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 AMICUS CURIAE CENTER FOR HUMAN LIBERTY IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTEREST OF AMICUS[1]

The Center for Human Liberty is a nonprofit organization dedicated to defending and advancing individual liberty and freedom, including the rights and liberties protected by the Constitution. Consistent with this purpose, the Center for Human Liberty engages in legal efforts, including the submission of amicus briefs, to promote the protection of liberty. Amicus is interested in this case to ensure that federal regulation of firearms is consistent with the original meaning of the Second Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The right to keep and bear arms protected by the Second Amendment is "exercised individually and belongs to all Americans." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). No one disputes that Respondent's proposed course of conduct—possessing commonly owned firearms—falls within the textual embrace of that right. Under this Court's precedent, that places the burden on the Government to justify its effort to disarm him under 18 U.S.C. Section 922(g)(3) "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). Petitioner's assertion that it has blanket authority to disarm whole categories of people it deems dangerous—without any individualized, ju-

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[1] Pursuant to SUP. CT. R. 37.6, Amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than Amicus or its counsel made such a monetary contribution.

dicial determination that they actually pose a physical danger to anyone—strays far outside the boundaries of our historical tradition, and the Fifth Circuit was right to reject it.

The Government argues that those individuals in the Founding Era most analogous to the marijuana users disarmed by Section 922(g)(3) today were alcoholics. But the Founders' treatment of alcoholics *confirms* the challenged provision's unconstitutionality. For as the Fifth Circuit concluded, under the 18th-century surety and affray regimes and the scattered American laws that specifically dealt with the problem of carrying arms while intoxicated, an alcoholic's right to keep and bear arms could be burdened only *so long as he was actually intoxicated*.

There is, to be sure, some evidence of a broader tradition—one that could potentially support the temporary disarmament of certain marijuana users even during periods of sobriety. The Founders do appear to have confined what they termed "common drunkards" and "lunatics" in workhouses, prisons, or asylums—groups that could conceivably be analogized to some users of marijuana—but that confinement was based on an individualized determination that the alcoholic or mentally ill individual *actually posed a risk of physical dangerousness.* The Government's assertion that historical tradition supports the even broader authority to disarm people without such an individualized determination is based on a misunderstanding of the history. Even under this alternative understanding of what the Founding-Era regulatory tradition allowed, then, Section 922(g)(3) can constitutionally be applied to marijuana users only if the Government demonstrates that a person's marijuana use poses a threat

of physical danger. The Government's assertion that it can disarm people it deems dangerous without any need for such an individualized judicial determination is starkly at odds with "the history that the Constitution actually incorporated." *United States v. Rahimi*, 602 U.S. 680, 723 (2024) (Kavanaugh, J., concurring).

ARGUMENT

I. The Best Interpretation of Our History and Tradition Is the One Adopted by the Fifth Circuit: Only Those Actively Using Marijuana May Be Disarmed.

There is no dispute that Petitioner's "proposed course of conduct" falls within the Second Amendment's "plain text." *Bruen*, 597 U.S. at 32. "Marijuana user or not, [he] is a member of our political community," *United States v. Connelly*, 117 F.4th 269, 274 (5th Cir. 2024), and he simply wishes to "have weapons," *Heller*, 554 U.S. at 582. Under this Court's Second Amendment framework, that means that the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

The Fifth Circuit was correct: under the best interpretation of our historical tradition, the Government cannot bear that burden. As Petitioner acknowledges, because the Founders "were not familiar with drug use or the modern drug trade," the closest Founding-Era analogues to Section 922(g)(3)'s restriction on marijuana users are early-American "laws restricting the rights of drunkards." Pet.Br.18, 27 (cleaned up). But the clearest of these Founding-Era restrictions applied only to "misuse of weapons while

intoxicated." *Connelly*, 117 F.4th at 280. "Disarmament" of the drunkard even when not intoxicated, by contrast, "was not an option" under these laws. *United States v. Veasley*, 98 F.4th 906, 911 (8th Cir. 2024).

A 1655 statute from Virginia, for example, banned "shoot[ing] any gunns at drinkeing." Act XII of Mar. 10, 1655, *reprinted in* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 401–02 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823). The law appears to have been primarily motivated by the need to preserve gunpowder for defense against Indian attacks. *Id.* Likewise, a 1731 Rhode Island law forbad anyone to "fire any Gun, or Pistol" within a town in the Colony "or in any Tavern in the same, after Dark." Act for Preventing Mischief, *in* THE CHARTER, GRANTED BY HIS MAJESTY, KING CHARLES II. TO THE GOVERNOR AND COMPANY OF THE ENGLISH COLONY OF RHODE-ISLAND AND PROVIDENCE-PLANTATIONS 120 (Newport, Samuel Hall 1767). And a 1771 New York law prohibited any person from "fir[ing] or discharg[ing] any Gun, Pistol, Rocket, Cracker, Squib or other fire Work" in certain populated areas of the Colony in the days surrounding New Years, due to the "many Mischiefs" and "great Terror" caused "by persons going from House to House, with Guns and other Fire Arms and being often intoxicated with Liquor" during New Years' celebrations. Act of Feb. 16, 1771, ch. 1501, *reprinted in* 5 THE COLONIAL LAWS OF NEW YORK 244 (Albany, James B. Lyon 1894).

These laws are scattered and somewhat equivocal—they come from only three Colonies, were enacted before the Revolution, and do not appear to have entirely focused on the public-safety risks of mixing fire-

arms with alcohol. But they are consistent with the two broader and well-established legal traditions of firearm regulation recognized by this Court in *Rahimi*: " 'going armed' laws" and "surety laws." 602 U.S. at 695–97. "Going armed" laws prohibited as a species of "affray" the "offense of arming oneself to the Terror of the People." *Id.* at 697 (quoting THEODORE BARLOW, THE JUSTICE OF THE PEACE: A TREATISE 11 (1745)) (cleaned up). They applied where a person used arms "in such manner as to strike terror to the people," *O'Neill v. Alabama*, 16 Ala. 65, 67 (1849), and almost certainly would have barred an intoxicated individual from using or brandishing his arms in a terrifying and dangerous manner due to his drunkenness, *see Veasley*, 98 F.4th at 917.

Surety laws, for their part, essentially "authorized magistrates to require individuals suspected of future misbehavior to post a bond." *Rahimi*, 602 U.S. at 695. The surety system "could be invoked to prevent all forms of violence," *id.*, and that included the risk of violence due to intoxication. Late-eighteenth-century and early-nineteenth-century laws in Rhode Island, Connecticut, South Carolina, Virginia, Delaware, Maryland, and the District of Columbia all required those found drunk to provide sureties to guarantee the peace. *See* An Act for Establishing Weights and Measures throughout this Colony, *in* ACTS AND LAWS OF HIS MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS IN AMERICA 11 (Boston, John Allen 1719); An Act Against Breaking the Peace, *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 189 (Hartford, Elisha Babcock 1786); An Act for Repressing the Odious and Loathsome Sin of Drunkenness, § 6 (1606), *in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA: APPENDIX II

at 26 (Philadelphia, R. Aitken & Son 1790); Act of Dec. 26, 1792, ch. 141, § 1, *in* JOSEPH TATE, DIGEST OF THE LAWS OF VIRGINIA WHICH ARE A PERMANENT CHARACTER AND GENERAL OPERATION 756 n.2 (Richmond, Smith & Palmer, 2d ed. 1841); Act of Dec. 16, 1812, *in* SAMUEL BIRCH, A DIGEST OF THE LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON 141 (Washington, D.C., James Wilson 1823); Act Against Drunkenness, Blasphemy, and to Prevent the Grievous Sins of Prophane Cursing, Swearing, and Blasphemy, ch. 67, §§ 1–3, *in* 1 LAWS OF THE STATE OF DELAWARE 173–74 (New Castle, Samuel & John Adams 1797) (punishing drunkenness and requiring drunks who abused arresting officers to be "bound to his or her good behaviour" as "breaker[s] of the peace"); A DIGEST OF THE LAWS OF MARYLAND 206 (Thomas Herty ed., Baltimore, 1799). Under this application of the surety regime, "[d]runks had to promise not to break the peace, lest they be locked up and thus disarmed." *United States v. Harris*, 144 F.4th 154, 159 (3d Cir. 2025).

Finally, these Founding-Era protections against the danger posed by going armed while intoxicated are likewise consistent with the handful of statutes enacted in the late nineteenth century that specifically targeted the use of firearms by individuals under the influence. Kansas barred "any person under the influence of intoxicating drink" from "carrying on his person a pistol, bowie-knife, dirk or other deadly weapon." 1867 Kan. Sess. Laws 25, ch. 12, § 1. Missouri and Wisconsin had similar laws. *See* Mo. Rev. Stat. § 1274 (1879); 1883 Wis. Sess. Laws 290, ch. 329, § 3. And Mississippi made it unlawful to knowingly sell certain weapons and ammunition to "any person . . . intoxicated." 1878 Miss. Laws 175, ch. 46, § 2. Because the meaning of the Second Amendment was

fixed in 1791 by those who ratified it, these nineteenth-century laws "do not provide as much insight into its original meaning as earlier sources" and could not support an interpretation of the Amendment "*inconsistent* with the original meaning of the constitutional text." *Bruen*, 597 U.S. at 36 (cleaned up) (emphasis in original). These later statutes are in fact broadly consistent with the Founding-Era restrictions on the use of arms while intoxicated, however, and so they provide "yet further confirmation" of that earlier historical tradition. *Id.* at 20.

They also provide further confirmation of the limits of that regulatory tradition: none of these regulations prevented anyone from keeping or carrying arms *while sober*. The statutes specifically concerning drunkenness—both before the Founding and after the Civil War—were on their face limited to the use or carrying of firearms while in an active state of intoxication. And to the extent that Founding-Era affray law incidentally criminalized carrying arms in a terrifying manner due to intoxication, that prohibition likewise lasted only so long as the intoxication—and thus the alcohol-induced terrifying behavior—subsisted. *See North Carolina v. Huntly*, 25 N.C. 418, 423 (1843); *see also Bruen*, 597 U.S. at 45; *Rahimi*, 602 U.S. at 697–98; *Veasley*, 98 F.4th at 917.

The same is true of surety laws. The Government disputes this—offering a different interpretation of the surety tradition, which it puts forward as one of the chief historical pillars of its argument—but it is mistaken. The Government points to some Founding-Era treatises that described the surety laws as extending to all "drunkards," and it concludes from this that these laws "subjected habitual drunkards to

prophylactic restrictions that were not limited to exigent bouts of drunkenness." Pet.Br.22. But even if that is so, the meaningful *burden* imposed by surety laws—forfeiture of the surety and, in some cases perhaps, imprisonment in the event that the individual broke his pledge of good behavior—only kicked in if his *actual drunkenness* caused him to *actually pose a threat of physical dangerousness*. *See Harris*, 144 F.4th at 163. It is conceivable that someone bound to sureties because of repeated, past drunkenness might be found to have forfeited the sureties based on violent behavior committed while sober. But in such an instance, the application of the surety law would have nothing to do with intoxication—and would thus fail to provide any historical support for Section 922(g)(3).

II. In the Alternative, History and Tradition At Most Support the Temporary Disarmament of those Marijuana Users Individually Determined To Be Physically Dangerous.

Accordingly, as the court below found, the clearest historical tradition at the Founding at most justifies laws disarming individuals *while they are under the influence* of alcohol (or, by analogy, marijuana), but that tradition does not provide any historical basis for disarming substance *users* even during periods of sobriety. There is, however, some historical evidence of a broader Founding-Era tradition of disarming those whose addiction to alcohol rendered them dangerous even when not under the influence. The Court could, in the alternative, rely on that tradition to uphold Section 922(g)(3) in some applications. *See Harris*, 144 F.4th at 158–65; *Veasley*, 98 F.4th at 912–18. The Government claims to identify a broader tradition still—one that would justify disarmament of all mari-

juana users *apart* from any individualized evidence of dangerousness—but its reading is based on a mistaken understanding of several historical sources, and this Court should not adopt it.

A. As the Third Circuit has recounted, there is some evidence that magistrates at the Founding had authority to imprison or otherwise confine individuals whose intense addiction to alcohol placed them in the juridical category of "common drunkards." This tradition appears to have grown out of the English surety system discussed above. In his celebrated Commentaries on the Laws of England, Blackstone wrote that "common drunkards" were among the types of people "that be not of good fame," whom a justice could "bind over to the good behaviour" with sureties. 4 WILLIAM BLACKSTONE, COMMENTARIES *256 (1770). William Hawkins's Treatise of the Pleas of the Crown agreed, adding that magistrates had "just Cause to suspect" that "common Drunkards" were "dangerous, quarrelsome, or scandalous." 1 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 132 (Elizabeth Nutt 1716); *see also* MICHAEL DALTON, THE COUNTRY JUSTICE 289 (London, Henry Lintot 1746).

The Founders continued this regulatory tradition on this side of the Atlantic. As the Government recounts, between 1719 and 1790, Rhode Island, Connecticut, and South Carolina enacted statutes authorizing local magistrates or justices of the peace to require drunkards to give sureties of good behavior. An Act for Establishing Weights and Measures throughout this Colony, *in* ACTS AND LAWS OF HIS MAJESTIES COLONY OF RHODE-ISLAND, *supra*, at 11; An Act Against Breaking the Peace, *reprinted in* ACTS AND LAWS OF THE STATE OF CONNECTICUT, *supra*, at 189;

An Act for Repressing the Odious and Loathsome Sin of Drunkenness, § 6 (1606), *in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA: APPENDIX II, *supra*, at 26.

Eighteenth-century American law also began providing that "common drunkards" could be imprisoned or confined in a "workhouse" for a time. A 1727 statute in Connecticut, for example, authorized county authorities to construct a "House of Correction" and charged local justices "to send and commit unto the said House . . . all . . . Common Drunkards." Act of Oct. 12, 1727, ch. 1, *in* ACTS AND LAWS, OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 344 (Albert C. Bates ed., Hartford, 1919). In 1788, Massachusetts similarly provided for the establishment of "houses of correction" and authorized county justices of the peace to commit all "common drunkards" there. Act of Mar. 26, 1788, *in* THE PERPETUAL LAWS OF MASSACHUSETTS 347 (Isaiah Thomas ed., Worcester, 1788). A 1791 New Hampshire law likewise authorized local authorities to build "a house of correction" or "a workhouse," and authorized justices of the peace to commit "common drunkards" "unto the county house of correction, to be kept and governed according to the rules and orders of such house." Act of Feb. 15, 1791, *in* SAMUEL BRAGG, CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE 299 (Dover, 1805). And in 1799, New Jersey also directed justices of the peace, upon conviction, to commit "disorderly persons," including "common drunkards," to the local "work house." Act of June 10, 1799, §§ 1, 3, *in* WILLIAM PATERSON, LAWS OF THE STATE OF NEW-JERSEY 410 (New Brunswick, Abraham Blauvelt 1800).

This tradition continued into the nineteenth century, with ten states enacting similar statutes between 1825 and 1887.[2] And many justice of the peace manuals in these States also echoed those provisions. *See, e.g.*, DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 255 (2d ed., Boston, Hilliard, Gray, Little & Wilkins 1828). Connecticut's handbook offered an instructive description of the category of "common drunkard" covered by this historical tradition, explaining that "[t]he crime of drunkenness is distinct from that of being a common drunkard; the former is punished by a fine of not more than twenty dollars, or imprisonment not more than thirty days, but in the latter case the offender may be sentenced to the work-house." JOHN W. JOY, THE CONNECTICUT CIVIL OFFICER 531 (18th ed. Hartford, E.E. Dissell & Co. 1923).

Because "[t]emporary imprisonment required temporary disarmament," *Harris*, 144 F.4th at 161, the fact that this tradition burdened "common drunkards" with imprisonment or confinement provides

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[2] Act of Feb. 22, 1825, ch. 297, § 4, 1825 Me. Pub. Acts 1034; Act of Mar. 15, 1865, ch. 562, §§ 1–2, 1865 R.I. Acts & Resolves 197; Act of Dec. 15, 1865, No. 107, § 1, 1865–66 Ala. Acts 116; Act of June 2, 1871, No. 1209, § 2, 1871 Pa. Laws 1301–02; Act of Feb. 14, 1872, § 647, *in* 2 THE CODES AND STATUTES OF THE STATE OF CALIFORNIA 1288 (Theodore H. Hittell ed., 1876); Act of Mar. 7, 1873, ch. 114, § 1, 1873 Nev. Stat. 189–90; Act of Feb. 18, 1876, § 378, *in* THE COMPILED LAWS OF THE TERRITORY OF UTAH 647 (1876); Act of Feb. 22, 1881, § 1, 1881 Mont. Terr. Laws 81–82; Act of Feb. 4, 1885, § 1, 1884–85 Idaho Terr. Gen. Laws 200; Act to Establish a Penal Code, tit. XVII, § 1014, *in* REVISED STATUTES OF ARIZONA 753–54 (1887).

some justification for "the lesser restriction of temporary disarmament" imposed by Section 922(g)(3), *Rahimi*, 602 U.S. at 682. Importantly, however, this burden was based on a *particularized finding of dangerousness*. The surety system obviously "involved judicial determinations of whether a particular defendant" posed a risk of breaching the peace, *id*. at 699, and the workhouse statutes likewise authorized confinement only "[u]pon due Conviction of" the offense of being a common drunkard, Act of Oct. 12, 1727, *in* ACTS AND LAWS, OF HIS MAJESTIES COLONY OF CONNECTICUT, *supra*, at 344.

Moreover, the regulatory tradition burdened "common drunkards" in this way *because they posed a risk of dangerousness*. Hawkins's treatise made that clear, stressing that sureties could be required of a common drunkard because of the "just Cause to suspect" that he was "dangerous." HAWKINS, *supra*, at 132. And the workhouse laws were in accord: as Massachusetts's highest court explained in an 1855 case interpreting that state's statute, a "common drunkard" was different from both a "habitual drunkard" and a "drunkard" *simpliciter* because being a *common* drunkard entailed "offence to the public peace and good order." *Massachusetts v. Whitney*, 71 Mass. 85, 87–88 (1855).

Accordingly, this regulatory tradition provides some support for analogous modern laws temporarily disarming those marijuana users who the government finds, after an individualized proceeding, pose a risk of dangerousness because of their marijuana use. But it does not support the Government's suggestion that it has the blanket authority to disarm "categories of persons who pose a special danger of misuse, includ-

ing habitual drug users" without any "individualized showing[ ]" of dangerousness. Pet.Br.12, 40.

B. This understanding of the government's authority to temporarily disarm *specific* marijuana users who are found to pose a risk of danger is further confirmed by another potentially analogous regulatory tradition: the treatment of those suffering from dangerous mental illness. As the Third and Eighth Circuits have explained, the "legal view of mental illness" at the Founding was that it was "a transitory condition, just like intoxication." *Veasley*, 98 F.4th at 913. Indeed, "[t]hose who suffered from bouts of mental illness were called 'lunatics,' drawn from the Latin word for the moon, on the belief that they 'had lucid intervals, sometimes enjoying their senses, and sometimes not, and that frequently depending on the change of the moon.' " *Harris*, 144 F.4th at 160 (brackets omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *304). Legal regulation of the mentally ill thus provides a potentially apt analogy for regulation of those who suffer temporary mental impairment due to marijuana use.

And the legal treatment of the mentally ill closely tracked the treatment of common drunkards: it provided for government-enforced confinement only after an individualized determination of dangerousness. As Joseph Story explained, the mentally ill could be declared "lunatics" by a court of chancery only after a full trial by jury. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 365 (1839). That proceeding provided the allegedly disabled person with the full panoply of procedural protections, including the right to be present at the trial, to know in advance the nature of the charges and evidence against him, to call

witnesses and present evidence, and to appeal. 1 GEORGE DALE COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOTES MENTIS 129–30, 160–62 (1812).

Moreover, the ill individual could be committed to *government* custody—and consequently disarmed—only if "dangerously insane," or "so furiously mad as to render it dangerous to the peace or the safety of the good people" to leave the person free. *See, e.g.*, An Act vesting Justices of the Peace with certain powers in Criminal Cases (1798, 1813, 1822), § 7, *in* THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 149–50 (Providence, Miller & Hutchens 1822). The confinement lasted only "till he or she be restored to his right mind." Act of Feb. 27, 1798, ch. 61, § 3, *in* 2 ISAIAH THOMAS & EBENEZER T. ANDREWS, THE PERPETUAL LAWS OF MASSACHUSETTS 457 (Boston, 1801); *accord* HAWKINS, *supra*, at 2 ("a dangerous Madman may be kept in Prison till he recover his Senses").

The Founders' treatment of the mentally ill thus strongly confirms the conclusion reached above: while our historical tradition of firearms regulation may be said, by analogy, to support the temporary disarmament of individuals whose unlawful use of marijuana renders them actually dangerous, it simply does not cede the Government the power to disarm people based on the Government's mere assertion that this is generally so—and without some form of individualized judicial determination, reached after due process, that they are dangerous and likely to use their firearms to physically harm others.

C.1. The Government's assertion that it can disarm marijuana users as a class—without providing

for any "individualized showings" of dangerousness, Pet.Br.40—is based on the misinterpretation of several additional categories of historical laws that are in fact not sufficiently analogous to justify Section 922(g)(3). The Government places prominent weight, for example, on what it calls "civil-commitment laws" that "provided for habitual drunkards to be committed to asylums, placed in the custody of guardians, or both, in the same manner as lunatics." *Id.* at 20–21. It is true that in addition to drunkards *plano* and "common drunkards" who could be confined if found dangerous, the Founders' law recognized an additional category of "habitual drunkards," who could be placed in guardianship and, in some cases, committed to an asylum or workhouse, in the same manner as non-dangerous lunatics. However, the justification (i.e., the "why") for these regulations was totally disanalogous to Section 922(g)(3) (or the historical traditions discussed above): rather than protecting the public peace and safety, these laws were wholly designed to *protect the property of the habitual drunkard.*

Massachusetts's 1784 statute was typical. It began by noting that "excessive drinking" sometimes caused individuals to "spend, waste or lessen [their] estate[s], as thereby to expose [themselves], or [their] famil[ies], or any of them to want for suffering circumstances, . . . [and] endanger or expose the town[s] to which [they] belong[ ], . . . to charge or expense for the maintenance or support of [them]." Act of Mar. 10, 1784, *in* THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra*, at 102–03. Accordingly, the statute authorized local officials to lodge a complaint against such habitual drunkards to the Judge of Probate, who after appropriate process, "shall appoint . . . guardian or guardians to such per-

son" to manage their estates "under similar obligations for a faithful discharge of their trust, as guardians appointed for idiots, lunatics, or for persons *non compos mentis*." *Id.* Pennsylvania's 1818 law was similar: it authorized the court of common pleas, after individualized process, to determine that a person "by reason of habitual drunkenness, has become incapable of managing his or her estate, and is wasting and destroying the same," and to "appoint at least two persons, who shall not be heirs or next of kin to said person, to be guardians and trustees of the said person," who "shall have the care and management of the real and personal estate of the said habitual drunkard." Act of Feb. 25, 1819, ch. XLIX, §§ 1–2, *in* ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 74–75 (1819). New Hampshire, Maine, and New York all enacted similar "habitual drunkard" laws in the Early Republic. *See* Act of Dec. 24, 1805, *in* THE LAWS OF THE STATE OF NEW HAMPSHIRE 47 (Concord, Isaac Hill 1811); Act of Mar. 20, 1821, § 53, *in* LAWS OF THE STATE OF MAINE 178–79 (1822); Act of Mar. 16, 1821, ch. 109, §§ 1–4, *in* 5 LAWS OF THE STATE OF NEW YORK 99–100 (1821). Several other States passed similar statutes throughout the nineteenth century. *See* Pet.Br.21 n.12.

Petitioner's authorities themselves confirm that the justification of these laws was preservation of property, not public safety. This Court's 1922 decision in *Kendall v. Ewert* did indeed note that "in many states statutes provide for placing [habitual drunkards] under a guardian or committee," but the *reason* for this "restraint," the Court explained, was "to preserve their property, not less for themselves than for those dependent upon them," because "habitual drunkards are not competent to properly transact

business." 259 U.S. 139, 146 (1922). And Theodric Beck's 1823 treatise explained that New York's statute "places *the property* of habitual drunkards under the care of the chancellor, in the same manner as that of lunatics," pointing to an English case discussing a habitual drunkard "who, when sober, was a very sensible man, but being in a constant state of intoxication, . . . was *incapable of managing his property*." 1 THEODRIC BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 376 (1823) (emphases added).

The Government notes that some historical statutes also provided for commitment of habitual drunkards to workhouses or asylums, and it concludes that under *Rahimi*, "if 'imprisonment was permissible' " treatment of these individuals then "the lesser restriction of temporary disarmament" is also permissible. Pet.Br.20–21, 25–26 (quoting *Rahimi*, 602 U.S. at 699). This line of reasoning distorts the Court's opinion in *Rahimi* by truncating the relevant passage. *Rahimi* did not hold or imply that any historical tradition that included imprisonment as a penalty is perforce analogous to modern firearm regulations providing for disarmament. Instead, the opinion stated that "if imprisonment was permissible *to respond to the use of guns to threaten the physical safety of others*, then the lesser restriction of temporary disarmament . . . is also permissible." *Rahimi*, 602 U.S. at 699 (emphasis added). In other words, it is not imprisonment *simpliciter*, but imprisonment *justified by a risk of physical dangerousness* that provides analogous support to a modern disarming regulation. To justify a modern firearm regulation, a historical tradition must be "relevantly similar" in terms of both "how *and* why the regulations burden a law-abiding citizen's right to

armed self-defense." *Bruen*, 597 U.S. at 29 (emphasis added).

Here, to the extent the regulatory tradition providing for "civil commitment" of "habitual drunkards" burdened their right to keep and bear arms at all, Pet.Br.20–21, its "why" is not relevantly similar to Section 922(g)(3)'s. This tradition was based on the protection and preservation of the habitual drunkard's property, not any risk to public safety. And moreover, the historical "habitual drunkard" regulations all required *an individualized judicial determination* that the person in question posed a risk of the relevant kind; the "how" of these laws thus also does not support the Government's claim that it can declare whole "categories of . . . persons "to be "especially dangerous" without "require[ing] individualized showings." *Id.* at 40.

2. The Government also asserts that its interpretation of history is supported by the early-American surety system. *Id.* at 22. That argument fails for the reasons discussed above. *See supra*, pp. 7–8. Yes, "[s]urety laws allowed justices of the peace to compel anyone who posed a risk of future misbehavior . . . to post bond," and yes Founding-Era law "often required drunks to post bonds for their good behavior." Pet.Br.22 (quoting *Harris*, 144 F.4th at 162). But these surety laws only *burdened* the right to keep and bear arms—by requiring forfeiture of the bond or, if it came to it, "imprisonment," *id.*—if the individual *actually became intoxicated and broke the peace*. *See Harris*, 144 F.4th at 163. They thus do not justify disarming marijuana users *when they are not using*—and they *certainly* provide no support for the Government's assertion that it need not provide any "individ-

ualized showings" of danger before disarming marijuana users as a class. Pet.Br.40.

The Government disputes this, claiming that "*Rahimi* treated the burden imposed by 'surety bond,' . . . as analogous to 'temporary disarmament.' " *Id.* at 26 (quoting *Rahimi*, 602 U.S. at 699). That is a misreading of this Court's decision. *Rahimi* did conclude that "[t]he burden Section 922(g)(8) imposes on" persons who pose a risk of domestic violence was relevantly similar to the surety laws in two specific respects: both "involved judicial determinations of whether a particular defendant" posed a risk of danger, and both imposed burdens "of limited duration." 602 U.S. at 698–99. But the Court *never* asserted that the burden of merely posting a surety was a relevantly similar *penalty* to temporary disarmament. To the contrary, the only aspect of our regulatory tradition that the Court found to support "the penalty . . . of temporary disarmament" was the affray or "going armed" laws—which provided for the even greater penalty of "imprisonment." *Id.* at 699.

3. The Government also attempts to support the claim that it may disarm whole "categories of persons" it deems dangerous by pointing to Revolutionary-Era laws disarming loyalists and Early-American laws disarming rebels. Pet.Br.14–15. These historical laws are plainly inapt. Those who had forfeited their rights of citizenship by adhering to a foreign enemy or engaging in insurrection were not disarmed simply because they posed a risk of danger, they were disarmed because they were understood as falling outside of the rights-holding political community altogether.

It is not difficult to understand why most States disarmed loyalists during the Revolutionary War: af-

ter siding with the British invaders during the very war by which the American States sought to achieve political independence, these loyalists could scarcely then lay claim to the rights of citizens of those new States. The mass disarmament of "non-associators" (those who refused to swear allegiance and give military support to the patriot cause) was justified on similar grounds—and for the additional reason that the measure provided the Continental Army with a source of much-needed armament.[3] *See also Bruen*, 597 U.S. at 63 n.26 (dangerous to rely on "military dictates" not "designed to align with the Constitution's usual application during times of peace"). And the early disarmament of actual rebels and insurrectionists—such as those who participated in Shays' Rebellion—was cut from the same cloth.

Indeed, in all of these cases, the groups whose arms were seized were *also* denied the exercise of many other fundamental constitutional rights, such as the right to vote or hold office.[4] That conclusively shows that the justification for all of these laws was that the groups in question *were understood to have no constitutional rights in the first place*—not that the Second Amendment somehow gives the government a

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[3] Letter from George Washington to the Pa. Council of Safety (Dec. 15, 1776), https://bit.ly/3EZbKN5. The impressment of arms from Quakers by some States during this period was justified on similar grounds.

[4] *See, e.g.*, Act of Mar. 14, 1776, ch. 21, §§ 1–5, *in* 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 479–82 (Boston, Wright & Potter 1886) (loyalists and non-associators); Act of Feb. 16, 1787, §§ 1–3, *in* 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 145–47 (Boston, Manning & Loring 1805) (Shays' Rebels).

blank check to "disarm[ ] . . . categories of persons" it deems dangerous. Pet.Br.14.

To the extent the Government cites these laws as supporting a broader tradition—providing for disarmament not only of those who have alienated themselves from the American political community but also of those who are merely politically unpopular—any such tradition is part of "the history that the Constitution left behind." *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring). Pre-Revolutionary English law, it is true, sanctioned the disarmament of "political opponents and disfavored religious groups. By the time of the Founding, however, state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents on this side of the Atlantic." *Id.* at 694 (majority). The Government thus cannot rely on this discarded part of our history to support Section 922(g)(3).

4. Finally, the Government seeks to shore up the case for the challenged provision by noting that "state and territorial legislatures started to prohibit drug addicts or drug users from possessing, carrying, or purchasing handguns in the 1920s and 1930s." Pet.Br.29. But those twentieth-century laws arose far too late in our history to provide any insight into the Second Amendment's original meaning. The task this Court set in *Bruen* is designed to determine "the scope" that the Second Amendment was "understood to have *when the people adopted [it].*" 597 U.S. at 34. Because the substantive right to keep and bear arms was ratified in 1791, Amicus submits that the relevant time period is the Founding Era. Others propose looking to the period surrounding the right's incorporation by way of the Fourteenth Amendment in 1868;

and the Court has consistently maintained from *Heller* through *Bruen* that history throughout the nineteenth century can be used as a confirmatory analytic, to support conclusions drawn from the Founding history itself. *Id.* at 36–37. But under any theory, laws that did not begin to appear until the 1920s come too late. Indeed, *Bruen* did not even deign to "address any of the 20th-century historical evidence" cited by New York. *Id.* at 66 n.28.

As explained above, the American historical tradition in the eighteenth and nineteenth centuries at most justifies disarming marijuana users during periods when they are actually impaired. And there is a case to be made that it also supports disarming them for longer periods, including periods of sobriety, if there is an individualized determination that they are actually physically dangerous even when not under the influence. The Government cannot establish a different regulatory tradition that conflicts with this one—and that would allow disarmament without any individualized determination whatsoever—based entirely on laws that did not appear until "the 1920s and 1930s." Pet.Br.29.

III. Under the Nation's Historical Tradition, Section 922(b)(3) Is Unconstitutional As Applied to Petitioner.

A. The historical principles developed above have important implications for Petitioner's constitutional challenge to the application of Section 922(b)(3) in this case. As explained in Part I, the best interpretation of the history is that the most analogous individuals at the Founding—those under the influence of alcohol—could only be disarmed temporarily, during the duration of their intoxication. On that under-

standing of our historical tradition, Respondent's as-applied challenge to Section 922(g)(3) should be sustained, and the court of appeals' decision should be affirmed.

Section 922(g)(3) provides, as relevant here, that "It shall be unlawful for any person . . . who is an unlawful user of . . . any controlled substance . . . to . . . possess in or affecting commerce, any firearm or ammunition . . . ." 18 U.S.C. § 922(g). Respondent's challenge is best understood as asserting that the application of the phrase "unlawful user of . . . any controlled substance" is unconstitutional in his circumstances. *Id.* Because the Government concedes that its evidence does not establish that Respondent was actively under the influence of marijuana while in possession of a firearm, Pet.App.2a, prosecuting him under Section 922(g)(3) is not consistent with our historical tradition of firearm regulation, and the indictment should be dismissed.[5]

B. In Part II, Amicus offered an alternative interpretation of our historical traditions—one that, we submit, is inferior to the interpretation offered in Part I but that nonetheless has some support in the Founding-Era history. According to this alternative understanding of our history, the regulatory tradition bear-

[5] Because Respondent's facial challenge to Section 922(g)(3) was denied by the district court and he has not sought this Court's review of that denial, no facial challenge is before this Court. Under this disposition of Respondent's as-applied challenge, however, the provision would presumably be facially unconstitutional as well, since no textually discrete portion of Section 922 disarms individuals based on the constitutionally relevant criterion: whether they are actively under the influence of a controlled substance and thus dangerous.

ing on the intoxicated and mentally ill (and, by analogy, those under the influence of substances like marijuana) sanctioned their disarmament not only during periods of active intoxication or "lunacy" but also when their minds were clear—if and only if the government could establish, including in an individualized proceeding with appropriate process, that the individual in question posed an actual risk of physical dangerousness. If the Court adopts this alternate approach, it may be possible for the Government to show that Respondent should be disarmed, and the decision below should be reversed.

The critical criterion, under this reading of historical tradition, is actual dangerousness, rather than active intoxication. If the Government can establish that an individual marijuana user is actually dangerous because of his substance abuse, disarming him under Section 922(g)(3) could be constitutional. While the Government intimates in its brief before this Court that Respondent should not be trusted with firearms, it has not argued or attempted to prove that Respondent, individually, is actually dangerous. *See* Pet.Br.6–7.

It has argued, however, that habitual marijuana users *as a class* pose an acute risk of danger. *Id.* at 23–25, 32–35. If the Court is persuaded by this evidence—or if it believes that the Government may be able to make such a showing in further proceedings before the district court or the Court of Appeals—that would provide another potential route to upholding the constitutionality of Section 922(g)(3). For if the Government establishes that habitual marijuana users as a class pose a sufficiently serious risk of danger, and if it establishes through individualized proceed-

ings that Respondent is a habitual user of marijuana, it follows that the key historical element—actual risk of danger—would be presumptively satisfied, and the application of Section 922(g)(3) could be constitutional. Put differently, showing that Respondent is a habitual user of marijuana would, under this approach, *entail* that he presumptively poses a sufficient risk of danger to disarm him.

It is important to note, however, that Section 922(g)(3) bars the possession of firearms by both those who are "addicted to" marijuana *and* by those who are "unlawful users of" marijuana. Under this alternative, in this case it would not suffice for the Government to show that those addicted to marijuana pose a sufficiently serious risk of danger, because the Government has not shown that Respondent belongs to that class. Rather, the Government would be required to show that mere unlawful use of marijuana (if that term even has a discernable meaning, *see* Resp.Br.15–24), short of addiction poses the requisite danger.

Because the key that unlocks Section 922(g)(3)'s constitutionality remains an actual, particularized finding of a risk of dangerousness, however, this approach also demands that individuals charged with violating the provision must be allowed to challenge that application, in court, as unconstitutional in their particular circumstances. Even if habitual marijuana use means that a defendant *presumptively* poses a risk of danger, it would not mean that the presumption can never be rebutted; it seems quite possible, for instance, that someone who uses marijuana occasionally and only as a physician-prescribed treatment for chronic pain could convincingly show that *she in particular* does not pose any risk of danger. Our historical

tradition of firearm regulation, which is keyed to actual dangerousness, requires that she be given the opportunity. And a system of judicial review of as-applied Second Amendment challenges to Section 922(g)(3) provides an appropriate mechanism for implementing this aspect of our historical tradition.

The Government suggests that any "constitutional concerns" about Section 922(g)(8)'s application in such "marginal cases" are adequately addressed by "the recently revitalized mechanism under 18 U.S.C. 925(c)" for the discretionary restoration of firearm rights, without the need for judicial review of as-applied challenges. Pet.Br.40. It contends that the Section 925(c) process is an adequate substitute for "the individualized dangerousness determination made by the justices of the peace" in the Founding-Era system, and that "[g]iven the opportunity for relief under Section 925(c), there is no sound basis for requiring the government . . . to make a further individualized showing about the risks that the defendant poses." *Id.* at 42. This contention is badly mistaken.

While Section 925(c)'s discretionary restoration process is laudable in its place, it is no adequate substitute for an as-applied Second Amendment challenge for multiple reasons. To begin, an individual seeking the restoration of his Second Amendment rights bears the burden of establishing that he meets the standard for rights restoration, *see* 18 U.S.C. § 925(c)—unlike in a Second Amendment challenge, where "the Government bears the burden of proving the constitutionality of its actions," *Bruen*, 597 U.S. at 24 (quotation marks and citation omitted). Further, restoration is not a legal entitlement; it is ultimately a discretionary matter of executive grace—entrusted

to the nation's top, politically appointed law-enforcement officer. And further still, since Section 925(c) directs the Attorney General to consider whether restoration would "not be contrary to the public interest," the statute does not even focus her discretion exclusively on the constitutionally relevant consideration: actual dangerousness. Finally, the fact that the entire process was moribund for over 30 years and began to be reinvigorated only months ago starkly illustrates the politically unstable nature of the process. While the current administration appears committed to its robust use, the next administration could eliminate it with a flick of the pen.

The Government notes that the Attorney General's discretionary determination is subject to limited judicial review, Pet.Br.41, but that is no panacea. For courts review the determination only for abuse of discretion, *see Bradley v. ATF*, 736 F.2d 1238, 1240 (8th Cir. 1984)—as befits a statutory scheme that entrusts a politically appointed officer to determine whether "it is established to [her] satisfaction" that restoration "would not be contrary to the public interest," 18 U.S.C. § 925(c). Section 925(c)'s discretionary, politically charged restoration process simply cannot be said to obviate the need for plenary judicial review of an individual's claim that he poses no risk of danger. Accordingly, for Section 922(g)(3) to fall within our historical tradition—even under this alternate, somewhat broader interpretation—judicial review of such individual challenges must remain available.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Fifth Circuit.

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Respectfully submitted,

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