be addressed in a manner consistent with this Nation's historical tradition of firearms regulation. There are certainly ways to address the concerns animating §922(g)(3) that are consistent with the Constitution. But to the extent §922(g)(3) really does make it a crime for anyone who regularly consumes any amount of marijuana a few days a week to keep a firearm in the home for self-defense, the Second Amendment "takes [that] policy

choice[] off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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