

In the
Supreme Court of the United States

ERIK HARRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF OF AMICI CURIAE SECOND
AMENDMENT FOUNDATION, CALIFORNIA
RIFLE & PISTOL ASSOCIATION,
INCORPORATED, SECOND AMENDMENT
LAW CENTER, OPERATION BLAZING
SWORD-PINK PISTOLS, MINNESOTA GUN
OWNERS CAUCUS, AND MINNESOTA GUN
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October 29, 2025

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AMICUS CURIAE STATEMENT OF INTEREST

Second Amendment Foundation (“SAF”) is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every state of the union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. Currently, SAF is involved in other litigation concerning the intersection of state-legal marijuana use and arms and thus has great interest in the outcome of this petition. *See* Complaint, *Greene v. Garland*, No. 1:24-cv-00021-CB (W.D. Pa. Jan. 23, 2024).¹

The Second Amendment Law Center (“2ALC”) is a nonprofit corporation in Henderson, Nevada. The Center defends the individual right to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Founded in 1875, the California Rifle and Pistol Association, Incorporated (“CRPA”) is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights

¹ No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Parties were notified that this brief would be filed on October 8, 2025, in compliance with Rule 37.2.

of individual citizens. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public. In service of these ends, CRPA regularly participates as a party or amicus in firearm-related litigation.

Operation Blazing Sword–Pink Pistols (“OBSPP”) comprises two organizations, Operation Blazing Sword and Pink Pistols, which together advocate on behalf of lesbian, gay, bisexual, transgender, and queer firearm owners, with specific emphasis on self-defense issues. Membership is open to anyone, regardless of sexual orientation or gender identity, who supports the rights of LGBTQ firearm owners.

Minnesota Gun Owners Caucus (“MGOC”) is a 501(c)(4) non-profit organization incorporated under the laws of Minnesota with its principal place of business in Shoreview, Minnesota. MGOC seeks to protect and promote the right of citizens to keep and bear arms for all lawful purposes. MGOC serves its members and the public through advocacy, education, elections, legislation, and legal action. MGOC's members reside both within and outside Minnesota.

The Minnesota Gun Owners Law Center (“MNGOLC”) is a 501(c)(3) nonprofit dedicated to challenging unlawful restrictions and advancing the right to keep and bear arms. MNGOLC also educates

lawmakers, the legal community, and the public about the Second Amendment.

SUMMARY OF ARGUMENT

This Court has explained that when it comes to which types of arms may not be banned, the American people themselves confer constitutional protection through their choices. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008); *see also Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (Thomas, J., dissenting from denial of certiorari) (“Our Constitution allows the American people—not the government—to decide which weapons are useful for self-defense.”).

By that same token, Americans have also traditionally chosen which substances are acceptable for responsible recreational use, and the fundamental right to keep and bear arms was never denied to people who occasionally partook in such drugs—unless they were carrying arms while actively intoxicated. Historically, the best example of this is alcohol, as its widespread consumption predates the founding. And sure enough, because of the dangers of mixing alcohol and firearms, plenty of laws arose to prevent inebriated people from being armed. But what never existed were laws that prohibited people from owning guns because they *sometimes* drank.

In the modern era, marijuana should be treated no differently. Once widely forbidden, “[t]oday, marijuana is legal to various extents in forty states, including for recreational use in twenty-four states and the District of Columbia.” *United States v. Harris*, 144 F.4th 154, 169 (3d Cir. 2025) (Krause, J., and

Bibas, J., concurring). “In fact, a recent study found — for the first time ever — the daily use of cannabis of any kind among Americans surpassed the daily use of alcohol.” Sandee LaMotte, *Why Replacing Alcohol with Weed Is a Growing Trend in the US*, CNN (May 31, 2024, 2:05 PM EDT), <https://www.cnn.com/2024/05/30/health/marijuana-versus-alcohol-wellness>. So dramatic has the public’s shift been on marijuana that the President is currently “taking a new look at reclassifying marijuana as a less dangerous drug in a move that could nudge the federal government closer to an approach already embraced in many states.” David A. Lieb, *Will Trump Change Federal Marijuana Policy? Here's What to Know*, PBS NewsHour (Aug. 12, 2025), <https://www.pbs.org/news-hour/politics/will-trump-change-federal-marijuana-policy-heres-what-to-know>. Such a move would have bipartisan support, as President Biden had hoped to do the same. Brian Bushard, *Biden Says Marijuana Being Reclassified As Schedule III Drug*, Forbes (May 16, 2024), <https://www.forbes.com/sites/brianbushard/2024/05/16/biden-says-marijuana-being-reclassified-as-schedule-iii-drug/>.

Yet because of the prohibition found in 18 U.S.C. § 922(g)(3), if Americans choose to use marijuana or other cannabis products (that often are legal in their state), they must surrender their Second Amendment right before they do so—and not only when they are intoxicated, They may not even *own* firearms if they regularly consume cannabis products. This does not square with the lengthy historical tradition of how alcohol and firearms have been regulated.

The Third Circuit erred because it ignored two important principles explained in *Bruen* and *Rahimi* that make this a simple case. The first is that “when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26 (2022). The regulations around alcohol and guns provide the limiting metric here in terms of how far modern regulations can go.

Second, the Third Circuit pointed to laws that disarmed the mentally ill when they risked endangering others. But this misses the mark by upholding the modern law based on a very remote resemblance to a historical analogue, which this Court warned against. *Id.* at 30. In taking up this case, this Court can clarify that when a close historical analogue is available (in this case, restrictions on alcohol and guns), lower courts must not go hunting for other comparisons to uphold the modern law at issue.

More importantly, by granting certiorari, this Court can resolve the circuit split that has formed on 18 U.S.C. § 922(g)(3) as it pertains to marijuana, and do so using “a case that cleanly presents an as-applied challenge by an individual who smoked marijuana recreationally and was not otherwise engaged in more serious, independent criminal conduct.” Pet. 2.

ARGUMENT

I. Historical Regulations on Carrying Firearms While Intoxicated Provide the Boundaries of What Our Historical Tradition Will Tolerate.

The Third Circuit ruled that the relevant historical tradition supports the principle that “[s]omeone who regularly uses mind-altering substances that make him a ‘credible threat to the physical safety of others with a gun’ may be disarmed temporarily until he stops using drugs.” *Harris*, 144 F.4th at 161-62 (citing *United States v. Rahimi*, 602 U.S. 680, 694, 698 (2024)).

In doing so, the panel ignored one of the most important guardrails of the historical analysis. As this Court has explained, “[i]n some cases, [the historical] inquiry will be fairly straightforward ... when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.” *Bruen*, 597 U.S. at 26. And when the same or similar problem was addressed in the past through “materially different means, that also could be evidence that a modern regulation is unconstitutional.” *Id.* at 26-27.

Both are true here. The dangers of common and socially acceptable drug use mixing with firearm possession is nothing new in our history, and since the founding, laws have consistently taken on this problem. But as other circuits have correctly ruled,

our historical tradition supports, “at most, a ban on carrying firearms while an individual is *presently* under the influence.” *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024); *see also United States v. Seiwert*, No. 23-2553, 2025 U.S. App. LEXIS 23667, at *29 (7th Cir. Sept. 12, 2025) (§ 922(g)(3) is constitutional as applied to an individual whose cognitive abilities are “presently and persistently impaired”).

This historical tradition began in the colonial era, where laws existed to prevent militiamen from becoming drunk while carrying their arms. “A 1746 New Jersey law prohibited the sale of liquor to members of the militia while on duty; a 1756 Delaware law prohibited the militia from meeting within half a mile from a tavern and prohibited the sale of liquor at any militia meeting; and a 1756 Maryland law prohibited the sale of liquor within five miles of a training exercise for the militia.” *Wolford v. Lopez*, 116 F.4th 959, 985 (9th Cir. 2024). It persisted throughout reconstruction as “[s]ome states—Kansas in 1867, Missouri in 1883, and Wisconsin in 1883—prohibited the carry of firearms while intoxicated.” *Id.*

But this tradition also had clear limits. As the Fifth Circuit put it, “our history and tradition may support some limits on an intoxicated person’s right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage.” *United States v. Daniels*, 77 F.4th 337, 340 (5th Cir. 2023). And because the same problem was addressed in a different way than how the modern law goes about things (i.e., banning drunks from carrying guns, but not banning possession or ownership of guns from

anyone who *sometimes drinks*), the modern law goes too far, at least as applied to an individual like the Petitioner who sometimes used marijuana but was not intoxicated when he was arrested. Pet. 7.

Curiously, even the Third Circuit seemed to acknowledge this, noting that many laws “deemed mere drunkenness sufficient to justify temporary disarmament.” *Harris*, 144 F.4th at 163. “Indeed, at the Founding, the consensus was that surety laws extended to all ‘common drunkards,’ not just those who acted abusively.” *Id.* But what the panel did not claim, nor does the historical record provide any support for, is the idea that earlier generations of Americans would have tolerated disarming anyone because they sometimes consumed alcohol--not just “drunkards,” but even those who drank in moderation from time to time.

In other words, while the “why” of § 922(g)(3) as it applies to marijuana may be quite like its historical counterparts regulating alcohol, the “how” is very different. The “comparable burden on the right of armed self-defense,” *Bruen*, 597 U.S. at 29, is simply much greater if occasionally partaking in a recreational substance² means you must completely surrender your right to own firearms unless you cease

² Nor is the application of the law limited to those who use marijuana recreationally. Even someone who uses cannabis products for medical purposes is barred from owning firearms until they cease doing so. One of the Amici is currently involved in litigation challenging 18 U.S.C. § 922(g)(3) as it applies to a holder of a medical marijuana card in Pennsylvania. See Complaint, *Greene v. Garland*, No. 1:24-cv-00021-CB (W.D. Pa. Jan. 23, 2024).

using that substance. It is not akin to banning drunkards from carrying guns, it is akin to banning anyone who has a six-pack of Budweiser in their refrigerator from owning guns.

To be sure, the law is not “trapped in amber.” *Rahimi*, 602 U.S. at 691. That is why the panel was correct that it did not need to find historical laws regulating marijuana specifically. *Harris*, 144 F.4th at 158. It is reasonable enough to conclude that alcohol is a very close analogue to marijuana both in terms of how the public uses it, and in terms of its potential for abuse and intoxication. Amici have no disagreement with that and therefore concede that § 922(g)(3) may be constitutional in some of its applications.

But through its application to not just the actively intoxicated and “drunkards,” but also even to those who responsibly use marijuana, § 922(g)(3) demands a “blank check” that our historical tradition cannot support. *Bruen*, 597 U.S. at 30. And by allowing it to apply even to someone like the Petitioner who was not under the influence of marijuana when he was arrested, Pet. 7, the Third Circuit read the relevant history “at such a high level of generality that it water[ed] down the right.” *Rahimi*, 602 U.S. at 740 (Barret, J., concurring).

Nor is there anything in the record to support any further “nuance” for marijuana when it comes to the historical analysis. Perhaps for some other drug in some other case, the record could demonstrate that it is so dangerously addictive and dangerous to society that anyone who regularly uses it is akin to the “drunkards” of old who could be restricted from

bearing arms. But as it pertains to marijuana, that substance is seeing increasing legalization across the country precisely because it is now recognized that it is much more like alcohol than it is harder addictive drugs like heroin or fentanyl. Indeed, marijuana is actually *less* addictive than alcohol. Alvin Powell, *What We Know and Don't Know About Pot*, Harv. Gazette (Feb. 24, 2020), <https://news.harvard.edu/gazette/story/2020/02/professor-explores-marijuanas-safe-use-and-addiction/>.

In a recent case challenging California's law limiting residents to purchasing a maximum of one gun per month, the Ninth Circuit explained that "the modern problems that California identifies as justification for its one-gun-a-month law are perhaps different in degree from past problems, but they are not different in kind. Therefore, a nuanced approach is not warranted." *Nguyen v. Bonta*, 140 F.4th 1237, 1245 (9th Cir. 2025)

Here, the problems are also not different in kind from past problems (and in fact, may not even be different in degree). There is thus nothing to justify the panel's drift from the clear historical tradition established by the laws regulating the possession of arms by actively intoxicated (but never sober) individuals. This Court should grant certiorari to correct that and to resolve the circuit split that has now developed on this issue.

II. This Court Should Grant Certiorari to Confirm That Courts Must Not Turn to Broader Levels of Generality When Closer Analogues Are Available.

Strangely, even after identifying the proper and closely related historical analogues to modern laws on marijuana users possessing arms (the restrictions on carrying arms that applied to actively intoxicated people and “drunkards”), the Third Circuit still turned to another set of historical laws: regulations on the “dangerously mentally ill.” *Harris*, 144 F.4th at 158.

Perhaps if substances like alcohol had not existed in the past and first came onto the scene in the modern era, then a looser analogical standard could be employed to address such an “unprecedented societal concern.” *Bruen*, 597 U.S. at 27. And perhaps other far more dangerous modern drugs are so different from alcohol that it would justify analogizing those addicted to them to the “furiously mad” that New York once “kept safely locked up.” *Harris*, 144 F.4th at 158 (citing *An Act for Apprehending and Punishing Disorderly Persons*, c.31 (1788), *reprinted in 2 Laws of the State of New York Passed at the Sessions of the Legislature Held in the Years 1785, 1786, 1787 and 1788, Inclusive* 643, 645 (Albany, Weed, Parsons & Co. 1886)).

But marijuana is no such substance. While drugs like fentanyl, heroin, and methamphetamine have not gained any widespread social acceptance and are extremely dangerous and addictive, marijuana by contrast is legal in two dozen states even for *recreational* use (and legal in another 16 for medicinal use). Even that tally understates public opinion, as

legislatures are lagging behind what Americans overwhelmingly think: “Nearly six-in-ten Americans (57%) say that marijuana should be legal for medical *and* recreational purposes, while roughly a third (32%) say that marijuana should be legal for medical use only. Just 11% of Americans say that the drug should not be legal at all.” *Most Americans Favor Legalizing Marijuana for Medical, Recreational Use*, Pew Res. Ctr. (Mar. 26, 2024), <https://www.pewresearch.org/politics/2024/03/26/most-americans-favor-legalizing-marijuana-for-medical-recreational-use/>.

In sum, especially when it comes to social acceptance, marijuana is not at all like the promethazine and cocaine involved in another petition that was recently granted certiorari (and is discussed *infra*). See Petition for a Writ of Certiorari at 5, *United States v. Hemani*, No. 24-1234 (U.S. filed Oct. 16, 2025). Unlike marijuana, those sorts of drugs may be more analogous to opium dens, which prior generations of Americans treated far less favorably than saloons and bars serving alcohol. See, e.g., George Fisher, *The Drug War at 100*, Stan. L. Sch. (Dec. 19, 2014), <https://law.stanford.edu/2014/12/19/the-drug-war-at-100/> (discussing “America’s first law banning any non-alcoholic drug—San Francisco’s 1875 ordinance against opium dens. That law made it a misdemeanor to keep or visit any place where opium was smoked”).

Given all of that, the Third Circuit had no reason to move beyond the extensive historical tradition laid out by the historical laws pertaining to alcohol and arms. It found the obvious close analogue to

marijuana in those laws because they dealt with a very similar “general societal problem that has persisted since the 18th century.” *Bruen*, 597 U.S. at 26. The panel thus had no need to go find—pardon the pun—other “things that are green.” *Id.* at 29. It should have stopped there and faithfully applied “the balance struck by the founding generation to modern circumstances.” *Id.* at 29 n.7.

Nor does the Third Circuit’s comparison to historical restrictions on mentally ill people work well anyway, at least as it pertains to marijuana. “Neither the majority nor the Government credibly explains how marijuana users resemble the *dangerously mentally ill*.” *Harris*, 144 F.4th at 173 (Ambro, J., dissenting). That difference is critical because “generally, a historical statute cannot earn the title ‘analogue’ if it is clearly more distinguishable than it is similar to the thing to which it is compared.” *Antonyuk v. Hochul*, 635 F. Supp. 3d 111, 131 (N.D.N.Y. 2022) (citing *Bruen*, 597 U.S. at 30).

Once again, the Third Circuit “read a principle at such a high level of generality that it water[ed] down the right.” *Rahimi*, 602 U.S. at 740. (Barrett, J., concurring). While there may always be disagreements in the analysis when it comes to the degree of similarity between a modern law and proposed analogues, one rule this Court should more clearly articulate is that when a close analogue exists to the modern technology or societal problem at issue, lower courts may not resort to more stretched analogies to avoid the inconvenient fact that the closer historical analogue does not support their position. This Court has already implied as much, but some

lower courts have not gotten the message. *See, e.g., Bruen*, 597 U.S. at 26 (“[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”).

This has become a widespread issue far beyond just the ruling below. For example, in a case concerning (in part) new carry bans in restaurants that happen to serve alcohol in Hawaii and California, the Ninth Circuit ignored the lack of historical carry restrictions in bars and taverns. Instead, it pointed to colonial laws that restricted the sale of liquor to militia members and a few cities that banned carry in ballrooms, and upheld the modern laws. *See, e.g., Wolford v. Lopez*, 116 F.4th at 986. It also ignored, just as the Third Circuit did here, that earlier generations solved this problem by barring only presently intoxicated people from carrying arms, not sober individuals who happened to be in proximity to alcohol. *See Connelly*, 117 F.4th at 282.

In another case concerning non-resident firearms carry and the onerous permitting processes that included wait times spanning over eight months (required even for individuals that have a carry permit in their home state), the Supreme Judicial Court of Massachusetts upheld the non-resident permit requirement by pointing to “going armed” and surety laws. *Commonwealth v. Marquis*, 495 Mass. 434, 456 (2025). In doing so, it ignored the far closer historical analogue: the very extensive historical

tradition of “traveler’s exception” laws, which exempted visitors from other states from concealed carry restrictions. See Brief for Nat’l Rifle Ass’n of Am. & Second Amend. Found. as *Amici Curiae*, *Commonwealth v. Donnell*, No. SJC-13561 (Mass. filed Aug. 16, 2024), at 16-28 (discussing many traveler’s exception laws).³

When a close historical analogue is apparent, courts should not rise to higher levels of generality, particularly when prior generations solved the same problem in a different way (e.g., exempting travelers from carry restrictions rather than requiring them to get a permit). That is exactly what this Court has already suggested, but lower courts are ignoring its guidance. See *Bruen*, 597 U.S. at 26-27 (“[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”).

More generalized analogues should be reserved only for those cases that present a truly new societal problem or technological change that lacks a distinctly similar analogue in our history. It is obvious of course why lower courts resist this principle: our historical tradition will sometimes limit how far modern governments can go in regulating the Second Amendment right. Here, the Third Circuit seems to

³ *Commonwealth v. Donnell* was heard by the Supreme Judicial Court of Massachusetts alongside *Commonwealth v. Marquis*. Mr. Marquis is now seeking certiorari with this Court. See Petition for a Writ of Certiorari, *Marquis v. Massachusetts*, No. 25-5280 (U.S. July 31, 2025). Amici support that petition, as well.

have identified that the historical regulations on alcohol and guns never applied to currently sober individuals. So, it turned to the looser analogue of mentally ill people (because they could be locked up for extended periods of time). *Harris*, 144 F.4th at 163. In doing so, the panel effectively ignored the balance “struck by the traditions of the American people” that should have commanded its “unqualified deference.” *Bruen*, 597 U.S. at 26.

“For better or worse, our Nation’s democratic policymaking process has gradually liberalized laws regulating marijuana over the past few decades.” *Harris*, 144 F.4th at 176 (Ambro, J. dissenting). Just as it does not matter if handguns may have been considered “dangerous and unusual” in the Founding Era because Americans today overwhelmingly choose them for the lawful purpose of self-defense, *Bruen*, 597 U.S. at 47, so too is it improper for the federal government to infringe on the right to keep and bear arms because it disagrees with what the American people have concluded as to the social acceptability of marijuana. Americans of the Founding Era did not tolerate being disarmed because they sometimes drank, and by that same token, Americans today do not tolerate being disarmed if they responsibly use marijuana.

III. This Case Should be Heard Together with *United States v. Hemani* So That Case’s Unusual Facts Will Not Lead to an Unusual Decision.

Amici are aware that the Court has recently granted certiorari in another case involving marijuana. *United States v. Hemani*, No. 24-1234,

2025 U.S. LEXIS 4005 (Oct. 20, 2025). But that case is not limited to marijuana. It also involves illicit drugs that do not share marijuana’s social acceptance and increasing legalization, nor its relative safety and medicinal use. It also involves a criminal defendant with highly unusual facts, complete with alleged drug dealing and claimed ties to the Iranian Revolutionary Guard Corps. *See* Petition for a Writ of Certiorari at 5, *United States v. Hemani*, No. 24-1234 (U.S. filed Oct. 16, 2025).

“If bad facts make bad law, then ‘unusual facts’ inspire unusual decisions.” *Tharpe v. Sellers*, 583 U.S. 33, 35 (2018) (Thomas, J., and Alito, J., dissenting). It would be unjust for this Court to decide an issue affecting millions of Americans based on the unique and highly unusual facts present in Mr. Hemani’s case alone. The Petitioner here is far more representative of how this issue affects most otherwise law-abiding people who use marijuana (often in compliance with their state’s laws). The two cases should thus be considered together to help ensure this Court reaches the right result on this important question.

CONCLUSION

Intoxication is inconsistent with responsible firearm use, but our historical tradition has long allowed occasional users of socially acceptable substances like alcohol and marijuana to own and use firearms, so long as they do so while they are not presently intoxicated.

For the reasons discussed above and in Petitioner's brief, this Court's intervention would be welcome in this case to resolve the circuit split that has developed on this issue. It should grant certiorari in this matter and hear it alongside *Hemani*.

October 29, 2025

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