

No. _____

IN THE
Supreme Court of the United States

STEPHEN BIVIANO ZAPTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

JASON J. TUPMAN

Federal Public Defender

DAVID S. BARARI

Assistant Federal Public Defender,

Counsel of Record

Office of the Federal Public Defender

Districts of South Dakota and North Dakota

655 Omaha Street, Suite 100

Rapid City, SD 57701

David_Barari@fd.org

605-343-5110

Attorneys for Petitioner

QUESTION PRESENTED

Whether 18 U.S.C. § 922(g)(3), the federal statute that prohibits possession of firearms by a person who “is an unlawful user” of “any controlled substance,” violates the Second Amendment on its face.

LIST OF PARTIES

The parties to the proceeding are:

Stephen Biviano Zapata (Petitioner)

United States of America (Respondent)

RELATED PROCEEDINGS

United States v. Stephan Biviano Zapata, No. 3:24-cr-30057, United States District Court for the District of South Dakota. Judgment entered May 6, 2025.

United States v. Stephen Biviano Zapata, No. 25-2000, United States Court of Appeals for the Eighth Circuit. Judgment entered June 18, 2026.

TABLE OF CONTENTS

	<u>Page(s)</u>
Question Presented.....	i
List of Parties.....	ii
Related Proceedings.....	ii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional & Statutory Provisions Involved.....	1
Introduction	2
Statement of the Case	3
A. Legal Background	3
B. Factual Background.....	6
Reasons For Granting The Petition	7
I. This Court should determine whether 18 U.S.C. § 922(g)(3) violates the Second Amendment on its face.....	8
A. The Second Amendment’s plain text covers the conduct at issue in § 922(g)(3).....	8
B. 18 U.S.C. § 922(g)(3) is not “consistent with the Nation’s historical tradition of firearm regulation.”	8
II. This case presents an important question of constitutional law and wide application that this Court should resolve.....	10
III. This case squarely raises the question presented.....	13

Conclusion.....	13
-----------------	----

Appendix

Appendix A - Court of appeals opinion (June 18, 2026)	1a
---	----

Appendix B - District court order adopting report and recommendation and denying and deferring in part motion to dismiss (January 22, 2025)	3a
--	----

Appendix C - Court of appeals judgment (June 18, 2026).....	5a
---	----

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	3, 7
<i>McDonald v. City of Chicago, Ill.</i> , 561 U.S. 742 (2010)	7
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	2-4, 7-10
<i>United States v. Connelly</i> , 117 F.4th 269 (5th Cir. 2024)	12
<i>United States v. Harrison</i> , 153 F.4th 998 (10th Cir. 2025)	12
<i>United States v. Hemani</i> , 608 U.S. ---, 146 S. Ct. 1677 (2026)	5, 6, 8-12
<i>United States v. Rahimi</i> , 602 U.S. 680 (2024)	4, 5
<i>United States v. Seiwert</i> , 152 F.4th 854 (7th Cir. 2025)	12
<i>United States v. Stennerson</i> , 150 F.4th 1276 (9th Cir. 2025)	12
<i>United States v. VanOchten</i> , 150 F.4th 552 (6th Cir. 2025)	12
<i>United States v. Veasley</i> , 98 F.4th 906 (8th Cir. 2024)	6, 7, 12
Statutes	
18 U.S.C. § 922(g)(1)	10
18 U.S.C. § 922(g)(3)	i, 1, 2, 5, 6, 8-13
18 U.S.C. § 922(g)(8)(C)(i)	4
18 U.S.C. § 924(a)(8)	6
18 U.S.C. § 924(d)	6
28 U.S.C. § 1254(1)	1
Other Materials	
Sup. Ct. R. 13.3	1

U.S. Const. amend. II	1, 7
-----------------------------	------

PETITION FOR A WRIT OF CERTIORARI

Stephen Biviano Zapata respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unreported but is available at 2026 WL 1755490. The district court's order (App. 3a-4a) is unreported but available at 2025 WL 266779.

JURISDICTION

The court of appeals entered judgment on June 18, 2026. App. 5a. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. II:

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.

18 U.S.C. § 922(g)(3):

It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

INTRODUCTION

This petition presents an important and recurring question of federal law that can only be settled by this Court: whether the prohibition on the possession of firearms by a person who “is an unlawful user” of “any controlled substance,” under 18 U.S.C. § 922(g)(3), is facially unconstitutional under the Second Amendment. This Court has never addressed this question directly.

Section 922(g)(3) bars an “unlawful user of” any controlled substance from possessing firearms but does not provide any preceding process before his or her Second Amendment right to bear arms is extinguished. *See* 18 U.S.C. § 922(g)(3). When the government chooses to regulate arms-bearing conduct, the Second Amendment presumptively protects that conduct and the government bears the burden of proving that its regulation is “consistent with this Nation’s historical tradition of firearm regulation.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022). In the decision below, based on prior circuit precedent, the court of appeals determined that 18 U.S.C. § 922(g)(3) is facially constitutional. App.2a (citing *United States v. Veasley*, 98 F.4th 906, 918 (8th Cir. 2024)).

This Court’s intervention is needed. Section 922(g)(3)’s lack of process before disarmament is without a sufficient historical analogue. The decision of the court of appeals permits stripping Second Amendment rights from citizens who unlawfully use controlled substances based on comparisons to historical traditions which are entirely dissimilar to 922(g)(3). The court of appeal’s view allows for the disarmament of thousands of ordinary Americans, without any sort of process

before extinguishing their Second Amendment rights. In the absence of prior process, the statute uniquely and impermissibly chills the exercise of a fundamental right for too many citizens wary of having to defend against potential criminal charges.

This Court should grant certiorari and resolve this important and recurring issue.

STATEMENT OF THE CASE

A. Legal Background

In *District of Columbia v. Heller*, this Court held that there is “no doubt . . . that the Second Amendment confer[s] an individual right to keep and bear arms.” 554 U.S. 570, 595 (2008). While the Court acknowledged that the right is not “unlimited,” it looked to historical restrictions on firearm possession to inform its analysis of the constitutionality of the law under consideration. *Id.* at 626-27, 631-34.

Over the next decade, lower courts “coalesced around a ‘two-step’ framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.” *Bruen*, 597 U.S. at 17. In *Bruen*, this Court explained that the Second Amendment “‘is the very *product* of an interest balancing by the people,’” and it is that “balance—struck by the traditions of the American people—that demands our unqualified deference.” *Id.* at 26 (quoting *Heller*, 554 U.S. at 635). In rejecting the “two-step” framework, the Court laid out a new approach based in “the Nation’s historical tradition of firearm regulation.” *Id.* at 24. Under the new approach, if

regulated conduct is covered by the plain text of the Second Amendment, the conduct is presumptively protected. *Id.* The burden then shifts to the government to justify the modern regulation by identifying analogous historical firearm regulations in both “how and why” they regulate firearms. *Id.* at 24, 29. In other words, the “modern and historical regulations” must “impose a comparable burden on the right of armed self-defense” that “is comparably justified.” *Id.* at 29.

In *United States v. Rahimi*, 602 U.S. 680 (2024), this Court provided further guidance on how to implement *Bruen*’s approach. *Rahimi* confirmed the historical tradition test: “[W]hen a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation.’ ” *Id.* at 689 (quoting *Bruen*, 597 U.S. at 24). The Court clarified that the modern law must be “consistent with the principles that underpin our regulatory tradition.” *Id.* at 692. But the “central” considerations in the “relevantly similar” inquiry remain “[w]hy and how the [challenged] regulation burdens the [Second Amendment] right.” *Id.* In other words, whether the regulation “impos[es] similar restrictions for similar reasons.” *Id.* Applying that framework, this Court held that 18 U.S.C. § 922(g)(8)(C)(i), prohibiting people subject to certain restraining orders from possessing firearms, is constitutionally sound because it is sufficiently analogous to a historical tradition of temporarily disarming those previously found by a court to pose “a credible threat to the physical safety of another.” *Rahimi*, 602 U.S. at 702.

As shown by *Rahimi*'s application of the *Bruen* standard, courts are required to compare the “why and how” of the challenged law with the government’s historical analogues to assess whether the challenged law passes constitutional muster. Notably, Justice Barrett cautioned, “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).

Then, in *United States v. Hemani*, 608 U.S. ---, 146 S. Ct. 1677 (2026), this Court applied the *Bruen* standard to a defendant’s challenge to the constitutionality of § 933(g)(3), prohibiting unlawful users of controlled substances from possessing firearms, as applied to him. Reiterating *Bruen* and *Rahimi*, this Court explained that “the more a modern law diverges from traditional laws in purpose and operation, the less likely it is to survive review.” *Id.* at 1686. After considering the government’s suggested historical analogues, this Court concluded that they fell short because the laws the government referenced “targeted different kinds of people, did so for different purposes, and operated in different ways.” *Id.* at 1687.

Unlike historical traditions that supported a prohibition on the possession of firearms by those who pose a credible threat to the physical safety of others in *Rahimi*, in *Hemani* this Court determined that § 922(g)(3) is not relevantly similar to vagrancy laws, civil-commitment laws, or surety laws identified by the government as reflecting a historical tradition of disarming people like Hemani, who “use[] marijuana a few times a week.” *Id.* at 1684-87. This Court rejected the

government’s proposed historical analogues to § 922(g)(3), in that they have a different “why” or “purpose” for their enactment. *Id.* at 1689-91.

Importantly for this petition, in *Hemani* this Court found that § 922(g)(3) fails to provide any sort of pre-deprivation process before a user of controlled substances is deprived of their Second Amendment rights. *Id.* at 1691-92. Thus, this Court found that § 922(g)(3) differs from this nation’s historical traditions in “how” it accomplishes disarmament. *Id.*

B. Factual Background

This petition arises out of Zapata’s conviction for possession of a firearm by a prohibited person under 18 U.S.C. §§ 922(g)(3), 924(a)(8), and (d). Dist. Ct. Dkt. 1; Dist. Ct. Dkt. 59.¹ On September 12, 2024, Zapata was indicted under these statutes with knowingly possessing a firearm while an unlawful user of controlled substances. Dist. Ct. Dkt. 1. In the district court, Zapata moved to dismiss the indictment, arguing, in part, that § 922(g)(3) was facially unconstitutional considering the history of firearms regulation in this country and the text of the statute. Dist. Ct. Dkt. 27. The district court denied Zapata’s motion based on the Eighth Circuit’s controlling decision in *United States v. Veasley*, 98 F.4th 906 (8th Cir. 2024). App. 3a-4a. Zapata then entered a conditional guilty plea and was sentenced to 27 months in prison. Dist. Ct. Dkt. 37, at 7-8; Dist. Ct. Dkt. 59, at 2.

¹ All citations to “Dist. Ct. Dkt.” are to the docket in *United States v. Zapata*, No. 3:24-cr-30057 (D.S.D.).

On appeal, a panel of the Eighth Circuit Court of Appeals found that Zapata’s arguments were foreclosed by *Veasley*. App. 2a. In *Veasley*, the Eighth Circuit summarized its holding, that “[f]or our purposes, all we need to know is that at least some drug users and addicts fall within a class of people who historically have had limits placed on their right to bear arms. . . . [F]or some drug users, § 922(g)(3) is ‘analogous enough to pass constitutional muster.’ ” 98 F.4th at 918 (quoting *Bruen*, 597 U.S. at 30).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The Second Amendment to the United States Constitution 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. The Second Amendment “confer[s] an individual right to keep and bear arms.” *Heller*, 554 U.S. at 595. It is a fundamental right, applicable against state and local governments, and entitled to the same protection as other fundamental rights enshrined in the Constitution. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). This Court has cautioned that it should not be treated as “a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *Id.* at 780 (plurality opinion); *see also Bruen*, 597 U.S. at 70. The contours of any abridgement of this fundamental right are an issue of profound significance.

This case presents the important question of whether Congress may constitutionally disarm any “unlawful users” of controlled substances without any other sort of pre-deprivation proceeding, a categorical restriction “that the historical evidence the government [presented in *Hemani*] does not support.” *Hemani*, 146 S. Ct. at 1692 n.6.

I. This Court should determine whether 18 U.S.C. § 922(g)(3) violates the Second Amendment on its face.

A. The Second Amendment’s plain text covers the conduct at issue in § 922(g)(3).

Possession of firearms is the primary conduct protected by the Second Amendment. Accordingly, the Second Amendment’s “plain text cover[ed the] conduct” at issue here, possession of a firearm. *Bruen*, 597 U.S. at 17; *see also Hemani*, 146 S. Ct. at 1686 (“[The government] agrees, too, that § 922(g)(3)’s unlawful user provision burdens conduct presumptively protected by the Second Amendment.”).

B. 18 U.S.C. § 922(g)(3) is not “consistent with the Nation’s historical tradition of firearm regulation.”

The Government bears the burden to show that the challenged regulation is consistent with the nation’s historical tradition of firearm regulation. *Bruen*, 597 U.S. at 30. Courts must “consider whether ‘historical precedent’ . . . evinces a comparable tradition of regulation.” *Id.* at 27 (citation omitted). If “no such tradition” exists, then the challenged statute is unconstitutional. *Id.* Given controlled substance abuse is a longstanding societal issue, the *Bruen* inquiry is

“fairly straightforward,” because, in the absence of a “distinctly similar historical regulation,” § 922(g)(3) is “inconsistent with the Second Amendment.” *Id.* at 26.

In *Hemani*, this Court recognized that § 922(g)(3) operates to disarm people in an entirely different manner than earlier practices. 146 S. Ct. at 1691-92. This Court rejected the government’s suggested analogues to § 922(g)(3), noting the profound differences in “how” they regulate firearms.

The historical laws the government identifies usually provided some form of process before an individual lost any of his liberties, even temporarily. . . .

None of that holds true for § 922(g)(3). On the government’s account, the statute automatically divests an individual of his constitutional right to bear arms the moment he becomes an unlawful user and until he ends his drug use—all without any pre-deprivation process. To be sure, and as the government highlights, an unlawful user who violates this ban is entitled to “a full-dress criminal trial” before he can be imprisoned or permanently disarmed. But be that as it may, § 922(g)(3) offers an unlawful user no pre-deprivation process before his “temporary disarmament,” the very burden the government says is akin to the burden vagrancy, civil-commitment, and surety laws imposed on habitual drunkards.

Id. at 1691-92 (emphasis added, citations omitted). In other words, this Court found that § 922(g)(3) fails to provide any sort of pre-deprivation process, significantly differing from this nation’s historical traditions of “how” to accomplish disarmament. *Id.* “The problem in this case is simply that the historical evidence the government presents does not support the categorical restriction it urges.” *Id.* at 1692, n.6.

Section 922(g)(3) is facially unconstitutional in every case. It categorically deprives people of their Second Amendment rights without pre-deprivation

process. This method of disarmament stands in stark contrast to both this nation’s historical traditions and to the operation of other provisions of § 922(g). *See id.* (discussing the pre-deprivation process existing under § 922(g)(1) and (4)). Even if the government presents historical analogues to the disarmament of *some* “unlawful users” under *Bruen*’s “why” inquiry, no historical analogue justifies “how” § 922(g)(3) does so in any case. Section 922(g)(3) imposes a significantly greater burden on the rights of *all* people subject to its sanction.

The Second Amendment is not a second-class right. *Bruen*, 597 U.S. at 70. Allowing legislatures the sweeping power to nullify those rights to categories of people it deems unworthy, without any pre-deprivation procedure, “would risk allowing it to ‘quickly swallow’ the Second Amendment.” *Hemani*, 146 S. Ct. at 1693 (quoting *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting)).

Now is the time to declare § 922(g)(3) facially unconstitutional.

II. This case presents an important question of constitutional law and wide application that this Court should resolve.

Section 922(g)(3) threatens to temporarily extinguish an individual’s fundamental Second Amendment right to possess a firearm and imposes severe felony criminal penalties, including up to fifteen years of imprisonment and permanent disarmament thereafter under § 922(g)(1). It does so without any process to extinguish the right to bear arms before the exercise of that right carries felony criminal sanction. In this way, § 922(g)(3) is operationally distinct from

historical analogues. This procedural void affects countless Americans and creates a chilling effect on the rights of more.

Given the widespread use of controlled substances, *see Hemani*, 146 S. Ct. at 1692-93; *id.* at 1701 (Alito, J. concurring), unknown numbers of people might be “chilled” from exercising their fundamental right to bear arms due to fears of criminal prosecution under this aberrant method of firearms regulation. The lack of process in § 922(g)(3) creates unclear boundaries to the law’s effect and the extent of its reach. Moreover, the text of the statute merely heightens the “chilling” effect. In the absence of a formal process, the statutory language is unclear how frequently or for how long one must use a controlled substance before they lose their right to bear arms. Similarly, in the absence of process, the statute does not indicate when or how a person regains the right to possess a firearm once they cease using controlled substances unlawfully.

Consider if a gun owner took their spouse’s prescribed sleep-aid medication to help them rest during a brief, particularly difficult, emotional trauma, such as the period following the death of a child. Are they prohibited from possessing guns in their home for that period? Have they established “regular” use over the course of those days? Have they committed a felony? Who decides? When can they again possess their weapons legally? The day after they stop taking the medication? A week? A month? A year? The statute does not say and there are no legal procedures in place to resolve these questions *before* that person is subject to criminal prosecution. Similarly, they have no clear process to know when they can again

exercise their right to bear arms, without fear of criminal prosecution. How many Americans face similar concerns at one time or another?

Section 922(g)(3) has neither process on the front end, nor on the back end. It regulates firearms in a wholly new way from historical precedents, allowing for widespread, arbitrary application by the government and widespread concern by the people. In the absence of process, the average individual cannot determine whether they may possess a firearm or whether they lack that fundamental right. As a practical result, many people may be chilled from exercising their right to bear arms because of the lack of process in § 922(g)(3)’s operation. Thus, the constitutionality of § 922(g)(3) is an important issue of wide-reaching application.

“[W]hen the government crosses the line from permissible regulation into unconstitutional infringement, courts have a duty to say so in the cases before them—no less in the Second Amendment context than in any other.” *Hemani*, 146 S. Ct. at 1685 (citations omitted).² This Court should consider this important and far-reaching legal question. Intervention is urgently needed.

² It should be noted that all the courts of appeals that have addressed the question since *Bruen* have explained that § 922(g)(3) is facially valid because the Second Amendment does not bar *all* its applications. See *Veasley*, 98 F.4th at 918; *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024); *United States v. VanOchten*, 150 F.4th 552, 558-560 (6th Cir. 2025); *United States v. Stennerson*, 150 F.4th 1276, 1285 (9th Cir. 2025); *United States v. Seiwert*, 152 F.4th 854, 872 (7th Cir. 2025); *United States v. Harrison*, 153 F.4th 998, 1035 (10th Cir. 2025). *Hemani* did not abrogate those decisions; instead, the Court specifically noted that its decision did “not address efforts to ban . . . those presently intoxicated[] from possessing a firearm.” 146 S. Ct. at 1693. Yet, none of these courts had the benefit of *Hemani*’s analysis and its rejection of the government’s historical analogues concerning “how” § 922(g)(3) regulates firearms.

III. This case squarely raises the question presented.

Zapata's case squarely raises the question of § 922(g)(3)'s facial constitutionality. Zapata presented a facial challenge to § 922(g)(3) to the district court. After his argument was rejected, he entered a conditional guilty plea, preserving his ability to present the issue on appeal. On appeal, the court of appeals addressed and rejected his facial challenge. The question is squarely raised here for this Court's consideration and determination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 3rd day of September, 2026.

Respectfully submitted,

JASON J. TUPMAN
Federal Public Defender
By:

/s/ David S. Barari
David S. Barari, Assistant Federal Public Defender
Office of the Federal Public Defender
Districts of South Dakota and North Dakota
655 Omaha Street, Suite 100
Rapid City, SD 57701
David_Barari@fd.org
Phone: (605) 343-5110

Counsel of Record for Petitioner