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

AMICUS BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

Barbara E. Bergman
National Co-Chair
NACDL Amicus Curiae Committee
1660 L St., NW, Suite 12
Washington, D.C. 20036

Jeffrey T. Green
National Co-Chair
NACDL Amicus Curiae Committee
1050 30th Street NW
Washington, D.C. 20007

Adeel M. Bashir*
Federal Public and Community Defenders
Sentencing Resource Counsel
Eleventh Circuit Vice-Chair NACDL Amicus Committee
400 N. Tampa Street
Suite 2660
Tampa, FL 33602
adeel_bashir@fd.org
703-835-3929

Counsel for Amicus Curiae
*Counsel of Record

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INTEREST OF AMICUS CURIAE

Founded in 1958, the National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files many amicus briefs each year in this Court, and other federal and state courts, seeking to provide amicus assistance in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.[1]

NACDL's interest in this case centers on: (1) ensuring that Second Amendment rights receive the same constitutional protection as other fundamental rights; (2) preserving the procedural requirements history shows were necessary when the government restricts individual liberties; (3) safeguarding the due process requirement that criminal statutes provide fair notice of prohibited conduct; and (4) maintaining workable standards that permit meaningful as-applied challenges to firearms offenses.

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[1] No persons or entities other than amicus, their members, or their counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission.

NACDL agrees with Respondent that 18 U.S.C. § 922(g)(3)'s "unlawful user" prong fails to provide fair notice and cannot be applied consistent with the Second Amendment to prosecute Respondent for possessing a firearm based solely on his marijuana use. *See* Resp. Br. 15–52. This brief offers a complementary analysis from the defense practitioner's perspective, demonstrating how § 922(g)(3)'s indeterminacy operates in practice: not as a bulwark against the dangers of firearm misuse, but as a prosecutorial leverage tool that risks disqualifying millions of ordinary Americans from exercising their Second Amendment rights.

SUMMARY OF THE ARGUMENT

In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court warned that the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* at 70. In *United States v. Rahimi*, 602 U.S. 680 (2024), the Court rejected the government's invitation to disarm citizens based on abstract judgments of "responsibility," emphasizing that firearm restrictions must be grounded in how and why the Founders regulated arms—not in legislative assessments of who deserves constitutional protection. *Id.* at 701.

This case is that warning come to life.

The government asks this Court to bless its prosecution of Respondent under 18 U.S.C. § 922(g)(3) for possessing a firearm based solely on his admitted marijuana use—without any showing that he was impaired at the time he possessed the firearm, posed

a threat to public safety, or otherwise misused a gun. And its purported justification is a familiar yet fatally flawed syllogism: some drug users *may* be dangerous; dangerous persons may be disarmed; therefore, *all* drug users may be disarmed and criminally prosecuted under § 922(g)(3). But that is means-end balancing in historical dress—precisely what *Bruen* and *Rahimi* refused to endorse.

From decades of defending individuals charged under this statute, NACDL has observed a consistent pattern: § 922(g)(3) operates not as a bulwark against dangerous individuals who are at special risk of misusing firearms, but as a mechanism for selective prosecution and as a leverage tool deployed when other charges cannot be sustained.

The scale of potential disarmament under § 922(g)(3) is staggering considering that millions of gun-owning Americans report some degree of regular marijuana use. And the statute could sweep further still, reaching anyone who has used "any controlled substance," without providing fair notice of when such use crosses the threshold into "unlawful user" status. *See* Resp. Br. 15–24.

The government's proffered historical analogues—criminal vagrancy laws, civil-commitment laws, and surety laws—do not rescue its position; they refute it. Each operated through individualized judicial process before any restriction attached, a temporal nexus between impairment and firearm use, or both. None imposed categorical disarmament. Section 922(g)(3) has none of these features: no pre-deprivation determination, no individualized finding, no temporal connection. It claims the breadth of status-based

regulation while discarding every critical mechanism that made those traditions constitutionally tolerable.

The government's remaining arguments fare no better. Its procedural defense conflates post-deprivation criminal process with the pre-deprivation civil process that history requires. Its "greater includes the lesser" argument ignores that historical punishments followed individualized adjudication. And its "temporary deprivation" theory inverts the constitutional order. Rather than adjudicating status before restricting rights, § 922(g)(3) strips the right by legislative decree and vague standards and leaves the citizen to seek discretionary executive grace to get it back. But a right held at the government's mercy is no right at all.

The Fifth Circuit correctly rejected the government's approach. And its temporal-nexus requirement offers one sound path forward. But whether the statute fails for vagueness, lacks historical support, or requires a narrowing construction, the bottom line is that the government cannot constitutionally prosecute Respondent for possessing a firearm based solely on his admitted marijuana use.

ARGUMENT

I. *Bruen* and *Rahimi* Define the Limits of Firearm Disarmament Grounded in "How and Why" the Second Amendment Right Is Burdened.

The government attempts to ground § 922(g)(3) in a set of founding-era laws said to reflect a tradition of disarming persons deemed dangerous. *Bruen* and *Rahimi*, however, require examining those laws at the level of specificity the Court has demanded—asking

not only *who* was regulated, but *how* and *why*. That inquiry reveals that the government's analogies fracture into two distinct historical traditions: laws addressing the misuse of firearms by persons *presently impaired*, and laws addressing status-based conditions through individualized, pre-deprivation process. Each operated within defined limits and employed distinct mechanisms. Section 922(g)(3) aligns with neither tradition.

A. *Bruen*'s and *Rahimi*'s "how and why" framework

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Bruen*, this Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and the government "must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. *Bruen*'s methodology turns on "how and why" a regulation burdens the right. *Id.* at 29. When earlier generations addressed a problem "through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26–27.

In *Rahimi*, this Court applied *Bruen*'s framework to § 922(g)(8), which prohibits firearm possession by an individual subject to a domestic-violence restraining order containing a finding that he "represents a credible threat to the physical safety of [an] intimate partner." 602 U.S. at 684–85. The Court upheld § 922(g)(8) because it "applies only once a court has

found that the defendant 'represents a credible threat to the physical safety' of another," thereby "match[ing] the similar judicial determinations required in the surety and going armed laws." *Id.* at 698–99.

Rahimi stressed that "[w]hy and how a firearm regulation burdens the Second Amendment right are central to [whether] the regulation is consistent with the principles that underpin the Nation's regulatory tradition." *Id.* at 692. The Court acknowledged that the Second Amendment "does not prohibit the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id.* at 698–99. But it "reject[ed] the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'" *Id.* at 701.

Justice Gorsuch's concurrence emphasized what *Rahimi* left open: whether the government may disarm a person "without a judicial finding that he poses a 'credible threat' to another's physical safety." *Id.* at 713 (Gorsuch, J., concurring). Nor did the Court "purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not responsible.'" *Id.*; *see also id.* at 744 (Thomas, J., dissenting) ("not a single Member of the Court adopt[ed] the Government's theory" of categorical disarmament based on legislative assessments of responsibility). Justice Barrett agreed, cautioning that while "[a]nalogical reasoning under *Bruen* demands a wider lens" and "[h]istorical regulations reveal a principle, not a mold," "a court must be careful not to read a principle at such a high

level of generality that it waters down the right." *Id.* at 740 (Barrett, J., concurring).

B. Respondent's as-applied challenge

This case concerns Respondent Ali Hemani's as-applied challenge to § 922(g)(3) based on his marijuana use. *See* Pet. Br. 7. That statute prohibits firearm possession by "any person who is an unlawful user of or addicted to any controlled substance." A knowing violation is a felony punishable by up to fifteen years' imprisonment. 18 U.S.C. § 924(a)(8). The government must prove that the defendant knew both that he possessed a firearm and that he belonged to the relevant prohibited category. *See Rehaif v. United States*, 588 U.S. 225, 237 (2019).

Among the nine § 922(g) categories, subsection (g)(3) stands apart. In eight, Congress specified a determinate triggering event, for example: "convicted" of a felony ((g)(1)); "adjudicated as a mental defective" or "committed to a mental institution" ((g)(4)); "discharged from the Armed Forces" ((g)(6)); or "subject" to a domestic-violence restraining order ((g)(8)).

Section 922(g)(3) takes a different approach. It does not turn on a prior conviction, adjudication, or any other objectively defined legal status. Rather, it rests on the undefined condition of being an "unlawful user" or "addicted to" a controlled substance. By regulation, a person may be "an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person…possesses a firearm," and an inference of "current use" can stem

from "a conviction for use or possession of a controlled substance within the past year." 27 C.F.R. § 478.11.[2]

The statute's potential reach is remarkably broad: "any controlled substance," meaning every drug on Schedules I through V of the Controlled Substances Act. 21 U.S.C. § 802(6).[3] The statute draws no distinction based on the substance's effects, frequency of use, or likelihood that use renders the individual dangerous.

Below, the Fifth Circuit held § 922(g)(3) unconstitutional as applied because the government did not prove Respondent was presently under the influence at the time he possessed a firearm. *See United States v. Hemani*, No. 24-40137, 2025 WL 354982, at 1 (5th Cir. Jan. 31, 2025). That holding follows *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), which held that history and tradition "support, at most, a ban on carrying firearms while an individual is presently under the influence," and that regulating a defendant "based on habitual or occasional drug use" imposes "a far greater burden on her Second Amendment rights than our history and

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[2] ATF recently proposed an interim final rule revising its interpretation of § 922(g)(3) to make "unlawful user" turn on a pattern of ongoing drug use. *See* Revising Definition of "Unlawful User of or Addicted to Controlled Substance," 91 Fed. Reg. 2,698 (Jan. 22, 2026). But the proposal expressly disclaims any requirement that an individual be using a controlled substance at the precise time she seeks to possess a firearm. *See id.* Moreover, because future administrations can revise or rescind this regulation at will, the proposed rule offers no durable answer to the constitutional question before this Court.

[3] *See* DEA, *Drug Scheduling*, https://tinyurl.com/27v5yp7a.

tradition of firearms regulation can support." *Id.* at 282.

II. Section 922(g)(3) Fails the "How and Why" in Practice.

This Court instructs that "why and how a firearm regulation burdens the Second Amendment right" is "central to" the constitutional inquiry. 602 U.S. at 692. The government's ostensible justification for § 922(g)(3)'s application here is that drug users pose a heightened risk of firearm misuse. *See* Pet. Br. 17–35. But the underlying logic is the same means-end rationale *Bruen* and *Rahimi* rejected: some drug users *may* be dangerous; dangerous persons may be disarmed; therefore, *all* drug users may be disarmed.

The statute's potential reach exposes the fallacy. Approximately 44% of American adults own firearms.[4] Twenty-three percent used marijuana in the past year—within the government's inference window for "current use." *See* 27 C.F.R. § 478.11.[5] The overlap between gun ownership and marijuana use encompasses tens of millions of Americans.

The government's rule may well categorically disarm all of them. That alone should give this Court pause, especially considering that the DEA recently proposed reclassifying marijuana from Schedule I to Schedule III, based in part on HHS's finding that "the vast majority of individuals who use marijuana are

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[4] *See* Gallup, *Percentage of Americans Who Own Guns* (2024), https://tinyurl.com/4c6fnntp.

[5] *See* Pew Rsch. Ctr., *9 Facts About Americans and Marijuana* (July 8, 2025), https://tinyurl.com/ffuzzn9z.

doing so in a manner that does not lead to dangerous outcomes to themselves or others."[6]

And that is just marijuana. The statute covers "any controlled substance." § 922(g)(3).[7] This could include Schedule V substances like codeine cough preparations, Schedule IV substances like zolpidem (Ambien) and alprazolam (Xanax), and Schedule III substances like testosterone—when used without a valid prescription or inconsistent with medical direction. *See* § 802(6).

Consider who the government's rule might also categorically disarm: the grandmother who uses painkillers to manage her chronic back pain; the college student who took more than the prescribed dose of her Adderall during finals week; the gym-goer who used steroids to build muscle; the insomniac who took an Ambien prescribed to her spouse. Each could in theory be labeled as an "unlawful user" given the statute's lack of clarity on the meaning of that term and potentially face up to fifteen years in prison.

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[6] Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44,597-01 (proposed May 21, 2024), https://tinyurl.com/84xbvd9s; *see also* Exec. Order No. 14370, *Increasing Medical Marijuana and Cannabidiol Research*, 90 Fed. Reg. 60541 (Dec. 23, 2025) (issued Dec. 18, 2025), https://tinyurl.com/yv7uxkj4.

[7] Even as the federal government moves to reschedule marijuana from Schedule I to Schedule III, § 922(g)(3) remains indifferent: it covers all scheduled substances, no matter where they fall in the hierarchy.

Yet despite this potentially sweeping reach, § 922(g)(3) functions in practice not as a bulwark against gun violence, but as a prosecutorial leverage tool deployed when other charges fall short. The numbers bear this out.

Although the government contends that "over 300 defendants have been charged with violating Section 922(g)(3) each year," Pet. Br. 6, critical context is missing. Of the 7,419 § 922(g) convictions in FY 2024, 90.4% were under the felon-in-possession provision of § 922(g)(1).[8] In its last comprehensive study of firearms offenders, the Sentencing Commission found about 5% sentenced under the firearms guidelines were prohibited because of drug use.[9] And compared with other § 922(g) offenses—including the felon-in-possession offense—§ 922(g)(3) cases result in relatively lower sentences, reflecting less serious and less dangerous underlying conduct.[10]

Peeling back the layers reveals § 922(g)(3) for what it is. From decades of practice, amicus has observed that the statute functions not for public safety but primarily as a leverage tool—serving as an instrument for selective prosecution, a pressure point during plea negotiations, or as a means of incarcerating otherwise law-abiding citizens when the government's primary theory falls short. *See* Dru

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[8] USSC, *18 U.S.C. § 922(g) Quick Facts* (FY24), https://tinyurl.com/mry7m2xa.

[9] USSC, *What Do Federal Firearms Offenses Really Look Like?* (July 2022), https://tinyurl.com/2hs8jr7t.

[10] The data used to derive these statistics were taken from the Sentencing Commission's individual datafiles, using the cases labeled as § 922(g)(3) in the Commission's public dataset.

Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. Crim. L. 211, 224–25 (2020).

So who actually gets prosecuted? Whoever the government chooses, often for reasons that have nothing to do with firearm misuse or danger.

Respondent's case is illustrative. He was investigated for another matter—here, suspected of ties to foreign actors that the government ultimately could not substantiate. No terrorism charges materialized. No charge related to the government's actual suspicions can be sustained. *See* Pet. Br. 6–7. But because both drug use and firearm ownership are ubiquitous features of American life, § 922(g)(3) provides an easy fallback. The government alludes to danger, but the underlying facts involve someone who admitted using marijuana—conduct that millions engage in lawfully under state law—and who was sober at the time of his arrest.

Respondent's case is far from an outlier. In *Connelly*, for example, the defendant was a "non-violent" individual "who indicated that she would at times smoke marijuana as a sleep aid and for anxiety." 117 F.4th at 272. Officers responded to a dispute between the defendant's husband and a neighbor. *See id.* Before conducting a sweep of the home, officers spoke with her and she volunteered information about her occasional marijuana use. *See id.* She was not intoxicated at the time, and the government offered no evidence that her marijuana use impaired her judgment, caused her to handle a firearm unsafely, or posed any risk to anyone. Yet because she admitted to marijuana use and because the sweep uncovered

firearms in the home, the government charged her under § 922(g)(3). *See id.*

Or take *United States v. Harris*, 144 F.4th 154 (3d Cir. 2025). There, the defendant, then 21, had "no history of violence or threatening behavior." *Id.* at 170 (Ambro, J., dissenting). He purchased three pistols over a few months, each time answering "no" on a federal form asking whether he was a user of or addicted to marijuana, though he smoked marijuana recreationally during this period. *Id.* at 156–57. When he reported one of his guns missing, officers questioned him, asking whether he had answered the form honestly about his drug use. *See id.* But even he could not say whether his use made him an "unlawful user," hedging that his use "depends which way you look at it." *Id.* at 157. Although he had committed no violent crime or otherwise misused his firearms, the government charged him under § 922(g)(3). As Judge Ambro noted in dissent, the statute's breadth allows the government to incarcerate "so many for such common behavior," sweeping in "ordinary Americans" whose drug use bears no demonstrated connection to firearm misuse. *Id.* at 178.

Drawing on the experience of defense practitioners nationwide, NACDL has observed that these examples are representative of a consistent pattern. A client is pulled over for a traffic stop or questioned for another suspected offense. Officers find a firearm and, upon questioning, the client admits to occasional marijuana use, perhaps in a state where such use is legal. No other offense can be charged, or the prosecutor wants leverage for other charges. Section 922(g)(3) is always available given the statute's

apparent breadth and scope. The prosecutor need not prove the defendant was impaired, posed any risk, or had any connection between his drug use and firearm possession.

These realities frame the historical question the Court must answer. The government asks whether drug users *may* be dangerous, and whether dangerous persons *may* be disarmed. But *Bruen* and *Rahimi* ask a different question: whether the Founders would have recognized a regime that could categorically disarm millions based on an amorphous "unlawful user" status alone, without pre-deprivation process, without a temporal nexus, and without any showing of individualized danger.[11] As the following analysis demonstrates, they would not.

III. The Government's Historical Analysis Fails the "How and Why" Inquiry.

The government contends that three categories of founding-era laws support categorical disarmament of drug users: criminal vagrancy laws, civil-commitment laws, and surety laws. Pet. Br. 22–23. According to the government, each "subjected habitual drunkards to prophylactic restrictions that were not limited to exigent bouts of drunkenness," and § 922(g)(3) is "closely analogous" because it "addresses the heightened risks posed by individuals who habitually use intoxicating substances." *Id.*

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[11] The government attempts to obscure this deficiency by invoking statutes punishing use of firearms in furtherance of drug trafficking. *See* Pet. Br. 32 & n.26. But those laws require a nexus between firearms and drug crimes that § 922(g)(3) does not.

The government's fundamental error is analogizing at too high a level of generality—precisely what Justice Barrett warned against. *See Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). At that altitude, the government's historical argument collapses into the same means-end syllogism: some drug users *may* be dangerous; dangerous people may be disarmed; therefore, all drug users may be disarmed. Further, the government conflates "habitual drunkards" and "unlawful users" as equivalent categories and assumes that any restriction historically applied to the former justifies any restriction now applied to the latter. *See* Resp. Br. 29–33. But the historical sources tell a different story.

What strikes amicus most about the historical regimes the government invokes is not merely what they prohibited, but what they required before any prohibition could attach. The Founders recognized that those *presently* impaired by alcohol lack the restraint needed to handle firearms safely. *See Connelly*, 117 F.4th at 279–80. Historical laws addressing this concern therefore required a temporal nexus between intoxication and firearm use. *Id.* at 280 ("Founding-era laws concerning guns and alcohol were few, and primarily concerned with (1) misuse of weapons while intoxicated and (2) disciplining state militias."). Separately, laws addressing status-based categories—vagrants, common drunkards, lunatics—operated through individualized judicial proceedings with procedural safeguards, addressed public nuisance or incapacity rather than firearm danger, and never imposed disarmament as a remedy.

Section 922(g)(3) fits neither tradition. Even accepting that legislatures historically possessed authority to make categorical judgments about dangerousness, that authority was exercised through specific mechanisms like prior adjudications, requiring a temporal nexus between the dangerous condition and the regulated conduct, and remedies short of categorical disarmament.

Examined closely, those historical laws reveal how disconnected § 922(g)(3), at least in some applications, is from what history tolerated as permissible infringements on the Second Amendment right.

A. Criminal vagrancy and "common drunkard" laws

Founding-era criminal law did not punish mere intoxication. Under English common law, "'[m]ere drunkenness,' … 'with no act beyond, is not indictable at the common law.' … It is not the drunkenness but the injury to other persons, committed under the influence of alcohol that is relevant at law." Jerome Hall, *Drunkenness as a Criminal Offense*, 32 J. Crim. L. & Criminology 297, 298 (1941–42). The government's theory treats drug use itself as the basis for disarmament, but the historical predicate required observable injury.

The government contends that a "leading treatise noted that States had criminalized 'being a common drunkard, or habitual drunkard'" as distinguished from mere "'[o]ccasional acts of drunkenness.'" Pet. Br. 20 (quoting 2 Joel Prentiss Bishop, Commentaries on the Criminal Law § 267, at 178 (1858)). But the case Bishop cited, *Ludwick v. Commonwealth*, 18 Pa.

172 (1851), actually defeats the government's argument.

Ludwick does not hold that habitual drunkards, as a class, forfeit legal rights by legislative fiat.[12] It holds the opposite: before any restriction could attach, there must first be a determination that a particular person is a habitual drunkard at the relevant time. The court explained: "It is impossible to lay down any fixed rule as to when a man shall be deemed a habitual drunkard. It must depend upon the decision of the jury, under the direction of the Court." *Id.* at 174. Only after that individualized, adjudicated determination did legal consequences follow. *Id.* at 174–75. And the standard was exacting: a person "habituated to intemperance whenever the opportunity offered," one "intoxicated or drunk one-half his time." *Id.* That is a far cry from someone who uses marijuana a few times a week with no evidence of intoxication, impairment, or loss of self-control.

What is more, vagrancy laws addressed a different problem altogether: public nuisance and economic dependency, not firearm danger. At common law, a vagrant was "an idle person, beggar, or person wandering without being able to give a good account of himself." *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L. Rev. 1203, 1207 (1953). Samuel Johnson's 1755 dictionary defined "vagrant" as "[a] wanderer," "a man unsettled in habitation," and "an idle roamer"—not as a drunkard or user of intoxicants. Christian Z. MacDonald, *A Blunt Reality:*

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[12] As Respondent demonstrates, "habitual drunkard" was a term of art denoting chronic intoxication, not mere regular use. *See* Resp. Br. 29–33.

How § 922(g)(3) of the Gun Control Act Violates the Second Amendment Rights of Marijuana Users, 78 SMU L. Rev. Forum 115, 155 (2025). It was not until the mid-1800s—well after the Founding—that vagrancy statutes began to incorporate "common drunkards" as one subcategory among many. *See id.*

To the extent vagrancy laws reached "common drunkards," they required more than habitual intoxication. Rather, they required public disorder. A Massachusetts court held that "a 'common' drunkard must not only have the habit of getting drunk, but must, also, offend the public peace and order." *Commonwealth v. Whitney*, 71 Mass. (5 Gray) 85, 87–88 (1855); *see also* Hall, 32 J. Crim. L. & Criminology at 302. Courts reversed vagrancy convictions when defendants were habitually intoxicated but "not 'disruptive of the public peace.'" MacDonald, 78 SMU L. Rev. Forum at 156. Section 922(g)(3) contains no such requirement.

Most critically, founding-era laws never disarmed vagrants. "Founding-Era regulations may have prohibited the act of being intoxicated while using a firearm, but they did not prohibit classes of persons who engaged in drinking alcohol from possessing firearms altogether." Mia Cordle, *Lawyers, Guns, and Marijuana: How N.Y. State Rifle and Pistol Ass'n v. Bruen Is Shaping Federal Marijuana Law*, 93 U. Cin. L. Rev. 151, 171 (2024). Rather, "punishment typically took the less onerous form of requiring economic labor for temporary periods." MacDonald, 78 SMU L. Rev. Forum at 158. "Even if a defendant were guilty of vagrancy due to intoxication, his punishment would be commitment to a house of correction—not

disarmament." *Id.* at 156. The Fifth Circuit correctly noted that "the government offers no Founding-era law or practice of disarming ordinary citizens for drunkenness, even if their intoxication was routine." *Connelly*, 117 F.4th at 280–81.

B. Civil-commitment laws

The government also argues that civil-commitment laws support § 922(g)(3) because they allowed habitual drunkards to be "committed to asylums, placed in the custody of guardians, or both, in the same manner as lunatics." Pet. Br. 21 (citing *Kendall v. Ewert*, 259 U.S. 139, 146 (1922)). The government emphasizes that drunkards could "remain under restriction until they produced 'proof of a permanent reformation'—which required 'as a general rule a voluntary refraining from the use of intoxicating drinks for at least one year.'" Pet. Br. 21 (quoting Amos Dean, Principles of Medical Jurisprudence 590 (1850)). And the government argues that "[t]hose restrictions could persist 'during the intervals of temperance, if any such exist.'" Pet. Br. 21–22 (quoting 1 Theodoric R. Beck, Elements of Medical Jurisprudence 376 (1823)).

These arguments undercut the government's position. Civil-commitment laws demonstrate that when the Founding era authorized ongoing restraints during sober intervals, it demanded pre-deprivation procedural protections and individualized findings—precisely what § 922(g)(3) lacks.

Process preceded prohibition. Before any restriction could attach, an official had to determine that a particular person was a habitual drunkard requiring commitment. Whether a person "shall be deemed an

habitual drunkard…must depend upon the decision of the jury, under the direction of the Court." *Ludwick*, 18 Pa. at 174. Civil-commitment laws treated habitual drunkenness "as a disease of mind and body, analogous to insanity," and were "limited to persons who have lost the power or will to control their appetite for intoxicating liquors, and have a fixed habit of drunkenness, who are in need of care and treatment, and to those it would be dangerous to leave at large." Hall, 32 J. Crim. L. & Criminology at 302 (quoting *Leavitt v. City of Morris*, 117 N.W. 393 (Minn. 1908)). This was not a categorical judgment about "users" as a class; it was a particularized finding about a specific individual's present incapacity and danger.

Only after that determination did restrictions follow. As *Connelly* explains, "just as there is no historical justification for disarming citizens of sound mind (including those adjudged mentally ill but who have been reevaluated and deemed healthy, i.e., no longer under an impairing influence), there is no historical justification for disarming sober citizens not presently under an impairing influence." 117 F.4th at 276.

Section 922(g)(3) inverts this sequence. No factfinder determines whether the defendant "is" an "unlawful user" before the statute's prohibitions attach. No proceeding assesses whether his drug use renders him incapable or dangerous. No guardian is appointed; no court exercises oversight. The prohibition is self-executing, by force of statute, the moment a person reaches the amorphous "unlawful user" or "addicted to" status. The Fifth Circuit recognized this distinction: "§ 922(g)(3) is not limited

to those judicially determined to be severely mentally ill (or 'who ha[ve] been committed to a mental institution') like those persons affected by § 922(g)(4)—not all members of the set 'drug users' have been adjudicated as such (or found to require institutionalization)." *Id.* at 277.

The civil-commitment analogy fails for an additional reason: it addressed a specific, judicially determined condition—alcohol addiction so severe that the individual had "lost the power or will to control [his] appetite for intoxicating liquors." Hall, 32 J. Crim. L. & Criminology at 302. Section 922(g)(3), by contrast, reaches the amorphous category of "unlawful user" of "any controlled substance" without regard to whether use of that substance produces anything resembling the incapacity that justified commitment. A medical-marijuana patient who uses cannabis for chronic pain, a college student who takes an Adderall to study, an insomniac who borrows a spouse's Ambien—none exhibits the loss of self-control that historically warranted civil intervention.

C. Surety laws

The government further contends that surety laws "provided a mechanism for preventing violence before it occurred" by "requir[ing] individuals suspected of future misbehavior to post a bond." Pet. Br. 22–23 (quoting *Rahimi*, 602 U.S. at 695, 697). But surety laws differ from § 922(g)(3) in every material respect and *Rahimi* emphasized the very features § 922(g)(3) lacks.

The surety regime on which this Court relied in *Rahimi* required an objective, individualized determination that an individual posed a credible

threat to another's physical safety. *Rahimi*, 602 U.S. at 695, 702; *see also id.* at 711 (Gorsuch, J., concurring). Surety laws required: (1) a complaint alleging threatened misuse; (2) appearance before a magistrate; (3) opportunity to contest; and (4) a judicial determination that the individual posed a credible threat. *See id.* at 695–96. *Rahimi* validated § 922(g)(8) precisely because it "applies only once a court has found that the defendant 'represents a credible threat to the physical safety' of another." *Id.* at 698–99. And "the disarmament could last only as long as that determination remained in place." *Id.* at 699.

Section 922(g)(3) contains none of these characteristics. No complaint initiates the process. No magistrate assesses the individual. No hearing precedes disarmament. No judicial officer determines that the defendant poses any threat. And critically, the statute, as the government reads it, requires no connection between the defendant's drug use and his firearm possession—the very link that would make "unlawful user" or "addicted to" status a meaningful proxy for firearm-related danger.

IV. The Government's Remaining Arguments Do Not Salvage Its Defense of § 922(g)(3).

The government's remaining arguments fail for the same reason: they too are means-end arguments disguised in historical garb—exactly what *Bruen* and *Rahimi* forbid.

Procedural arguments: The government argues that § 922(g)(3) "provides greater procedural protections than its historical forebears" because it

"entitles respondent to a full-dress criminal trial" where "the government bears the burden of proving the elements of the crime…beyond a reasonable doubt to a unanimous jury." Pet. Br. 26–27.

This argument erroneously conflates post-deprivation criminal process with pre-deprivation civil or preventive process. But the relevant historical question is what process preceded the deprivation of the right to keep arms. Historically, that process came first.

The government's conflation reflects a fundamental misunderstanding of what the historical analogues required. Under the vagrancy, civil-commitment, and surety regimes the government invokes, the sequence was consistent: (1) a complaint or petition initiated proceedings; (2) a factfinder determined whether the individual met the regulated category; (3) that determination altered the individual's legal rights going forward; and (4) criminal liability attached only for violating the restriction already in place. The adjudication preceded the deprivation.

As explained, § 922(g)(3) inverts every step. No complaint initiates the process. No factfinder determines whether the defendant "is" an "unlawful user" before disarmament. The statute operates by legislative decree: the moment a person crosses some undefined threshold of drug use, her Second Amendment rights are treated as forfeited. The only adjudication is the criminal trial itself, which occurs only after she has been arrested for exercising the right the government claims she already lost. The jury does not decide whether she should lose her rights; it

decides whether she violated a prohibition the government asserts was already in place.

That is not process preceding deprivation. It is deprivation enforced through prosecution.

From the defense practitioner's vantage, this inversion is not academic. Our clients learn of the government's view—that they are "unlawful users" who forfeited their rights—only when they are indicted. They have no opportunity to contest that status before the firearms prohibition attaches, no mechanism to seek a determination that their use does not render them dangerous, and no pathway to clarify their rights before exercising them becomes a felony.[13] The historical regimes the government invokes provided clear, judicially determined status before any restriction attached. Section 922(g)(3) provides none.

The historical record demonstrates that founding-era legislatures never imposed categorical firearms prohibitions without some limiting principle—whether individualized process, a requirement of contemporaneous intoxication, or both. Section 922(g)(3) lacks any. Whether the Second Amendment

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[13] Although *Rehaif* requires that a defendant know she belongs to the prohibited class, 588 U.S. at 237, knowledge of marijuana use alone does not establish knowledge that such use crosses an undefined threshold into "habitual" use or "unlawful user" status under the government's shifting construction of § 922(g)(3). *See United States v. Cook*, 970 F.3d 866, 882–83 (7th Cir. 2020) (providing that knowledge that one is an unlawful user turns on his awareness of somewhat nuanced factual aspects of his drug use).

requires pre-deprivation process in every case is a question for another day; but what history makes clear is that categorical disarmament without *any* limiting mechanism finds no founding-era support.

United States v. Daniels, 124 F.4th 967 (5th Cir. 2025), illustrates one such limiting principle. The Fifth Circuit recognized that "historical intoxication laws invoked by the government might also support some applications of § 922(g)(3), depending on the facts admitted by a defendant or proven at trial." *Id.* at 976. But the court emphasized that "specificity in jury instructions will likely be crucial," and that "[i]nstructions requiring jurors to find a tight temporal nexus between an individual's drug use and his possession of firearms could bring § 922(g)(3)'s application closer in line with historical laws." *Id.*

The government misunderstands this requirement. Its concern that a temporal-nexus standard would require officers to "constantly carry and administer drug tests," Pet. Br. 38–39, confuses what officers must know before an arrest with what the government must prove at trial. *Daniels* does not impose a pre-arrest screening requirement; it holds that the *prosecution* must ultimately establish a temporal connection between drug use and firearm possession—through "facts admitted by a defendant or proven at trial." 124 F.4th at 976. That is an evidentiary burden, not an investigative protocol.[14]

[14] This Court rejected analogous administrability objections in *Rehaif*. *See* 588 U.S. at 235–37. The case for rejecting similar arguments here is stronger. Constitutional requirements do not yield to prosecutorial convenience.

Greater includes the lesser arguments: The government also contends that § 922(g)(3) "burdens [the Second Amendment] right less severely than vagrancy laws and civil-commitment laws, which provided for drunkards to be confined in jails, workhouses, or asylums." Pet. Br. 25. Because imprisonment was historically permissible, the argument goes, the "lesser" burden of disarmament must also be permissible.

This argument misapprehends the historical framework. The severity of historical punishments does not authorize modern restrictions that lack the features that made those punishments constitutionally tolerable. The "greater" burden of imprisonment *followed* a judicial determination that the individual met the regulated category; it did not precede it.

The government's logic also proves far too much. Virtually any criminal offense—from vagrancy to public drunkenness to petty theft—was punishable by some form of confinement. Under the government's reasoning, Congress could categorically disarm anyone who commits any such offense, without individualized process, simply because the Founders permitted imprisonment for similar conduct. That cannot be what *Bruen* and *Rahimi* authorize.

Unlawful user and temporary deprivation arguments: Furthermore, the government argues that restrictions on "unlawful" drug users stand on "even stronger footing" than restrictions on drunkards because the Second Amendment does not protect "the right to simultaneously choose both gun possession and another act, the taking of drugs." Pet. Br. 35–36.

The government also contends that § 922(g)(3) authorizes only "temporary disarmament" because a drug user "can regain that right simply by ending his habitual use." *Id.* at 37.

The first argument supports a temporal-nexus requirement. If the constitutional justification is that a person may not "simultaneously" possess firearms and take drugs, then the statute must be limited to circumstances where that simultaneity exists. Without it, § 922(g)(3) prohibits firearm possession by individuals whose drug use is neither concurrent with possession nor productive of any present impairment. The government's own framing confirms that untethered, status-based disarmament exceeds constitutional bounds.

The "temporary disarmament" argument fares no better. *Rahimi* approved of temporary disarmament in the restraining-order context because the duration was defined by a court order with a fixed, judicially determined endpoint. *See* 602 U.S. at 699. Section 922(g)(3) has no such feature—no temporal limit, no mechanism for restoration, no judicial determination that the disabling condition has ended.

The government's assertion that a drug user can "regain" his rights "simply by ending his habitual use" is illusory. And its invocation of 18 U.S.C. § 925(c) relief, Pet. Br. 40-41, underscores the point. Section 925(c) offers discretionary, after-the-fact executive mercy—not a meaningful pathway to restoration. It reverses the historical presumption by stripping arms first and requiring the citizen to later persuade the government he deserves them back. And the government's own proposed rule makes former users

"presumptively ineligible for relief" absent "extraordinary circumstances." *Id.* at 41–42. A restriction available only in "extraordinary circumstances" is not "temporary"; it is categorical disarmament with an escape valve that almost never opens.[15]

V. The Fifth Circuit's Approach Offers One Sound Path Forward.

While amicus agrees with Respondent's statutory view that § 922(g)(3)'s "unlawful user" prong is void for vagueness, *see* Resp. Br. 15–24, if the statute is to be saved through a limiting construction, the Fifth Circuit's temporal-nexus requirement offers one textually sound and administratively grounded path forward.

A "cardinal principle" of statutory interpretation provides that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Section 922(g)(3) raises precisely those doubts. But another construction is "fairly possible"—and

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[15] The government's framing also underscores the vagueness problem. If the constitutional justification is that a person may not "simultaneously" possess firearms and use drugs, then the citizen must be able to know when that simultaneity exists. Yet the government's "habitual user" construction, which appears nowhere in the statute, provides no guidance. When does occasional use become "habitual?" How long must one abstain before ceasing to be a "habitual user?" The government provides no answers because the statute provides none. A citizen cannot conform her conduct to a prohibition whose boundaries are unknowable.

every court of appeals to address the question has adopted some version of it.[16]

The statutory structure supplies interpretive guidance. Section 922(g)(3) prohibits possession by "any person who *is* an *unlawful user* of or addicted to any controlled substance." § 922(g)(3) (emphasis added). The emphasized words provide a textual fabric for the temporal-nexus requirement. *See United States v. Espinoza-Melgar*, 687 F. Supp. 3d 1196, 1215–16 (D. Utah 2023).

First, the verb "is" is in the present tense, requiring the person's status as an unlawful user to be contemporaneous with firearm possession. Congress specified that the prohibition applies to one who "*is*" an unlawful user—not one who *was* or *has been*—conveying that the condition must be temporally connected to the firearm possession. *See id.* at 1216.

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[16] *See United States v. Marceau*, 554 F.3d 24, 30 (1st Cir. 2009) (requires use "proximate to or contemporaneous with the possession of the firearm."); *Cook*, 970 F.3d at 874 ("'unlawful user,' as used in section 922(g)(3), 'must be contemporaneous with the defendant's possession of a gun.'"); *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004) ("[T]o be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm."); *United States v. Hasson*, 26 F.4th 610, 615 (4th Cir. 2022) (requires use "consistent, prolonged, and close in time to his firearm possession."). The Fifth Circuit requires temporal use. *Daniels*, 124 F.4th at 970–71 ("regular[ly] and in some temporal proximity to the gun possession."). The Sixth, Ninth, Tenth, and Eleventh Circuits impose similar requirements. *See United States v. Bowens*, 938 F.3d 790, 793 (6th Cir. 2019); *United States v. Purdy*, 264 F.3d 809, 812-13 (9th Cir. 2001); *United States v. Bennett,* 329 F.3d 769, 778 (10th Cir. 2003); *United States v. Edmonds*, 348 F.3d 950, 951 (11th Cir. 2003).

Second, "unlawful user of or addicted to" pairs two terms joined disjunctively, "implying each has a separate meaning." *United States v. Bennett*, 329 F.3d 769, 777 (10th Cir. 2003). "Addicted to" denotes one "given up to a habit" or "physically or mentally dependent on a substance"—a present, ongoing condition. Oxford English Dictionary (2d ed. 1989). One is not "addicted to" a substance one used years ago and stopped. Read alongside its statutory neighbor, "unlawful user" likewise implies a present, ongoing relationship with controlled substances contemporaneous with firearm possession. *See Espinoza-Melgar*, 687 F. Supp. 3d at 1216.

Third, all agree that "evidence of [a] single use" is "insufficient" to prove that a person is an unlawful user. *See, e.g., United States v. Augustin*, 376 F.3d 135, 138 (3d Cir. 2004). Multiple courts have concluded that the statute "runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use." *Id.*[17] As the Fifth Circuit observed, "[t]he statutory term 'unlawful user' captures regular marijuana users, but the temporal nexus is most generously described as vague—it does not specify how recently an individual must 'use' drugs to qualify for the prohibition." *Connelly*, 117 F.4th at 282.

To be clear, amicus does not contend that the temporal nexus requirement is the only path to affirmance or that it is necessarily sufficient. Other

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[17] *Accord Marceau*, 554 F.3d at 30; *United States v. Espinoza-Roque*, 26 F.4th 32, 35 (1st Cir. 2022); *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003), *vacated on other grounds*, 543 U.S. 1099 (2005).

circuits have taken varying approaches to § 922(g)(3) in the wake of *Bruen* and *Rahimi*, and several have concluded that history demands more than a temporal nexus alone.[18] Even so, no court of appeals has endorsed the government's position that status alone—without temporal connection, without contemporaneous impairment, without individualized findings—justifies categorical disarmament.

The Fifth Circuit's framework thus provides the administrable constitutional minimum. It demands less than circuits requiring individualized dangerousness showings—which risk the "interest-balancing inquiry" *Bruen* sought to eliminate, 597 U.S. at 22–23—while demanding more than bare

[18] Some require more than a temporal nexus, such as a showing of dangerousness. The Third Circuit, for instance, demands an "individualized showing" that the defendant "would likely pose a physical danger to others if armed," *Harris*, 144 F.4th at 164–66; the Eighth Circuit asks whether drug use caused the defendant to act "in an outwardly erratic or aggressive manner," *United States v. Cooper*, 127 F.4th 1092, 1096 (8th Cir. 2025). Others require less—the Sixth Circuit permits categorical disarmament but places the burden on the accused to rebut a presumption of dangerousness. *See United States v. VanOchten*, 150 F.4th 552, 558 (6th Cir. 2025). Still others fall somewhere in between—the Seventh Circuit upholds § 922(g)(3) as applied to "active and persistent drug users" who are "presently and persistently impaired," *United States v. Seiwert*, 152 F.4th 854, 869, 872 (7th Cir. 2025); the Ninth Circuit holds that history supports disarming "at least" those "who are presently intoxicated," *United States v. Stennerson*, 150 F.4th 1276, 1285 (9th Cir. 2025); and the Eleventh Circuit has permitted as-applied challenges by medical marijuana users to proceed, joining the Fifth Circuit in holding that such users do not "pose a credible threat to the public safety of others based solely on their use of medical marijuana." *Florida Comm'r of Agric. v. Attorney General*, 148 F.4th 1307, 1320–21 (11th Cir. 2025).

status. It is grounded in history: the Founders regulated firearm use by the presently intoxicated, not status-based categories of past users. *Connelly*, 117 F.4th at 280. It is textually defensible. And it is administrable: courts can determine whether drug use was ongoing during the period of firearm possession through standard evidentiary methods. *Daniels*, 124 F.4th at 976.

Finally, given that the government's rule risks stripping millions of Americans of their Second Amendment rights, the absurd results canon counsels against its interpretation. Statutes should be read "as not to lead to injustice, oppression, or an absurd consequence." *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486–87 (1868); *see also Rowland v. California Men's Colony*, 506 U.S. 194, 200 & n.3 (1993). And where any doubt remains, lenity requires resolving ambiguity in the defendant's favor. *See McNally v. United States*, 483 U.S. 350, 359–60 (1987).

This Court has repeatedly declined to vest the Executive with such unchecked prosecutorial discretion in other contexts.[19] The same principle should govern here to ensure the Second Amendment remains on the same footing as other fundamental constitutional rights.

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[19] *See, e.g.*, *Bond v. United States*, 572 U.S. 844 (2014); *Fischer v. United States*, 603 U.S. 480 (2024); *Yates v. United States*, 574 U.S. 528 (2015); *Elonis v. United States*, 575 U.S. 723 (2015); *cf. Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (finding the statute "unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute").

CONCLUSION

For the foregoing reasons, and those in Respondent's brief, the Court should affirm. The government's reading of § 922(g)(3) fails to provide fair notice, sweeps beyond any historically recognized disarmament category, and dispenses with the pre-deprivation process that characterized every founding-era analogue. Whether the Court addresses these defects through the vagueness doctrine, Second Amendment analysis, or a narrowing construction, the judgment below should be affirmed.

Respectfully submitted,

Adeel M. Bashir*
Federal Public and Community Defenders Sentencing Resource Counsel
Eleventh Circuit Vice-Chair NACDL Amicus Committee
400 N. Tampa Street
Suite 2660
Tampa, FL 33602
adeel_bashir@fd.org
703-835-3929

Counsel for Amicus Curiae

January 30, 2026 *Counsel of Record