

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SARAH M. HARRIS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ERIN E. MURPHY, ESQ.	
7	On behalf of the Respondent	70
8	REBUTTAL ARGUMENT OF:	
9	SARAH M. HARRIS, ESQ.	
10	On behalf of the Petitioner	128
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
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21
22
23
24
25

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-1234, United States versus Hemani.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONER

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

The Second Amendment does not prohibit the government from temporarily disarming habitual marijuana users while they persist in using frequently. That tailored restriction easily fits within the historical tradition of disarming categories of people who present a special danger of misuse. That is no license for Congress to deem anyone dangerous.

The government must show a historical analogue that is relevantly similar and why and how it restricts Second Amendment rights. Here, that's habitual drunkard laws. Under historical vagrancy and civil commitment laws, habitual drunkards were imprisoned or confined without specific dangerousness findings based

1 on judgments that habitual drunkards as a class
2 threatened public safety. Surety laws required
3 them to post bond or be jailed. Like
4 922(g)(3), those restrictions reflect public
5 safety concerns about the dangers of frequently
6 using intoxicants. And 922(g)(3) is less
7 restrictive. Habitual illegal drug users can
8 regain their arms through their own voluntary
9 conduct by not using illegal drugs so often.

10 Upholding 922(g)(3) would not open the
11 door to disarming weekend beer drinkers.
12 Unlike alcohol, illegal drugs are illegal.
13 They're illegal because Congress deemed their
14 use dangerous at any level, and their dangers
15 extend beyond their mind-altering effects to
16 the risks of illegal drug trade.

17 Unlike alcohol, Congress and the
18 executive branch have made specific
19 determinations about the dangers of illegal
20 drugs. And, unlike alcohol, robust
21 post-ratification history supports disarming
22 habitual illegal drug users, not just
23 frequently intoxicated users.

24 Respondent's contrary approach that no
25 habitual drug users can be disarmed would

1 invalidate 922(g)(3) and parallel state laws
2 even for habitual heroin, Ketamine users, and
3 would replace the Bruen-Rahimi framework with a
4 discredited law trapped in amber approach.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Ms. Harris, the
7 drunkards weren't the only one included in
8 these sorts of statutes. What was the public
9 safety concern about those who -- using subtle
10 crafts, juggling, unlawful games or plays,
11 feigning themselves to have knowledge of
12 physiognomy, palmistry, or pretending that they
13 could tell fortunes?

14 MS. HARRIS: I'm glad you asked about
15 the vagrancy laws. The vagrancy laws did cover
16 those categories of people. They covered
17 multiple concerns. They covered both people
18 whose disorderly conduct presented a risk of
19 public safety, and that's usually the mentally
20 ill and habitual drunkards, and people who are
21 essentially transients who are considered a
22 threat.

23 I don't think it's a problem that that
24 type of law covered multiple purposes or
25 categories or the Court would have had to also

1 throw out the surety laws in Rahimi, which, of
2 course, covered a much broader swath of
3 conduct, including whoremongers, nightwalkers,
4 all sorts of other categories of people.

5 I think the fact that the -- there's
6 an overlapping set of categories of vagrancy
7 laws, civil commitment laws, and surety laws
8 that are all singling out habitual drunkards --

9 JUSTICE SOTOMAYOR: So would you --

10 MS. HARRIS: -- is relevant.

11 JUSTICE SOTOMAYOR: -- argue that it's
12 okay to impose a ban on homeless people who are
13 not drug addicts but just merely homeless?

14 MS. HARRIS: For the --

15 JUSTICE SOTOMAYOR: Just vagabonds?

16 MS. HARRIS: For Second Amendment
17 purposes, no, we don't think so.

18 JUSTICE SOTOMAYOR: All right.

19 MS. HARRIS: And here's the
20 difference.

21 JUSTICE SOTOMAYOR: And why is that?

22 MS. HARRIS: Yes. I think the
23 difference -- two things. One is -- one is the
24 point with respect to the specific application
25 here, and two is a methodological point about

1 Rahimi, I think.

2 So here's the reasons: Being homeless
3 is not itself a crime. Being homeless is -- at
4 least in many -- there -- there's -- there are
5 things additional to it for due process
6 purposes. It is not, unlike illegal drug
7 usage, something associated with the public
8 safety concerns historically. There is not a
9 robust post-ratification history the same
10 way -- these are the kind of constraints you'd
11 look at on top of that.

12 JUSTICE SOTOMAYOR: But the danger of
13 habitual alcohol users was not merely the fact
14 that they were using an intoxicating substance.
15 The way "habitual" was defined was that the
16 state of intoxication didn't permit you to have
17 a regular life. All the definitions around
18 habitual alcoholics centered around not merely
19 taking the drug but the potential effect it had
20 on you because you couldn't control it and
21 would continue to use it. You weren't
22 responsible -- acting responsibly towards your
23 family. You were sleeping in the streets. You
24 were doing other things that showed that it
25 incapacitated you.

1 Now it's hard for me to see how, given
2 that drugs affect -- there are different kinds
3 of drugs with different kinds of effects,
4 different kinds of duration. We have the
5 illegal Ambien user who shouldn't be using the
6 sleeping drug but is. We have a marijuana user
7 that you say "regular" is defined by two or
8 three or every other day. But how about the
9 marijuana user who uses it only one day a week
10 and not in their home where the gun is?

11 I mean, there was a definition and a
12 situation with habitual alcoholic users that's
13 different than this.

14 MS. HARRIS: So two points, one with
15 respect to the historical definition of
16 habitual drunkards and two with respect to why
17 I think that 922(g)(3) is more tailored and
18 easier to justify than modern-day regulations.

19 Habitual drunkards as a category were
20 defined certainly for civil commitment and
21 vagrancy purposes. There were no
22 individualized dangerousness findings. It was
23 a sort of judgment made often by magistrates or
24 justices of the peace as to whether someone's
25 conduct was frequent and putting them in a

1 status of a drunkard. So "habitual" didn't
2 mean frequent or regular. The "drunkard" piece
3 is what does the work, I think, in a lot of
4 your questions with respect to the level of
5 intoxication.

6 Second, why I think it's not a problem
7 that there is translation of that level of
8 intoxication for habitual drunkards to illegal
9 drug users here. I think 922(g)(3) is a lot
10 more tailored. There's no, like, founding-era
11 breathalyzers to tell you exactly how
12 intoxicating things are. For 922(g)(3), what's
13 happening is you have, first of all, a
14 restriction that is tailored and temporary and
15 less restrictive because it is tailored to how
16 often you're using it within your control.

17 JUSTICE GORSUCH: Well, Ms. Harris --

18 MS. HARRIS: Second --

19 JUSTICE GORSUCH: -- on that -- I'm
20 sorry to interrupt, but I just want to --
21 before we lose track of what Justice Sotomayor
22 is talking about, one -- one can ask whether
23 the habitual drunkard statutes are
24 sufficiently -- how and why sufficiently
25 analogous. One could also ask, though, more

1 basically whether this defendant would qualify
2 as a habitual user, and I want to explore that
3 before we lose track of it.

4 Habitual drunkard, the American
5 Temperance Society back in the day said eight
6 shots of whiskey a day only made you an
7 occasional drunkard.

8 (Laughter.)

9 JUSTICE GORSUCH: We have to remember
10 the founding era. If you want to invoke the
11 founding era, to be a habitual drunkard, you
12 had to do double that, okay?

13 John Adams took a tankard of hard
14 cider with his breakfast every day. James
15 Madison reportedly drank a pint of whiskey
16 every day. Thomas Jefferson said he wasn't
17 much a user of alcohol, he only had three or
18 four glasses of wine a night, okay?

19 Are they all habitual drunkards who
20 would be properly disarmed for life under your
21 theory?

22 MS. HARRIS: No. And, again, I think
23 this is something --

24 JUSTICE GORSUCH: Okay. If they're
25 not, then what do we know about Mr. Hemani? We

1 know he uses marijuana a few times -- about
2 every other day. That's all we have in the
3 record, right?

4 MS. HARRIS: That's all we have, and
5 I'm not troubled by --

6 JUSTICE GORSUCH: Okay. So we don't
7 even know the quantity of how much he uses
8 every other day. What -- what if he took one
9 gummy bear with a medical prescription in
10 Colorado -- well, you may not even need a
11 medical prescription. You don't even need that
12 anymore. But let's say he had one to help him
13 sleep every other day.

14 Disarm him for life?

15 MS. HARRIS: We're not -- no, it's not
16 disarm for life. And here's what's going on.

17 JUSTICE GORSUCH: Potentially.

18 MS. HARRIS: Well --

19 JUSTICE GORSUCH: Would that be enough
20 under your theory, one gummy bear every other
21 night with a medical prescription?

22 MS. HARRIS: So I think you'd have a
23 Rehaif problem -- potential Rehaif problem, but
24 I will accept the hypothetical. So let me just
25 deal with what's the unlawful behavior --

1 JUSTICE GORSUCH: I think the answer's
2 yes under the government's theory.

3 MS. HARRIS: Yes under our theory, but
4 let me give you an explanation of two parts of
5 this that are important. One, you asked about
6 how do you tell who's an unlawful user, how is
7 it more defined than -- than a habitual
8 drunkard. I think it's a lot clearer than --

9 JUSTICE GORSUCH: Is it? I mean --

10 MS. HARRIS: Yes.

11 JUSTICE GORSUCH: -- the government
12 has not been able to define what a user is. I
13 mean, it has -- it has -- it has said at
14 various points that it's someone who's used any
15 illegal drug in the past year, right?

16 MS. HARRIS: Respect --

17 JUSTICE GORSUCH: It said ATF now
18 wants to say a pattern. And you argue for
19 habitual, which, of course, conflates the
20 second half of the statute, which talks about
21 an addict, which is different than a user, and
22 an addict is a habitual user it's defined as.
23 So you're kind of conflating the two parts of
24 the statute there.

25 So tell me how it's so clear.

1 MS. HARRIS: Okay. A couple things to
2 help you with this. One, I'm going to set
3 aside the forfeiture issue, but I would like to
4 return to that later. Just deal with the
5 substance. With respect to who is an unlawful
6 user, the court of appeals are in -- are
7 uniform in adopting the same view as us, which
8 is a habit -- it is a habitual user in context.
9 An unlaw --

10 JUSTICE GORSUCH: Well, but the ATF
11 disagrees apparently.

12 MS. HARRIS: No, they absolutely do
13 not, and let me --

14 JUSTICE GORSUCH: They say a pattern.

15 MS. HARRIS: Let me be very clear
16 about the distinction here. There is a
17 distinction between what is the statutory
18 definition of an unlawful user, and everyone
19 has always agreed, including ATF, that that
20 means habitual or frequent. And on the other
21 hand, how do you prove that? What type of
22 evidence is sufficient to show beyond a
23 reasonable doubt or for purposes of background
24 checks for ATF purposes that you, in fact, do
25 that? So that is the discrepancy.

1 JUSTICE GORSUCH: Okay. So that
2 circles us back down to you would qualify as an
3 habitual user one gummy bear every other night?

4 MS. HARRIS: Absolutely. And here's
5 why. Their check on that sort of situation is
6 twofold. One is you have to know that you are
7 using an unlawful drug. So, if you're using
8 your gummy and you don't know that it has THC
9 in it or there's something else, you could have
10 a nice Rehaif defense.

11 But setting that aside, in terms of
12 other guardrails, illegal drugs are different
13 from habitual drunkards in an important way.

14 First of all, there is robust
15 post-ratification history that I think shows
16 that there is a tight connection between
17 someone who is a habitual drunkard --

18 JUSTICE GORSUCH: So, if it all boils
19 down to illegality, what do we do with the fact
20 that marijuana is sort of illegal and sort of
21 isn't and that the federal government itself is
22 conflicted on this? It doesn't enforce it
23 quite the same way it does with respect -- drug
24 laws with respect to other drugs.

25 MS. HARRIS: So two points. One is

1 not just illegality, but, with respect to
2 illegality, I don't think the government is of
3 two minds. The government is considering
4 rescheduling marijuana as Schedule 3 to
5 facilitate medical -- potential medical
6 applications, but the government is not saying
7 that it is not illegal anymore simply because
8 states are not following federal law.

9 I think the fact that the Controlled
10 Substances Act is involved, it brings this not
11 just in terms of the category of illegality but
12 into the realm of how do you test the fit, how
13 do you test if Congress is like prohibiting
14 chewing gum or caffeine on the one hand, legal
15 substances, versus substances that actually do
16 have intoxicating, mind-altering effects,
17 although --

18 JUSTICE BARRETT: Okay. But,
19 Ms. Harris, one of the difficulties that I
20 think is, and this kind of takes Justice
21 Gorsuch's question one step farther, is, in
22 this case, I know we're talking about
23 marijuana, but, obviously, the statute applies
24 more broadly to other things that are
25 scheduled, some of which can be taken lawfully

1 or unlawfully.

2 I take it you're saying marijuana can
3 never be lawful because it's on Schedule 1 and
4 even if it's on Schedule 3, the government's
5 saying it wouldn't be lawful.

6 Justice Sotomayor asked you about
7 someone who takes Ambien to sleep. So let's --
8 let's assume that someone takes their spouse's
9 Ambien prescription. The spouse takes it too,
10 lawfully, with the prescription, but then, you
11 know, you take it unlawfully because you break
12 into your spouse's Ambien jar.

13 So I take it that the one would fall
14 under (g)(3) and the other who had the
15 prescription would not, right?

16 MS. HARRIS: That's correct because,
17 for one, it would be illegal. And then there
18 are sort of ancillary questions about the use
19 by one of habitual drugs.

20 JUSTICE BARRETT: Okay. But I guess
21 my -- my -- so my question is, I agree with
22 you, and I think this is what Rahimi says, that
23 legislatures can regulate to keep guns out of
24 the hands of dangerous people, but when I look
25 at this statute and when I look at what the

1 qualifications are for being listed on one of
2 these schedules, they're all about public
3 safety, you know, they're about reducing
4 addiction.

5 And the example that I just gave you
6 about the Ambien is important to me because
7 it's not the drug itself in this circumstance
8 that's causing the dangerousness. It couldn't
9 be because, if my husband has a prescription
10 and I don't, what is it about Ambien itself
11 that would make one of us more likely to be
12 dangerous? It's not. It's the lawfulness.

13 And so too here with the marijuana, I
14 just don't see anything in the scheme that
15 actually reflects Congress's judgment that this
16 makes someone more dangerous.

17 MS. HARRIS: Okay. Let me help on a
18 couple ways. One is I think that there's --
19 there's two parts of this. One is the fact
20 that the Controlled Substances Act's scheduling
21 scheme does consider the long-term effects of
22 use, I think, is important.

23 I think that is important because it
24 does reflect a determination that especially if
25 you are regularly and routinely using these

1 illegal drugs, there are serious side effects.

2 I would point you to the Third
3 Circuit's Harris decision when you look. If
4 you think that there should be a more tailored
5 assessment of who is dangerous, their questions
6 are replicating the very questions that are
7 being answered through the Controlled
8 Substances Act regime.

9 And second of all --

10 JUSTICE BARRETT: The Third Circuit's
11 not Congress. And nothing about the scheduling
12 process suggests that the attorney general or
13 his delegee has to make a decision that a
14 drug -- that the psychological effects -- I
15 agree with you, everyone would say that any
16 drug can have long-term psychological effects.

17 But there's no indication that that's
18 what was motivating the attorney general or
19 Congress. This just wasn't about -- the Gun
20 Control Act just wasn't about dangerousness.
21 It wasn't something that the legislature
22 thought it needed to consider then.

23 MS. HARRIS: Respectfully, I think
24 these are on all fours with respect to
25 considering dangerousness. In the Gun Control

1 Act, the fact that it's habitual users or
2 addicts, and I think, under -- under the
3 theories that are being floated, you would have
4 a real problem justifying even disarmament of
5 addicts under (g)(3) because I think that it's
6 reflecting a determination that frequent and
7 habitual use of illegal substances not only
8 above and beyond the determinations that are
9 made to schedule them but potential
10 involvements of the illegal drug trade are a
11 real problem.

12 And just one other point on this. I
13 think this is a smaller gap in between the move
14 that's being made that's supported by
15 post-ratification history making the same
16 judgment in state after state than what the
17 Court did itself in *Rahimi*, where, again, in
18 *Rahimi*, there was no founding-era history of
19 disarming domestic abusers at all.

20 It was treated as a much lesser
21 offense. It was punished, if at all, by surety
22 laws, and the court relied on the going armed
23 laws as saying that's an even sort of more
24 different danger. The danger there is
25 brandishing your weapon publicly to terrorize

1 people versus, in Rahimi, it can be sort of
2 conduct in your home.

3 So I think, if you're looking at the
4 fit between the danger involved and here, I
5 think that provides it. And just one thing on,
6 like, how would you otherwise figure out who is
7 dangerous in this situation? I really don't
8 know how this would work on an individualized
9 basis.

10 The Third Circuit's approach seems to
11 rely on the kind of pharmacological judgments
12 that are already being made within the
13 Controlled Substances Act, but how are you
14 going to find a reliable way of figuring out
15 this person had a particular type of marijuana
16 or other drug from an illegal source? At what
17 concentration, who knows? At what point in
18 time, who knows? If there is some sense that
19 you have to have a dangerousness determination
20 for each type of person to track it, I think
21 that's a risk --

22 JUSTICE BARRETT: What about each kind
23 of drug? Is it the government's position that
24 if I unlawfully use Ambien or I unlawfully use
25 Xanax, then I become dangerous?

1 MS. HARRIS: I will just point out we
2 have never prosecuted any -- anything beyond
3 Schedule 1 or Schedule 2.

4 JUSTICE BARRETT: Well, but the
5 question is would it violate the Second
6 Amendment, and what is the government's
7 evidence that using marijuana a couple times a
8 week makes someone dangerous?

9 MS. HARRIS: Okay. Just with respect
10 to marijuana, I'll take that first, but I'll
11 just say, like, my -- my backup is I think
12 Schedule 1, 2, and for marijuana, we have not
13 made a policy choice with respect to what --
14 what's happening, but I think we can very
15 easily justify those threshold categories,
16 whatever you want to do with further down on
17 the schedule.

18 The reason is, for the dangerousness,
19 all of the things that go into the scheduling
20 decision include potential for abuse, the
21 effects of potential addiction, all sorts of
22 things that go into the same kind of calculus
23 that went into the presumptive disarmament of
24 the mentally ill or other things that affect
25 your mental capacity and affect your ability to

1 use firearms safely.

2 And so, if the Court is saying, well,
3 mind-altering drugs aren't a sufficient proxy
4 for dangerousness or Congress cannot make a
5 determination, including one that's backed by
6 the executive branch scheduling process and
7 judicial review, that these types of illegal
8 drugs not only have particular mind-altering
9 effects on the body, they can create a serious
10 hazard for firearms use, as the Court's sort of
11 precedents show --

12 JUSTICE GORSUCH: Ms. -- Ms. Harris,
13 you're -- you're kind of talking about
14 dangerousness being per se because it's
15 unlawful, so I guess that does raise the
16 question, is it just Schedule 1? Is it
17 Schedule 2? How far down does that go? Does
18 it go down to Ambien?

19 MS. HARRIS: My front-line position
20 would be we take all of it because of the
21 determinations that go into it.

22 JUSTICE GORSUCH: Okay.

23 MS. HARRIS: My backup is, if you have
24 a problem with that, you can look with respect
25 to the gradations of the scheduling scheme, and

1 if you wanted to calibrate it further --

2 JUSTICE GORSUCH: So some judgment
3 would still have to be calibrated on
4 dangerousness that way in your view?

5 MS. HARRIS: You could certainly do it
6 that way, and I think we would --

7 JUSTICE GORSUCH: But that would be
8 your backup position. Your primary position
9 is, if it's scheduled in any way, so long as
10 you use it a couple of times a week, you're --
11 you're -- you're subject to disarmament?

12 MS. HARRIS: That is our position --

13 JUSTICE GORSUCH: Yeah.

14 MS. HARRIS: -- because of the
15 combined effects of, again, the judgments that
16 are being made that are permissible, backed by
17 post-ratification history and everything else,
18 and also the dangers of illegal drug trade on
19 top of that.

20 JUSTICE SOTOMAYOR: But all --

21 JUSTICE JACKSON: Ms. -- Ms. --

22 JUSTICE SOTOMAYOR: -- of the safety
23 factors that you mentioned in my mind go --
24 come down to the second part of the statute,
25 which is "addicted to drugs," meaning you say

1 there's a danger that you will become addicted
2 or that you're going to act out in your
3 addiction.

4 So why do you need to control this
5 with respect to someone who uses it twice a
6 week?

7 MS. HARRIS: Because --

8 JUSTICE SOTOMAYOR: Under your
9 definition, the mere use -- and it's actually
10 not twice a week. It's once a week regularly.

11 MS. HARRIS: Because the addiction
12 prong and the unlawful user prong sort of are
13 overlapping but distinct and cover two
14 different situations. The adding --

15 JUSTICE SOTOMAYOR: I understand. I
16 don't know why the second is not more
17 comparable --

18 MS. HARRIS: Because --

19 JUSTICE SOTOMAYOR: -- to the
20 historical twin, which had to do with the
21 question of whether you were a vagabond,
22 whether you didn't have any place to sleep
23 ever, whether you were doing something so
24 persistently that the danger would arise.

25 MS. HARRIS: A couple of points. One

1 is the habitual drunkard laws themselves don't
2 gauge, like, addict versus just drunk all the
3 time. And I don't think this fit has to do so
4 either. If you're frequently using heroin
5 regardless of whether you're addicted to it, it
6 is a fair judgment to make that you are
7 exceptionally dangerous.

8 JUSTICE JACKSON: But -- but -- but --

9 MS. HARRIS: Same with Ketamine, same
10 with PCP, same with other things that have
11 those effects.

12 JUSTICE JACKSON: So I guess my
13 problem is it might be a fair judgment, but,
14 conceptually, that is precisely what the Bruen
15 test prohibits, that we don't credit the
16 judgments of the modern legislature about who
17 is dangerous and who needs to be disarmed as a
18 result.

19 The entire point, I thought, of the
20 Bruen test was to say that the only thing the
21 modern legislature gets to do is follow the
22 judgments of the founding-era legislature
23 around who was dangerous and who gets to be
24 disarmed.

25 So I think your argument sort of falls

1 apart under the Bruen test to the extent that
2 you are saying the reason why there are --
3 these are historical analogues is because the
4 historical legislature was making a -- the same
5 kind of determination, that they were making a
6 determination that these people, habitual
7 drunkards, were dangerous, and you see the
8 modern legislature, the Congress, is making
9 that same kind of dangerousness determination,
10 and so, therefore, we have a match.

11 And what I'm saying is that can't work
12 because the modern legislature, under our Bruen
13 test, only gets to do the policy judgments of
14 the historical ones. So we have to see that
15 the historical legislature, going back to
16 Justice Gorsuch's point, was making a
17 determination that someone who only drinks or
18 takes an intoxicant once every, you know, other
19 day and is not doing so while he's using a
20 firearm can be disarmed. And if we don't see
21 that, then the fact that the -- today's
22 Congress thinks that that person is dangerous
23 is irrelevant under the Bruen test.

24 MS. HARRIS: Respectfully, I think
25 that would mean that you were overruling Rahimi

1 because Rahimi made the various -- like, an
2 even bigger jump. If you thought that only
3 people who were dangerous at the founding could
4 be restricted now, I think you'd have a real
5 problem with the fact that domestic abusers at
6 the founding were only penalized through surety
7 laws.

8 JUSTICE JACKSON: No, it's not the
9 penalty necessarily. It's the policy judgment
10 about who was dangerous.

11 MS. HARRIS: Right.

12 JUSTICE JACKSON: And I thought there
13 was evidence at the founding that the -- the --
14 there was a concern about domestic abuse to
15 some degree. Maybe people weren't being
16 disarmed as a result of it, right?

17 MS. HARRIS: Well, the problem is that
18 it was a determination that they weren't
19 dangerous enough to be imprisoned or subject to
20 disarmament. And, here --

21 JUSTICE JACKSON: Right. But that's
22 not what I'm saying.

23 If you -- if you do it at that level
24 here, then you are -- you don't even have that
25 original point. In other words, you don't have

1 the determination that people who are doing
2 what today's Congress says is dangerous were
3 dangerous to people at the founding. This is
4 Justice Gorsuch's point, right? The dangerous
5 people at the founding were well beyond just
6 one, you know, item, one intoxicant every other
7 day.

8 So, without that, I don't know how you
9 can even begin the conversation of how we
10 punish those people. Is there a match with
11 regard to what can be done about them? You
12 have to have a policy judgment at the founding
13 that matches the policy judgment today under
14 the Bruen test.

15 MS. HARRIS: Right. And we agree with
16 the Bruen test, but the policy judgment is, at
17 the founding, people who are using intoxicants
18 in a dangerous way, in a habitual fashion, can
19 be subject to various -- various penalties from
20 confinement and imprisonment.

21 And 922(g)(3) is similar to that
22 judgment. It is saying habitual illegal drug
23 use, even if it's not to the exact same point
24 as alcohol, which is legal, which is not
25 subject to the same determinations, is enough

1 on all fours.

2 And I think the other plus factor that
3 the --

4 JUSTICE JACKSON: I'm sorry. What do
5 we do about the fact that wrapped into that is
6 your view of illegality doing a lot of work
7 when the government itself controls that
8 determination? I don't -- I don't know that
9 you can say that this matches because the
10 government today has determined that this
11 particular substance fits in a -- in -- in the
12 schedule or is illegal because the government
13 controls that.

14 MS. HARRIS: The government controls
15 that subject to judicial review and much more
16 strict findings than were present at the
17 founding for habitual drunkards, who didn't
18 have to be deemed dangerous. There weren't any
19 considerations of what are the public safety
20 concerns with respect to habitual drunkards.

21 JUSTICE JACKSON: But, to the extent
22 your argument both accepts what was happening
23 at the founding and distances -- distances
24 itself, I think that's a problem. You've said
25 many times this is not like alcohol. This is

1 different from alcohol. This is illegal.

2 And I say: Okay, well, where are the
3 founding-era analogues that do what is
4 happening here?

5 MS. HARRIS: Right. And the illegal
6 drug problem did not emerge at the founding.
7 And so I think the fact here that
8 post-ratification history, we're not trying to
9 get to the original principle from it, the
10 original principle of disarmament comes from
11 the problem of intoxicants and firearms and
12 restrictions on people.

13 But, as soon as the illegal drug
14 problem emerged, there is an unbroken history
15 of treating them as similar to habitual
16 drunkards. The two laws kind of merge in terms
17 of how they function. Habitual drunkards and
18 illegal users of drugs, not just addicts, are
19 subject to disarmament. And so I think --

20 JUSTICE KAVANAUGH: But the original
21 laws that were enacted, including the uniform
22 law, really spoke to addicts.

23 MS. HARRIS: With respect, there's a
24 lot of laws that did not just -- were not just
25 confined to addicts at least -- I think at

1 least a dozen of them either put in the federal
2 definition or otherwise.

3 JUSTICE KAVANAUGH: It seems like most
4 were -- were addicts, not illegal users, but --
5 well, I'll wait until my seriatim round.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 JUSTICE THOMAS: You seem to rely
10 quite a bit on the illegality of the marijuana.

11 MS. HARRIS: Yes but not exclusively.
12 I think it's post-ratification history -- well,
13 illegality, and the way the Controlled
14 Substances Act works to make determinations,
15 plus the temporary nature of the restrictions.
16 So I would mix all four of those.

17 JUSTICE THOMAS: What about -- what
18 about other unlawful or illegal drugs, such as
19 anabolic steroids?

20 MS. HARRIS: Anabolic steroids, I
21 believe, are either Schedule 3 or Schedule 4.
22 So I would give similar answers to Justice
23 Barrett with respect to my front-line and my
24 backup. I think the front-line is there are
25 the same kind of judgments that are -- that are

1 being made. My backup is, if there are
2 concerns with respect to how you go sort of
3 down the schedule, the government only cares
4 really about prosecuting Schedule 1 and
5 Schedule 2. And that's the tightest level of
6 determinations you have to find, a serious
7 danger of abuse. And any sort of alternative
8 approach is going to throw out the heroin, the
9 Fentanyl, the Ketamine, those kinds of things.

10 JUSTICE THOMAS: So, other than the
11 danger of abuse, does there have to be some
12 sort of implicit danger in the drug, the
13 effects of the drug, itself?

14 MS. HARRIS: That is usually part of
15 the scheduling determination. So it includes
16 the addictiveness, but also you can look even
17 at the recent notice of proposed rulemaking
18 with respect to marijuana, mentioning that DEA
19 in this process normally comes forward with
20 public safety evidence with respect to other
21 risks. And so that is part of the calculus and
22 I think is part -- is -- is pretty tight in it.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito?

25 JUSTICE ALITO: Most of the -- the

1 most commonly used illegal drugs either had not
2 been invented at the time of the adoption of
3 the Second Amendment or the adoption of the
4 Fourteenth Amendment.

5 Heroin was invented in 1874. Cocaine,
6 1855. Methamphetamine, 1893. Fentanyl, 1959.
7 Marijuana existed, but my understanding, yeah,
8 hemp was grown for industrial purposes. My
9 understanding is that it was not consumed to
10 any degree by people in the United States until
11 at least the beginning of the 20th century.

12 Is that consistent with your
13 understanding of the situation?

14 MS. HARRIS: That is correct.

15 JUSTICE ALITO: So we don't know what
16 the founders -- what those who adopted the
17 First Amendment -- or, I'm sorry, the Second
18 Amendment or the Fourteenth Amendment thought
19 about illegal drug use per se?

20 MS. HARRIS: Correct.

21 JUSTICE ALITO: There's talk --
22 there's a lot of talk about alcohol. Do you
23 think that the regulation of alcohol is exactly
24 the same as the regulation of illegal drugs?
25 Isn't -- doesn't alcohol -- isn't alcohol --

1 doesn't it have a different place in the
2 history and culture of the west? Aren't there
3 a lot of people who consume alcohol in
4 moderation and have done so for centuries for
5 purposes -- primarily for purposes other than
6 the effect that it has on one's brain?

7 MS. HARRIS: Absolutely. And I think
8 that's why the post-ratification history is so
9 difficult for Respondent here with respect to
10 the difference between illegal drugs and the
11 history of alcohol use in moderation.

12 JUSTICE ALITO: Now, as to Justice
13 Barrett's question about Ambien, which I think
14 is -- is quite important, do you think that as
15 a practical matter it is feasible for there to
16 be as applied challenges to the use of every
17 drug on the schedule?

18 MS. HARRIS: No. And I think Chief
19 Judge Colloton's recent dissent in Ledvina
20 illustrates a lot of these problems in terms of
21 how do you know exactly how much someone's
22 taking, if it's an illegal drug, what's in it?
23 How do you know exactly what the concentration
24 is? What else are they mixing with other
25 things? At what point do you might have a

1 tipping-point situation where someone goes into
2 a greater risk of addiction or having
3 additional mind-altering effects?

4 These are really hard judgments, and
5 those are the kind of judgments that go into
6 scheduling determinations.

7 JUSTICE ALITO: 922(g) sets out a
8 whole list of categories of people who Congress
9 presumably thought created a special danger
10 with regard to the possession of drugs.

11 Do you see a ground on which one might
12 say an individualized determination is required
13 for (g)(3) but not for any of the other
14 categories in (g)?

15 MS. HARRIS: I think that would be
16 difficult. And if you did so, you'd be taking
17 down (g)(2), which is particularly hard to
18 fathom. That's fugitives. So I don't know how
19 someone would say, how is this -- how dangerous
20 is this particular fugitive in the moment?
21 Like, did they just get scared, what's going
22 on?

23 Or other parts of (g)(4), and then
24 there's a lot of issues with respect to (g)(1),
25 but I think we could all agree it would be

1 passing strange to suggest that it's
2 constitutionally required for serial murderers
3 to be subject to individualized dangerousness
4 determinations for Second Amendment purposes.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 Justice --

9 JUSTICE SOTOMAYOR: One question. The
10 other side has conceded that you can have laws
11 that prohibit people while they're in -- while
12 they've taken illegal drugs from possessing a
13 firearm. That's correct, there's no -- there's
14 no argument about that?

15 MS. HARRIS: I believe that's correct.

16 JUSTICE SOTOMAYOR: And I think
17 they've even gone so far to say you can
18 prohibit a drug user from possessing the gun
19 while using the drugs?

20 MS. HARRIS: They seem to suggest
21 that, yes.

22 JUSTICE SOTOMAYOR: All right. So,
23 really, the question is whether someone who
24 possesses the gun and drinks socially at a bar
25 or drinks socially somewhere else, takes a

1 stick of marijuana at a party, whether you can
2 prosecute that person?

3 MS. HARRIS: Respectfully, not quite.
4 I don't think it's a question with respect to
5 casual bar drinkers, which we think are on
6 different footing.

7 JUSTICE SOTOMAYOR: Well, you're --
8 you're -- but let's take the -- the person who
9 has marijuana at a party.

10 MS. HARRIS: If the person is doing so
11 habitually and repeatedly, they are --

12 JUSTICE SOTOMAYOR: At parties?

13 MS. HARRIS: Anywhere.

14 JUSTICE SOTOMAYOR: Even though the
15 gun is somewhere else?

16 MS. HARRIS: That is correct.

17 JUSTICE SOTOMAYOR: All right.

18 MS. HARRIS: They cannot --

19 JUSTICE SOTOMAYOR: I just want to
20 know what your --

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Ms. Harris, I think
23 I'd like to know more about how controlled
24 substances are identified. I mean, the
25 Controlled Substances Act is obviously not

1 written with 922(g)(3) in mind, right? It's
2 like the separate statute which presumably has
3 its own purposes and methods and so forth.

4 And, I mean, one of the things that
5 might be considered in determining whether
6 something is a controlled drug is, is a person
7 dangerous when that person is on the drug? But
8 I would -- I guess I would be surprised if that
9 was remotely the primary thing.

10 So could you just tell me about, like,
11 the whole range of things that are considered
12 in deciding whether something ends up as a
13 controlled substance?

14 MS. HARRIS: Yes. And it's in 21
15 U.S.C. 811(c) as sort of the lesser criteria.
16 And while they don't specifically list
17 dangerousness, I'll get to why I think they're
18 a good proxy. It lists things such as the --
19 the potential for abuse and addiction, the
20 state of the science, the pharmacological
21 properties, the history and pattern of abuse,
22 its scope and significance, public health
23 risks, whether the drug is a precursor for
24 other illegal drugs.

25 And in the course of the

1 determinations, as I mentioned, these are not
2 just subject to judicial review through the APA
3 process and also subject to rescheduling
4 challenges, but in the course of the process,
5 it's obviously a dialogue among agencies with
6 respect to -- that -- that do -- does consider
7 such things as DEA's views, which, again, tends
8 to consider connections to public safety and
9 crime.

10 So, again, the intuition that what
11 they're focused on is what are the effects,
12 what are sort of the mind-altering effects of
13 this particular drug and how dangerous is it
14 when you're on it, is a fairly tight fit for
15 such other categories, including the mentally
16 ill, which this Court has said is presumptively
17 legal.

18 I think it would be hard to say no,
19 you can't -- you know, it -- it's not enough to
20 say there's this kind of risk of abuse, this
21 kind of public safety concern in general and
22 say Congress isn't doing a good enough job
23 because it's not specifically considering
24 exactly how dangerous is this particular drug
25 when mixed with firearms. The point is it's

1 dangerous at any level when it's being used in
2 an illegal way.

3 JUSTICE KAGAN: Okay. So a different
4 question.

5 In thinking about these analogues and
6 what counts and what doesn't, do you recognize
7 a difference between statutes that go to public
8 safety, like we're really afraid that this
9 person is going to commit crimes against other
10 people, and statutes that go to what we might
11 call public order, so there's a person who
12 keeps on falling down dead drunk in the town
13 square, and we want to remove that person from
14 our environment, that sort of thing.

15 You know, it seems to me that those
16 are two different kinds of concerns which might
17 end up in the same statute or might not, and
18 how do we think about that in terms of the
19 analogues that you're pointing us to?

20 MS. HARRIS: I think that's a valid
21 concern. I think it's one that Blackstone's
22 recognized with respect to surety laws, and I
23 think the Court should be attentive to it, but
24 the answer here is I think the overlapping
25 nature of the historical restrictions and what

1 they -- what they sound in. So the civil
2 commitment laws, I think, are the easiest
3 example I'd give you. They're focused on
4 habitual drunkards.

5 I think it's very clear to say that
6 the reason is, as Blackstone's sort of would
7 have put it, the fear that people are going to
8 be out and about sort of terrorizing the public
9 or doing other unsafe things, similar to the
10 mentally ill.

11 And the vagrancy laws, I will
12 obviously spot you that there is a wider range
13 of concerns within them, but I think you can
14 piece apart the different purposes both with
15 respect to some of the -- the -- the -- the
16 manner of handling them and just historically
17 how those laws were understood with respect to
18 specific categories of people.

19 And then, three, I would say the
20 post-ratification history can help you
21 distinguish between is this public order, we
22 don't like this kind of person being around for
23 aesthetic reasons or whatever it is, or public
24 safety? We think there's a real danger for
25 having this kind of person on the streets or at

1 liberty for -- for -- with -- without sort
2 of -- with -- with -- without restrictions.

3 And I think the post-ratification
4 history here and, again, the fact that habitual
5 drunkards laws translate very closely into the
6 illegal drug user laws as soon as that problem
7 emerges in the early 20th century, late 19th
8 century, is another way of telling you this is
9 how you do the calculus.

10 And I don't think it can be throw all
11 the laws out the window or you have a problem
12 with surety laws and Rahimi because they
13 covered all sorts of stuff.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: Just a couple quick
18 questions more, sorry.

19 MS. HARRIS: No.

20 JUSTICE GORSUCH: 922(g)(3) has two
21 prongs, as we've discussed. One is you're an
22 unlawful user, and second is you're an addict.
23 And you prosecuted Mr. Hemani only under the
24 first prong, unlawful user.

25 MS. HARRIS: Correct. Correct.

1 JUSTICE GORSUCH: You're asking us now
2 to understand that prong to mean a habitual
3 user.

4 MS. HARRIS: Correct.

5 JUSTICE GORSUCH: What's left of the
6 second prong? Do you render it superfluous
7 given that an addict is defined by the statute
8 as a habitual user?

9 MS. HARRIS: So two pieces of this.
10 One, it's not superfluous. An addict is
11 someone who has an uncontrollable urge to use
12 the substance regardless of whether they have
13 access to it at a particular moment in time.
14 You can be an addict and not be an unlawful
15 user because, for instance, you're in a
16 treatment --

17 JUSTICE GORSUCH: Well, I thought the
18 CSA definition of an addict was any individual
19 who habitually uses a narcotic drug so as to
20 endanger the public moral's health, blah, blah,
21 blah, blah, blah.

22 MS. HARRIS: Yes. So the second part
23 of this is I think Respondent is being very
24 careful to say we're not actually -- no one
25 thinks that that is the actual operative

1 definition. And I don't think you could
2 because it says narcotics. It is obviously not
3 the definition that Congress was using. It's
4 limited to narcotics for the purpose in the
5 Controlled Substances Act of dealing with
6 treatment facilities.

7 So the ordinary meaning that's been
8 adopted by the government with dictionary
9 definitions and all the courts of appeals is
10 not that. It does cover both concepts. It
11 covers unlawful user as someone judged by the
12 objective criteria of their frequency of use.
13 An addict is someone who has an uncontrollable
14 urge. They can overlap, but they -- they
15 are -- also indicate -- there are situations,
16 as perhaps here, where --

17 JUSTICE GORSUCH: I've got it. I've
18 got it. Thank you.

19 MS. HARRIS: Okay.

20 JUSTICE GORSUCH: And then, secondly,
21 your backup argument is, well, maybe Schedule 1
22 and 2, we really need those, but not Schedule 3
23 and -- and the rest of the schedules. If
24 that's the case, what do we do with this case
25 given that, yes, it's presently a Schedule 1

1 drug, but the government itself is considering
2 rescheduling it to a Schedule 3 drug? Why --
3 why bring this case? Why -- why is this the
4 test case?

5 MS. HARRIS: Why is this the test
6 case? I mean, one is that, first of all, at
7 the time when the offense was committed,
8 marijuana is and was a Schedule 1 drug. Two is
9 the government has not made final decisions
10 with respect to what to do with marijuana, but
11 I think something that is clear for the -- from
12 the NPRM at least, again, bracketing, like,
13 what happens in ensuing stages, is that even
14 Schedule 3 drugs, which include things like
15 Ketamine, may -- the difference is they have
16 some medically accepted uses, not that they're
17 not dangerous, not that they don't present --

18 JUSTICE GORSUCH: No, I understand
19 that's your --

20 MS. HARRIS: Okay.

21 JUSTICE GORSUCH: -- primary
22 argument --

23 MS. HARRIS: Yeah.

24 JUSTICE GORSUCH: -- is they all
25 count.

1 MS. HARRIS: That's fine.

2 JUSTICE GORSUCH: But your backup
3 argument is we'll stop at Schedule 2. I don't
4 know why, but, okay. But the drug that is
5 involved in this case might wind up being a
6 Schedule 3 drug tomorrow.

7 MS. HARRIS: Yes. I understand that.
8 And I think what I'm saying is not so much
9 there's, like, a hard-and-fast, like, special,
10 magical Second Amendment rule that says
11 Schedule 2 and no further. It's just, if you
12 wanted to sort of set a -- if -- if you wanted
13 to rule out, like, Schedule 5 or Schedule 4 for
14 Ambien, the -- the cutoff with respect to
15 dangerousness, like, does diminish. And I
16 think the Court could say -- you could -- you
17 could -- you could bracket potentially as
18 applied challenges if you wanted to do that.

19 I'm just saying this is a fallback
20 that's not the government's main position, but
21 I think, when you see the way the scheduling
22 works in the statutory criteria, that's one
23 option.

24 JUSTICE GORSUCH: No, I understand
25 that. It's just an odd case to have chosen to

1 test -- to test the principle when -- when the
2 government itself is potentially rescheduling
3 it as a drug that it wouldn't think would
4 qualify under at least its backup argument.

5 MS. HARRIS: I think we would not
6 concede that it wouldn't qualify. I think the
7 government has to make a decision with respect
8 to the risk potential of marijuana and other
9 externalities, assuming -- again, this is a
10 process that has not yet unfolded, which I
11 can't commit to a result.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 JUSTICE KAVANAUGH: In response to
16 Justice Alito, I think you said that drugs are
17 distinct from alcohol for Second Amendment
18 purposes, although there are some similarities.
19 Is that accurate?

20 MS. HARRIS: Yes. And I would say
21 that -- yes. I can elaborate.

22 JUSTICE KAVANAUGH: Please elaborate.

23 MS. HARRIS: Okay. Thank you. So
24 drugs are similar in -- to alcohol in the sense
25 that there is a similar history and tradition

1 with respect to identifying people who, by use
2 of their -- by use of the intoxicants on a
3 habitual basis, present on the how and why
4 spectrum special danger of misuse.

5 Drugs are different in a couple of
6 ways that I think make this an easier case.
7 One, we've talked about a lot its illegality,
8 the externalities, and additional features of
9 being involved in the illegal drug trade
10 increase the risks. And there's also an
11 additional notice requirement that makes this
12 unlike, you know, you're doing caffeine or
13 sugar. You know that you are already using
14 something that's unlawful to possess. And I
15 think that helps clarify the -- the boundaries
16 of the prohibited conduct.

17 Two is the post-ratification history
18 is worlds apart, as the questioning with
19 Justice Alito illustrated. There is no
20 post-ratification history or a history of
21 saying habitual drunkards but also anyone who
22 casually drinks on Fridays or sort of who --
23 who drinks -- who drinks at parties can be
24 disarmed. That is starkly different from the
25 tradition with respect to illegal drug users.

1 Now Respondent has pointed out that
2 some of them cover addicts, but I think the
3 clearest ones that I would give you that
4 definitely cover unlawful drug users and hark
5 to the time that the problem existed are states
6 like Hawaii, Maryland, Maine, Minnesota,
7 Missouri, Nevada, New York, Ohio, Tennessee,
8 Utah, West Virginia. There's a bunch of them.
9 I could go on with respect to other ones. I
10 think those are the clearest.

11 And that shows that there is a
12 historical judgment that illegal drugs are
13 different, again, for kind of the reasons we
14 talked about for the Controlled Substances Act.
15 There's a judgment that because of their
16 dangerousness, because of the abuse potential,
17 because of other effects, they're unsafe at any
18 level, and it's really hard to figure out at
19 what point does that come.

20 JUSTICE KAVANAUGH: Do you agree that
21 there's -- more of the state laws, though,
22 target addiction than a simple user?

23 MS. HARRIS: I'm not sure I would
24 concede that. I think it's a little hard to
25 parse exactly what all of them cover. I think

1 a lot of them do cover addiction, but a lot of
2 them also cover unlawful users.

3 And I'm not sure that would be
4 dispositive when, if you're looking for a
5 post-ratification consensus, you'd have to take
6 the position that, like, all of these laws that
7 are pretty longstanding for people who are mere
8 habitual users of illegal drugs are
9 unconstitutional.

10 JUSTICE KAVANAUGH: Assume, even
11 though I think you disagree, I know you
12 disagree, assume for a second that there is a
13 history of drug addiction, drug addicts being
14 disarmed, but not so much for users. Just
15 assume that for a second.

16 Then I go to how you define the terms
17 in this case, and this is picking up on
18 something Justice Gorsuch was just asking, but
19 it seems how you define "drug user" merges with
20 "addict" in the sense that you've added the
21 word "habitual," and then, when you turn to the
22 definition of "addict" in the Controlled
23 Substances Act, it does say someone who
24 habitually uses any narcotic drug so as to
25 endanger the public morals. That's enough.

1 And I don't know how a habitual user
2 is distinct from a habitual user who endangers
3 the public morals.

4 MS. HARRIS: Right.

5 JUSTICE KAVANAUGH: So, if that's
6 true, the two definitions merge, that helps you
7 on the history if I'm right in the hypothetical
8 I posed about the history being really targeted
9 at addicts.

10 MS. HARRIS: A couple responses. One
11 is we resist the idea that the Controlled
12 Substances Act definition itself is ported
13 over. The part of the Controlled Substances
14 Act that is textually ported over is just the
15 definition of illegal drugs. That's because
16 the definition only covers narcotics. That
17 would be a real problem for us in defining who
18 is an addict versus an unlawful user.

19 Second, with respect to how clear is
20 the definition, I mean, I would remind the
21 Court the case comes to the Court with the
22 proposition universally accepted by the court
23 of appeals that someone who repeatedly uses
24 marijuana multiple times a week is in the
25 heartland of an unlawful user. And when you're

1 trying to tease out who is an unlawful user
2 versus addict, I agree with you it helps --

3 JUSTICE KAVANAUGH: And why are they
4 not in the heartland of an addict? So just
5 parse that out for me.

6 MS. HARRIS: Because it is not clear
7 whether Mr. Hemani could voluntarily cease the
8 conduct. Addict is defined by sort of an
9 internal compulsion to use. An addict can
10 include someone who isn't actively using right
11 now but has an uncontrollable compulsion to use
12 whenever they get access to the substance.

13 JUSTICE KAVANAUGH: So is "addict"
14 misdefined in the Controlled Substances Act
15 then?

16 MS. HARRIS: It's defined correctly
17 for the purposes of that Act, but Congress did
18 not port that definition over into 922(g)(3)
19 because, again, the only thing it ports over is
20 the controlled substance.

21 And this is not sort of an unusual
22 view. It's what the court of appeals have
23 recognized based on the dictionary definitions,
24 that this is an overlap -- it may well be
25 overlapping categories of people, but we're

1 giving them distinct meaning, and that this is
2 something that constrains the government in
3 prosecutions. And an unlawful user is judged
4 by a high frequency of use. That's the
5 objective test.

6 JUSTICE KAVANAUGH: Let me, on a
7 different front, mens rea. How does mens rea
8 work here given Rehaif? What do you have to
9 prove that the defendant knew about habitual?

10 MS. HARRIS: Here's what you have to
11 do. One, you have to know that you're using an
12 illegal drug, and I think that's an important
13 constraint just right out of the gate.

14 Two, you have to know that you're
15 using with -- how many times you're using it.
16 You don't, in the government's view, have to
17 know the legal definition of "habitual." But
18 you do have to know, like, if I use marijuana
19 four times a week, I have to know I use
20 marijuana four times a week. So the conduct
21 that would put me in the category of habitual,
22 I must know.

23 I think these are virtues of the
24 approach here. The government doesn't normally
25 like Rehaif a lot, but in this particular

1 context, I think it helps impose meaningful
2 limits. To the extent the Court is concerned
3 with how broadly "unlawful user" goes above and
4 beyond the constraints courts of appeals have
5 identified -- and this is something Chief Judge
6 Colloton also pointed out -- the knowing
7 requirement does work here. That is important.

8 JUSTICE KAVANAUGH: Do you think the
9 government could prohibit a habitual drug user
10 from owning a car?

11 MS. HARRIS: Owning a car? I think
12 that -- I guess there would be various -- there
13 would be various challenges with respect to
14 takings and other types of property, and I
15 think you would have a different -- probably
16 not, but the question for Second Amendment
17 purposes is a different one, which is, are you
18 someone who presents a special danger of misuse
19 in that tradition?

20 So, for takings purposes or whatever
21 else the constraints are in that --

22 JUSTICE KAVANAUGH: Let's just -- it's
23 a danger to have drug users, obviously, driving
24 cars.

25 MS. HARRIS: And I don't think you

1 would find a history and tradition of saying --
2 I mean, I think you could say there's a
3 tradition of confinement and other
4 restrictions, but with respect to the Second
5 Amendment, the question is, do you present a
6 special danger of misuse for firearms because
7 of a historical category? Just like, for
8 felons, you probably wouldn't say you can't
9 have a car, but as the Court has recognized
10 from Heller onwards, it's presumptively lawful
11 to identify felons and the mentally ill as
12 categories that may present a special danger of
13 misuse.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: So, Ms. Harris, when
18 you were going through with Justice Kagan the
19 considerations in the Controlled Substances Act
20 for winding up on one of the schedules, there
21 are a panoply, right, and you can wind up for
22 one reason and maybe not for another.

23 Is proclivity to violence expressly
24 one of the things that's taken into account in
25 putting a drug on the schedule?

1 MS. HARRIS: It is not in the
2 statutory criteria. The way I do think it
3 often works out is the DEA may provide evidence
4 with respect to the drug in connection with
5 crimes, but, obviously, it's not one of the
6 fixed statutory criteria.

7 Again, I don't think that's a problem
8 for the reasons we've discussed, which is you
9 also don't have findings with respect to the
10 mentally ill or other categories like --

11 JUSTICE BARRETT: I mean, I -- I
12 understand that. I think where I'm stuck, I --
13 I agree with you that you don't need to have
14 just alcohol because that's all there was at
15 the finding and that would be trapped in
16 under -- amber. Let's say that I think that
17 the principle is, if you have reason to know
18 that someone would pose a risk of violence, is
19 dangerous, that the -- the legislature can
20 disarm.

21 I guess, when I look at these drugs,
22 however, I mean, Robitussin, Ambien, Tylenol
23 with codeine, testosterone, Adderall, I mean,
24 none of those drugs strike me -- I mean, I --
25 I'm not a pharmacologist, but none of those

1 drugs strike me as drugs for which it is
2 obvious that a risk of violence would ensue.

3 Is it your position that all of the
4 drugs that I just mentioned would pose a risk
5 of violence and dangerous behavior?

6 MS. HARRIS: So what I'm saying is
7 those drugs in Schedule 4 and Schedule 5 --

8 JUSTICE BARRETT: Oh, actually,
9 Adderall is in Schedule 2.

10 MS. HARRIS: Okay. Just with -- yes,
11 I -- sorry, I'm less familiar with Adderall
12 on -- on the scheduling. But, with respect to
13 these categories of drugs, whichever schedule
14 they're on, you have to be using them
15 habitually and not for their prescribed
16 purpose.

17 So, yes, our position is, if you are
18 in that category, you are doing something that
19 is --

20 JUSTICE BARRETT: So it's the
21 lawfulness? Because what if you're a college
22 student and you take your roommate's Ritalin
23 twice a week because you think it's going to
24 help you take exams?

25 MS. HARRIS: Yeah. And I think we're

1 going to get to a place where you're into
2 Ketamine and other drugs, Ketamine being
3 Schedule 3. It's a lesser version of PCP.
4 And --

5 JUSTICE BARRETT: So the problem is
6 that if you take Adderall, then you slide into
7 other drugs?

8 MS. HARRIS: I think it is a problem
9 of who decides what the adequate proxy for
10 dangerousness is. And if you wanted to go on
11 a --

12 JUSTICE BARRETT: But -- but -- but
13 you said -- and -- and I think it's clear when
14 you look at the Controlled Substances Act,
15 dangerous is not necessarily the primary reason
16 why or even a reason why all of these drugs
17 land on the list.

18 And so I guess my concern is let's say
19 that I think Congress could make a
20 determination, maybe, I don't know, I mean,
21 there was just an article in the New York Times
22 about the dangers of marijuana, and, you know,
23 maybe that's true. Maybe THC concentrations
24 are higher nowadays and that does have bad
25 effects on -- bad mind-altering effects and

1 maybe it gives rise to violence. I just don't
2 see that -- my -- my -- my concern, and maybe
3 you can dispel it, my concern is I just don't
4 see that that determination was made here.

5 MS. HARRIS: I guess I would point you
6 to, again, if you wanted comfort with respect
7 to marijuana in particular, the whole history
8 of rescheduling the determinations made with
9 respect to that substance, et cetera.

10 And I think the other thing to
11 consider is, if you were going --

12 JUSTICE BARRETT: And where does it
13 say that it leads to violence --

14 MS. HARRIS: There are --

15 JUSTICE BARRETT: -- in the history?

16 MS. HARRIS: Well, first of all, I
17 guess I would point to the Court's cases,
18 which -- which -- many of which have -- are
19 cases in which there is a strong connection
20 between marijuana use and violence, but I would
21 just take a step back and say, if that is the
22 key, if you have to have some determination
23 that, say, the mentally ill or a particular
24 drug present a risk of dangerousness as opposed
25 to the common sense in -- common-sense notion

1 backed by all of this evidence, backed by these
2 processes, that when you are frequently using
3 these mind-altering substances, you are in the
4 class of people who present a special danger of
5 misuse just so long as you're habitually doing
6 it, I think that's more of a guardrail.

7 There's no such thing for habitual
8 drunkards. No one was going around saying
9 habitual drunkards are as a class unsafe
10 because the justice of the peace isn't saying
11 this particular habitual drunkard is too unsafe
12 to do anything.

13 JUSTICE BARRETT: Actually, I'm glad
14 you asked that. This is my last question.
15 This goes back to your colloquy with Justice
16 Alito, and you were talking about how as
17 applied challenges would be unworkable.

18 What about as applied challenges --
19 you know, let's put aside the possibility of as
20 applied challenges being required as to each
21 individual defendant, you know, an as applied
22 challenge to Mr. Hemani in particular.

23 What about an as applied challenge
24 just to that particular drug? Why -- why can't
25 Mr. Hemani simply say, you don't have to take

1 into account all of my personal circumstances,
2 but, you know, government, I would like to put
3 you to your proof about whether marijuana has
4 an established link to violence?

5 MS. HARRIS: Right. And I think, if
6 you look at the Third Circuit's opinion in
7 Harris, the kind of questions that you would
8 adduce to answer that question, unless you are
9 not willing to accept a connection, the
10 intuitive and historically grounded connection
11 between intoxicating substances and the dangers
12 they present and the idea that they are, in
13 fact, dangerous and might lead to violence, I
14 think you have a real problem with respect --

15 JUSTICE BARRETT: So the person with
16 Robitussin shouldn't be able to -- who's caught
17 with Robitussin and -- and uses it for coughing
18 and sleeping, you know, three nights a week,
19 that person can't make an as applied challenge?

20 MS. HARRIS: I think the government is
21 willing to entertain the idea, as we would
22 with, like, sugar or caffeine, that if -- if
23 there is not -- if there is not sort of a
24 factual record, but I think here, again, you
25 can either carve out Schedule 5 or do some

1 other things that the --

2 JUSTICE BARRETT: So you're not
3 rejecting out of hand the the possibility of as
4 applied challenges to the particular drugs,
5 you're just resisting that it would apply as to
6 marijuana?

7 MS. HARRIS: I'm resisting the idea
8 that it could be constitutionally required for
9 Second Amendment purposes because I think you
10 would be fundamentally altering the Rahimi
11 framework in a problematic way by discounting
12 the ways in which the modern analogue of
13 922(g)(3) is more tailored and only focusing on
14 the idea that you need, like, some exact
15 comparator as if you could go back in time and
16 figure out exactly the mental effects of
17 intoxication to feel -- figure out how violent
18 someone is. I think that's an impossibility.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: So I guess maybe I
22 just don't understand how the tests work
23 anymore. Maybe it's post-Rahimi, I'm not sure,
24 but it seems like you're asking us to trust
25 Congress's legislative judgment here that

1 unlawful drug users pose a heightened risk of
2 misuse but that this test really doesn't
3 provide us a way to check that in any
4 meaningful sense.

5 And -- and I guess the benefit of the
6 pre-Bruen kind of means-end scrutiny is that
7 you got to the bottom of whether what Congress
8 was actually doing here was legitimate and
9 whether the means that they had chosen, the
10 disarmament of this person, was tailored,
11 sufficiently tailored, to that aim.

12 And what's worrying me is that the
13 current Bruen test modified by Rahimi or
14 whatnot is not allowing us to assess that, and
15 that's really the problem in this situation,
16 that the concerns, the questions that you're
17 being asked seem to all relate to people's
18 concern that even if we all agree that Congress
19 can legislate to disarm people who are
20 dangerous as a general matter, that this person
21 in this circumstance really is not dangerous.

22 And -- and your test doesn't seem to
23 get to allow us the way we're -- we're --
24 you're talking about it to assess that. Can
25 you help me with -- with how the means-end

1 scrutiny analysis is being folded into Bruen?

2 MS. HARRIS: Sure. I don't think the
3 means-ends analysis is or should be folded into
4 Bruen.

5 JUSTICE JACKSON: But then how do we
6 keep it from having this very situation where
7 it just boils down to us believing what the
8 modern Congress says about whether or not
9 someone is dangerous?

10 MS. HARRIS: We would also reject the
11 trust us position.

12 JUSTICE JACKSON: Okay.

13 MS. HARRIS: Here's the guardrails
14 again. I think I would start with
15 post-ratification history because history is
16 the touchstone of the Bruen inquiry and the
17 Court has repeatedly recognized that when you
18 have a principle from the founding with respect
19 to how to classify which kinds of people
20 present a special danger of misuse, it's not a
21 law trapped in amber situation. You don't have
22 to accept the founding generation's judgments
23 as to exactly who is or is not dangerous.

24 JUSTICE JACKSON: Right, but your
25 principle --

1 MS. HARRIS: But, when --

2 JUSTICE JACKSON: -- is just the
3 Congress -- the -- the -- the founding era
4 identified certain people as dangerous. Your
5 principle has to be specific enough to allow us
6 to adequately or accurately match it.

7 MS. HARRIS: Yes.

8 JUSTICE JACKSON: If it's not, then it
9 really doesn't do any work to look at the
10 founding. We just look at today's judgments
11 and we do the kinds of policy analysis that we
12 used to do, which is basically what I hear you
13 saying back and forth with Justice Barrett,
14 right?

15 We're just looking at -- like you say
16 there's a really good reason to do this and
17 Congress's judgments are grounded in important
18 policy determinations. All that's true, but
19 that's not what the Bruen test is asking us to
20 do.

21 MS. HARRIS: Respectfully, I'm not
22 saying Congress is doing great work here. I'm
23 saying that the tests are in addition to
24 post-ratification history, which tells you the
25 principle is a lot more specific than here's a

1 dangerous category of people, you know, have at
2 it.

3 JUSTICE JACKSON: So what is the
4 specific thing about habitual drunkards as a
5 category obviously identified at the founding
6 that is parallel to the every other day
7 marijuana user here?

8 MS. HARRIS: It is that when you
9 habitually use intoxicating substances, you can
10 present special dangers that weren't
11 confinement or imprisonment or other restraints
12 that are greater than what 922(g)(3) is doing.

13 JUSTICE JACKSON: Yes. But you're
14 just defining "habitual user" differently in
15 those two situations. I mean, you -- you --
16 you've just defined away the problem. Yes,
17 fine, when you habitually use, but the founding
18 people said, when you habitually use, you're
19 falling down drunk in the street, it's -- it's
20 like, you know, whatever Justice Gorsuch
21 identified at the beginning, that's what it
22 means to be a habitual user back then, and,
23 therefore, it presents a category of
24 dangerousness.

25 That's not what we have here. So you

1 can't just redefine it and still say there's a
2 match.

3 MS. HARRIS: So two problems with
4 that. One is, again, I think if you think that
5 there's not a close enough fit between the
6 principle I identified and the judgment of
7 post-ratification history of many states that
8 for a long time have treated unlawful illegal
9 drug users as of a piece, then you have a real
10 problem with Rahimi itself because --

11 JUSTICE JACKSON: Well, that may be
12 it. I mean, I -- I guess I'm concerned that
13 Bruen and Rahimi are going to be allowing for
14 arbitrary identifications of analogues and
15 producing inconsistent results.

16 You were here in January with respect
17 to the WOLFORD case when you argued that
18 historical antipoaching laws were different
19 enough from what Hawaii was doing that it's
20 unconstitutional. Here you're arguing that
21 historical laws that have nothing to do with
22 guns, very little to do with unlawful users of
23 intoxicants as -- you know, was going on in the
24 history, are similar enough to cause this law
25 to be unconstitutional.

1 I don't understand how this works
2 anymore in any meaningful way.

3 MS. HARRIS: Okay. Wolford is a case
4 about a handful of founding-era putative
5 analogues that missed out on what we considered
6 to be the relevant principle, which --

7 JUSTICE JACKSON: Yes, where you
8 considered -- what I'm asking you is how does
9 that -- how do we know what is the relevant
10 principle --

11 MS. HARRIS: Okay. Again --

12 JUSTICE JACKSON: -- here versus
13 there?

14 MS. HARRIS: -- I think there's a
15 couple ways of figuring it out. One is with
16 respect to how it's liquidated in
17 post-ratification history. I think it is a far
18 superior approach than what Justice Gorsuch
19 aptly described in his Rahimi concurrence as a
20 sort of free-for-all in which courts of appeals
21 are imposing -- or having free wheel to impose
22 their own policy preferences. So I think that
23 is an important check.

24 Two, we're not just saying trust us,
25 Congress. We're saying the process by which

1 you test whether illegal drugs are illegal are
2 deemed dangerous in whatever it is, the range
3 of things, is something that provides a check
4 for a specific fact-finding that well exceeds
5 the kinds of individual -- the determinations
6 that were made with respect to being a habitual
7 drunkard at the framing.

8 It seems like people have an idea of
9 habitual drunkards as, like, a very defined
10 class. That was not true. Habitual drunkards
11 were within the judgment of a justice of the
12 peace or a magistrate with respect to some of
13 their own personal experience. There's no
14 judgment that, like, a habitual drunkard is
15 specifically dangerous.

16 The Ludwick decision shows that the --
17 the mine-run of cases are not even saying
18 someone was incapable of handling their own
19 affairs.

20 JUSTICE JACKSON: Thank you.

21 MS. HARRIS: But that is a helpful
22 check.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Ms. Murphy.

2 ORAL ARGUMENT OF ERIN E. MURPHY

3 ON BEHALF OF THE RESPONDENT

4 MS. MURPHY: Mr. Chief Justice, and
5 may it please the Court:

6 The question in this case is a narrow
7 one. Can the "unlawful user" prong of
8 922(g)(3) be constitutionally applied to Ali
9 Hemani? The answer is no. In fact, it can't
10 constitutionally be applied to anyone because
11 the statute fails to provide fair notice of
12 what makes someone an unlawful user of a
13 controlled substance who can be stripped of
14 their Second Amendment rights. But even
15 assuming the statute could be applied to
16 Mr. Hemani consistent with due process, it
17 could not be applied to him consistent with the
18 Second Amendment.

19 The government reads the "unlawful
20 user" prong to cover anyone who is engaged in
21 habitual use of a controlled substance. But
22 the only historical tradition it has offered is
23 one of imposing restrictions on habitual
24 drunkards. That entire line of argument rests
25 on a category mistake, because the laws to

1 which the government points applied only to
2 habitual drunkards, not to habitual drinkers.

3 Indeed, the whole point of the
4 doctrine was to distinguish those who consumed
5 alcohol frequently but mostly in moderation,
6 from those who so habitually consumed alcohol
7 to the point of intoxication as to impair their
8 ability to function even in whatever moments of
9 sobriety they may have had.

10 And that distinction was critical, as
11 deeming anyone who regularly consumed alcohol a
12 habitual drunkard would have given the
13 government sweeping power to subject much of
14 the populus to hard labor, guardianship, civil
15 commitment, and incarceration.

16 Now, to be sure, the habitual drunkard
17 tradition may well support disarming people who
18 are addicted to a controlled substance, which
19 is, in fact, the dominant approach in the
20 states today. And perhaps it could justify a
21 categorical approach as to certain substances
22 if the government is able to actually prove
23 that a particular substance is, in fact, so
24 addictive and dangerous as to make anyone who
25 regularly consumes it akin to a habitual

1 drunkard of yore.

2 But it cannot support disarming
3 someone based solely on the fact that it
4 consumes a few times a week something that
5 Congress has designated a controlled substance.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: The government takes
8 the view that -- or seems to suggest that your
9 argument boils down to a facial challenge on
10 the -- of the statute.

11 MS. MURPHY: We are making the
12 argument that it is unconstitutional as applied
13 to Mr. Hemani. Some of the arguments that we
14 make may mean that it is unconstitutional as
15 applied to a lot of people or even perhaps most
16 people, but we are not pointing to some
17 deficiency in the statute that's not applicable
18 to Mr. Hemani and saying that that's a reason
19 to invalidate it.

20 And at the end of the day, we don't --
21 I mean, my client just wants to see the
22 decision below affirmed. Whether that's done
23 on facial or as-applied grounds is -- is not of
24 particular importance to us.

25 CHIEF JUSTICE ROBERTS: Well, I know

1 your client just wants to prevail, which is
2 understandable, but your argument it seems to
3 me -- I mean, why doesn't it apply to any drug,
4 whether it's PCP, methamphetamine, whatever?

5 It seems that -- again, to the extent
6 that you're overriding the judgment of Congress
7 and the executive branch with respect to the
8 listing of particular drugs, I don't know why
9 that -- that same approach doesn't apply to any
10 drug?

11 MS. MURPHY: So we think the same
12 principle should govern in -- with respect to
13 any drug, but that doesn't mean that the
14 statute is unconstitutional as to every drug.
15 If you take the principle underlying -- as to
16 habitual drunkards, the concept that the
17 statutes back then required, is somebody
18 drinking to such excess that they can't care
19 for themselves or their affairs, that they've
20 lost self-control, that they're posing a public
21 safety risk, if you apply that, there are going
22 to be some substances where it may be that
23 pretty much anybody who uses them regularly --

24 CHIEF JUSTICE ROBERTS: So we're going
25 to -- we're going to assess those on a

1 case-by-case basis and apparently on an
2 individual-by-individual basis?

3 MS. MURPHY: Actually, we are -- we --
4 we -- we are happy for the government to have
5 two options. They can present -- it can do it
6 on an individualized basis, which is exactly
7 what the statute contemplates as to "addicted
8 to." I mean, you have to engage in an analysis
9 of someone's actual use to figure out whether
10 they're addicted to a controlled substance.

11 But if the government wants to try to
12 say a particular substance is so categorically,
13 you know, addictive, dangerous that you can't
14 use it regularly, okay, but it has to do that
15 under the burden of proof that Bruen assigns
16 it, of proving that the category it has
17 identified maps onto that category of habitual
18 drunkard. It's not enough to just come in and
19 do APA, discretionary, government gets the
20 benefit of the doubt review because that's
21 eliminating the burden of proof that is --

22 JUSTICE SOTOMAYOR: So Ms. Murphy --

23 CHIEF JUSTICE ROBERTS: I think --

24 MS. MURPHY: -- required by the
25 government.

1 CHIEF JUSTICE ROBERTS: Well, I was
2 just going to say I don't understand the
3 determination in every -- every case. But also
4 for other examples, you have the New Year's Eve
5 example. You can't, you know, shoot a gun on
6 New Year's Eve and all that. It does indicate
7 there's some categories of use that were
8 prohibited at -- at the -- at the founding,
9 whether it's habitual drunkards in -- in terms
10 of the illegal use based on particular
11 individuals or categories or geographic
12 limitations. Like today, we don't allow people
13 to bring guns into courthouses even if they can
14 say, look, I've never used it un- -- unsafely
15 or, you know, similar types of restrictions.

16 And you say, well, no, those are going
17 to have to be litigated on a case-by-case
18 basis, in every individual instance, is this --
19 and that's going to be hashed out in court, is
20 this drug one that's particularly dangerous or
21 particularly addictive?

22 And it just seems to me that takes a
23 fairly cavalier approach to the necessary
24 consideration of expertise and the judgments we
25 leave to Congress and the executive branch.

1 MS. MURPHY: So I want to be clear
2 about two things. First, we are not saying --
3 we're not arguing that the Second Amendment
4 doesn't allow for categorical prohibitions.
5 That is not our position. And we're not even
6 arguing that Congress couldn't perhaps have
7 categorical restrictions as to particular
8 substances.

9 Our core point is if Congress wants to
10 do that, then the government needs to prove
11 with its burden of proof under Bruen not just
12 that this was a reasonable determination
13 supported by substantial evidence that gets
14 past APA review with highly discretionary,
15 we'll assume the government knows what it's
16 talking about, that it has, in fact, identified
17 the category in a way that maps onto the
18 historical tradition it is --

19 JUSTICE SOTOMAYOR: So Ms. --

20 JUSTICE ALITO: Well, Ms. Murphy, I
21 don't really -- I don't understand what you
22 just said. 922(g) sets out various categories
23 of people who are prohibited from possessing a
24 firearm.

25 And I thought you began what you just

1 -- I thought you said to start out that a
2 categorical approach is permitted. Is that
3 correct? So -- or are you saying that as to
4 everybody in all of those categories, there
5 must be an individualized showing when that
6 person is prosecuted?

7 MS. MURPHY: -- we accept that the
8 government can take categorical approaches. I
9 think you're going to have to look at each --
10 any given prohibition and examine the history
11 behind it to determine what categorical
12 approach can be taken, but we're -- we are not
13 here to suggest that the only time the
14 government can ever restrict the exercise of
15 rights --

16 JUSTICE ALITO: Okay. So as -- as to
17 at least some of these categories, there's no
18 right to an individualized determination under
19 the Second Amendment? Is that what you're
20 saying?

21 MS. MURPHY: I mean, I think that, you
22 know, you could have a discussion and a case
23 involving certain provisions about the need for
24 as applied challenges, some way to allow
25 somebody to show that, you know, yes, you might

1 have the category right as a general matter,
2 but I am somebody who happens to be outside it.
3 But I think that that's something you confront
4 once you've determined that the government got
5 the category right, which is the threshold
6 question, did they get the category right as
7 compared to the historical tradition that they
8 are in.

9 JUSTICE ALITO: So I -- I'm not -- I
10 don't completely understand -- understand that.
11 Can -- is it -- can -- must there be an
12 individualized determination as to anybody who
13 is prosecuted under any of the subsections of
14 922(g)? Yes or no?

15 MS. MURPHY: No.

16 JUSTICE ALITO: No? Okay.

17 MS. MURPHY: That is not our position.

18 JUSTICE KAGAN: Suppose, Ms. Murphy,
19 Congress tomorrow says, you know, we're afraid
20 that this Controlled Substances Act is not
21 really doing it for us in this area, so we're
22 going to come up with a list of particular
23 drugs that we -- we want to be able to take
24 away people's guns.

25 And the first on that list -- I'm

1 going to say I don't know a lot about this
2 drug, I'm assuming you don't know a lot about
3 this drug, so what I'm going to tell you about
4 this drug let's just assume is the truth about
5 this drug.

6 MS. MURPHY: Fair enough.

7 JUSTICE KAGAN: So it's -- the drug is
8 Ayahuasca, and it's a very, very, very intense
9 hallucinogen, and the -- the episode lasts a
10 very long time. But it's not, let's say, an
11 addictive drug. You know, you can choose when
12 to take it. But, when you're in its grip,
13 like, you basically -- reality dissolves, all
14 right? And I'm assuming that Congress has a
15 good reason for saying, when reality dissolves,
16 you don't want guns around.

17 So -- but that to me, when you give
18 the description of the historical analogue, to
19 me, that's going to fail your test. Should it
20 fail your test?

21 MS. MURPHY: Not necessarily. I guess
22 I would say two things. First, obviously, we
23 agree that -- that you can be prohibited from
24 carrying while you're taking that drug, but --
25 but I don't think -- I don't think it stops

1 there.

2 JUSTICE KAGAN: Well, it's not -- it's
3 not a question of carrying. It's like, you
4 know, there you are in your house, you have a
5 gun in your house as well, so you're owning a
6 gun even though you use this drug, let's say,
7 once every two weeks.

8 MS. MURPHY: Yeah, I think that it
9 would be a little bit difficult to -- to show
10 that merely using that drug every few weeks is
11 going to be enough to render you akin to the
12 concept that the historical drunkard laws were
13 getting at, which is that your consumption
14 rendered you -- we're not saying that you had
15 to be intoxicated all the time, but your
16 consumption impaired your ability to function
17 even in your moments of sobriety.

18 That's what the courts are talking
19 about. They're asking whether -- it doesn't
20 have to be addiction, it can be addiction
21 certainly, but it could also be you're
22 consuming so frequently that, you know, that's
23 really all you do during the day, you're not
24 functioning, and --

25 JUSTICE KAGAN: Yes. So -- so it's

1 definitely going to fail your test, though.

2 MS. MURPHY: It -- it -- it may. It
3 may not. I think, you know, you'd have to look
4 at what -- what the lasting --

5 JUSTICE KAGAN: On my facts, it will,
6 right?

7 MS. MURPHY: -- how lasting the impact
8 is. But, if a person is -- if -- if what
9 you're essentially saying is there's a
10 substance that leaves a person impaired once
11 every two weeks, but the other 13 days of those
12 two weeks they are perfectly fine, I don't
13 think it's consistent with the historical
14 tradition the government has invoked.

15 Just as I don't think that tradition
16 would support incarcerating that person,
17 subjecting them to guardianship, or committing
18 them to a drug treatment facility.

19 JUSTICE ALITO: Well, what if a
20 person --

21 CHIEF JUSTICE ROBERTS: Well --

22 JUSTICE ALITO: I'm sorry.

23 CHIEF JUSTICE ROBERTS: I was just
24 going to say you're -- I mean, the hypothetical
25 focused on a particular time period, but I

1 think it could be used every -- every week, not
2 just every third week or every other day, and,
3 again, I think that's something -- the judgment
4 about that, you say that that's going to be
5 made in court.

6 MS. MURPHY: And -- and that kind of
7 judgment gets made in court all over the
8 country all the time in the hearings that are
9 routinely held to decide whether somebody can
10 be subject to things like guardianship or civil
11 commitment because of their substance abuse.

12 CHIEF JUSTICE ROBERTS: Well, but
13 they're made under the determinations set forth
14 by Congress and the executive in statutes. You
15 don't -- you know, it turns -- if -- if they
16 want to categorize this particular drug as
17 something that's dangerous, that's not enough
18 for you.

19 MS. MURPHY: Well, that's not enough
20 for the types of civil commitment and
21 guardianship laws the government's pointing to
22 either. It -- it is not enough to just walk
23 into state court and say: This person
24 sometimes uses a controlled substance and then
25 you say okay, therefore, we will commit them to

1 treatment for substance abuse.

2 There is a process that has been
3 developed in courts that requires all sorts of
4 individualized inquiries into the nature of
5 someone's use and whether it, in fact, renders
6 them a danger to themselves and others on a
7 regular basis.

8 CHIEF JUSTICE ROBERTS: There's a
9 broad range of determinations like that where
10 we leave the question of its addictive
11 difficulties and the consequences of -- of that
12 to a determination by the legislature with the
13 Schedule 1, Schedule 3, and all that, and in
14 each case, you don't get in and get to reweigh
15 the legislative determination.

16 MS. MURPHY: But the point is to get
17 to the types of restrictions the government is
18 pointing to as its analogues being able to say
19 your use of a substance has become so extreme
20 that you can be appointed a guardian, you can
21 be committed for treatment.

22 I mean, alcohol was never illegal at
23 those times. So it's not enough that someone's
24 made a determination about the substance. What
25 you had to look at was how the use of that

1 substance was impacting somebody's ability to
2 function in their day-to-day life.

3 JUSTICE JACKSON: Ms. Murphy --

4 JUSTICE KAGAN: This might be a
5 strange question, Ms. Murphy, but do you think
6 a Congress that really wants to get this
7 Ayahuasca drug, you know -- you know, really
8 wants to disarm people who use it, could they
9 pass a statute that says something like this:
10 You know, here are the findings. The findings
11 are we live in a post-Bruen world.

12 And it's been pointed out to us that
13 the best analogues are these habitual drunkard
14 statutes. And Congress -- so Congress says, so
15 we're going -- we think -- we've looked at all
16 these statutes and we've looked at the
17 modern-day evidence, and Ayahuasca fits our
18 idea of what the habitual drunkard statutes
19 we're getting at.

20 Now, as we just talked about, it
21 doesn't fit your idea. In other words, it's --
22 I'm just going to stipulate that it doesn't
23 meet your test. Could Congress say it meets
24 our test, thanks, and that's good enough?

25 MS. MURPHY: I think, at that point,

1 you've sort of abandoned the Bruen inquiry of
2 saying it has to actually map onto historical
3 tradition and you're in the world of simply
4 saying Congress can make its own reasonable
5 determinations about who is and is not
6 dangerous.

7 Now, you know, I -- I appreciate
8 there's some on this Court who may think that's
9 the better approach, but I do -- do think --

10 JUSTICE SOTOMAYOR: I think I
11 signed --

12 MS. MURPHY: -- once that's all you're
13 asking, you have -- you are no longer assessing
14 the question vis-à-vis a historical --

15 JUSTICE SOTOMAYOR: I -- I signed onto
16 that.

17 MS. HARRIS: Understood, understood.

18 JUSTICE JACKSON: Well, Ms. Murphy --
19 Ms. Murphy, isn't --

20 JUSTICE BARRETT: Ms. Murphy --

21 JUSTICE SOTOMAYOR: However, I do want
22 to follow up on something that Justice Kagan
23 asked. I think the government gave this away
24 when it said that there was no determination by
25 the legislature on the dangerousness of the

1 drug with guns in terms of listing it on the
2 schedules.

3 So doesn't that give away the whole
4 game for them?

5 MS. MURPHY: I -- I think it goes to
6 show why this Court would have to do or a court
7 would have to do its own inquiry, because
8 the bare fact --

9 JUSTICE SOTOMAYOR: But why bother?
10 Meaning, if Congress -- we can only uphold the
11 law if there is something to defer to.

12 MS. MURPHY: Correct.

13 JUSTICE SOTOMAYOR: But, if no one has
14 actually done the analysis whatsoever --

15 MS. MURPHY: Correct. And I think it
16 is a fair point, you know, I think it's a
17 correct concession on the government's part
18 that the Controlled Substances Act does not
19 reflect a determination that every substance
20 that is labeled a controlled substance is too
21 dangerous for people to regularly consume.

22 JUSTICE ALITO: Well, didn't
23 Congress --

24 MS. MURPHY: In fact, it represents
25 the opposite.

1 JUSTICE SOTOMAYOR: We can't -- we
2 can't make that -- given for all the reasons
3 that Justice Barrett pointed out, all the
4 different scheduling, you can't really say that
5 every single drug on there Congress could have
6 reasonably, rationally, whatever.

7 MS. MURPHY: Congress, I mean, the
8 point of the scheduling is to say some of these
9 substances, even though controlled substances,
10 are capable of being used regularly in
11 moderation without making somebody a walking
12 public safety risk.

13 So, if you are serious about ensuring
14 that the modern, you know, the modern law fits
15 that historical understanding, this law doesn't
16 even reflect Congress's determination that
17 everything designated a controlled substance is
18 inherently the kind of thing that cannot be
19 used responsibly or in moderation.

20 JUSTICE JACKSON: And, Ms. Murphy, I
21 thought your point --

22 JUSTICE BARRETT: Ms. Murphy --

23 JUSTICE JACKSON: I thought your point
24 was that even if it had, even if it did,
25 deferring to Congress with respect to that kind

1 of judgment is what Bruen tells us we're not
2 supposed to do, that you would be abandoning in
3 a sense the Bruen test to kind of take the
4 Chief Justice's what I think reasonable view
5 of, you know, thinking about what Congress has
6 said and assessing what Congress wants to do
7 and evaluating whether it's doing it in a -- a
8 narrowly tailored way, if we're doing that,
9 then what work does the historical analogue
10 have to do?

11 I thought we had to look at the
12 historical analogue to constrain Congress in
13 its ability to disarm people today.

14 MS. MURPHY: That is -- that is
15 exactly -- I mean, that is our core submission.
16 And the government said multiple times today
17 that they agree, that they have to actually map
18 onto a historical tradition, and if that is the
19 principle --

20 JUSTICE JACKSON: And so the question
21 is, how does that mapping happen? At what
22 level does that mapping happen?

23 MS. MURPHY: Sure.

24 JUSTICE JACKSON: And I hear the
25 government saying it happens just at the level

1 of the old cases were looking at people and
2 making judgments about when they were dangerous
3 and should be committed or whatever. And it
4 can't be that broad, I think.

5 MS. MURPHY: We certainly don't think
6 it can be that broad. I think it has to be
7 attached to a principle. So the principle in
8 Rahimi was not simply Congress decided certain
9 people were dangerous. The Court focused in
10 particular on the fact that that part of (g) --
11 of 922(g) required an individualized
12 determination of dangerousness.

13 Now we're not saying that's the only
14 way you can map onto historical tradition, but
15 it was that. The Court didn't stop at the high
16 level of saying a determination -- you know,
17 that there was just a legislative view of
18 dangerousness. It looked at that
19 individualized inquiry.

20 JUSTICE KAVANAUGH: Well --

21 MS. MURPHY: Here, I think that you'd
22 have to say, okay, you know, what was -- what
23 was the historical principle surrounding
24 dangerous substances, intoxicating substances?
25 And when you have a tradition that's all about

1 ensuring that the regular user doesn't get
2 swept up with the habitual drunkard, I don't
3 think you can point to that tradition and say
4 this is our tradition that allows us to bring
5 the regular user in along with the person whose
6 abusive use is actually impairing their ability
7 to function in their day-to-day life.

8 JUSTICE KAVANAUGH: Can I ask about
9 the tradition with respect to addiction?

10 MS. MURPHY: Yes.

11 JUSTICE KAVANAUGH: Because I think
12 you and the government agree -- I want to find
13 places of agreement here.

14 MS. MURPHY: Yeah.

15 JUSTICE KAVANAUGH: I think you and
16 the government agree that there is a tradition
17 of prohibiting gun ownership, possession, by
18 those who are addicted to drugs, correct?

19 MS. MURPHY: Yes. We agree that the
20 historical -- I mean, you know, we agree that
21 the historical tradition of habitual drunkards
22 can support laws with respect to addiction,
23 which is -- I'm happy to talk about the state
24 laws -- is really the dominant approach that's
25 taken -- had been taken.

1 JUSTICE KAVANAUGH: Well, as my
2 questions indicated, I think you have a strong
3 point there on -- on that being the dominant
4 approach when it -- when it started up.

5 Now then, on this statute, so taking
6 what you just said and applying it to this
7 statute, this statute does cross-reference the
8 Controlled Substances Act, which then does
9 define "addict" as a habitual user so as to
10 endanger the public morals.

11 MS. MURPHY: Yeah.

12 JUSTICE KAVANAUGH: I'll just leave it
13 at that. And my question is, is that
14 definition of "addict" good enough in your view
15 to satisfy the tradition of prohibiting gun
16 ownership, possession, by addicts, and, if not,
17 what is the delta?

18 MS. MURPHY: Yeah. I think that
19 definition pretty -- pretty well maps onto the
20 historical tradition. It's a little bit of an
21 unusual definition because it has these two
22 prongs. It refers to a habitual user as
23 someone whose habitual use either is
24 essentially because they're addicted or just is
25 in endangering public safety.

1 But I actually think, you know, while
2 that may be a bit of an odd way to think,
3 like --

4 JUSTICE KAVANAUGH: It says
5 endangering the public morals too --

6 MS. MURPHY: It does say I think
7 some --

8 JUSTICE KAVANAUGH: -- which means
9 anything.

10 MS. MURPHY: Yeah. Look, if we were
11 here in an "addicted to" case --

12 JUSTICE KAVANAUGH: Right.

13 MS. MURPHY: -- there's some
14 discussion to have about whether some of that
15 language is a little bit broad and a little
16 bit --

17 JUSTICE KAVANAUGH: Right.

18 MS. MURPHY: -- problematic from --
19 from maybe just -- but I think what the -- what
20 the definition is getting at is, if your use is
21 so excessive either because you're addicted or
22 if it's a product of choice, either way, if
23 your addiction is rendering you a threat to
24 yourself and others -- your use is -- your
25 habitual use is rendering you a threat to

1 yourself or others, I think that maps onto
2 historical tradition --

3 JUSTICE KAVANAUGH: So you're good --
4 let me just summarize. You're good with
5 addiction being a tradition and with this
6 definition of "addiction" being good enough?

7 MS. MURPHY: The only --

8 JUSTICE KAVANAUGH: Is that correct?

9 MS. MURPHY: -- minor caveat I will
10 give you is the government has, in fact,
11 accused my client of being a drug addict, so I
12 don't want to foreclose, like, literally any
13 argument that might be made about the "addicted
14 to" prong, but as a conceptual matter --

15 JUSTICE KAVANAUGH: As a legal matter.

16 MS. MURPHY: -- we don't have a
17 problem with the historical tradition
18 supporting the use -- as supporting laws that
19 prohibit drug addicts from possessing firearms.

20 JUSTICE SOTOMAYOR: The government
21 didn't accept that. They said that that
22 definition doesn't control.

23 MS. MURPHY: The -- I think what I
24 heard --

25 JUSTICE KAVANAUGH: Well, they --

1 MS. MURPHY: So --

2 JUSTICE SOTOMAYOR: In fact, They said
3 it had to be more focused.

4 MS. MURPHY: -- I think what I -- if I
5 understood the government, I think they're
6 focused on the fact that the definition
7 specifically refers to narcotic drugs, which is
8 a narrower category than controlled substances.

9 We aren't suggesting that the
10 definition has to be read, like, literally in
11 haec verba into the -- the -- you know,
12 922(g)(3). I think you could say the standard
13 that the definition of "addict" is
14 accomplished -- is -- is setting out for
15 addiction can apply as to a controlled
16 substance.

17 And this is actually the way -- when
18 the government does prosecute under "addicted
19 to," several courts use this as the jury
20 instruction to give content to what the conduct
21 is.

22 JUSTICE KAVANAUGH: So you think we
23 could --

24 JUSTICE SOTOMAYOR: I want -- we
25 interrupted Justice Barrett, and I want to make

1 sure you get back to her.

2 JUSTICE BARRETT: Justice Kavanaugh,
3 you can finish.

4 JUSTICE KAVANAUGH: Go ahead.

5 JUSTICE BARRETT: I was just going to
6 give you a variation of Justice Kagan's
7 hypothetical. I have never heard of the drug
8 that she was -- is that real? Okay.

9 (Laughter.)

10 JUSTICE BARRETT: Let's imagine that
11 it's marijuana, okay? So let's say that you
12 win this case and Congress comes back and
13 says -- you know, it conducts hearings, it
14 hears all this evidence about the
15 concentrations of THC and marijuana that's made
16 today, documents that marijuana users who use
17 it several times a week have a proclivity for
18 violence, violence with firearms, and then
19 passes the same statute with findings along the
20 lines I just sketched out.

21 Can Congress do that consistently with
22 the Second Amendment?

23 MS. MURPHY: So I think you'd have to
24 look at that evidence yourself and decide does
25 it suffice to show that someone fits this

1 pattern if they could show that --

2 JUSTICE BARRETT: I'd have to look at
3 the evidence to see if the person satisfies the
4 pattern or if the --

5 MS. MURPHY: No, the category. If
6 Congress wants to say we're going to do it at a
7 categorical level, then I think you look and
8 say, did they get the category right? I think
9 that --

10 JUSTICE BARRETT: Okay. How do I make
11 that judgment?

12 MS. MURPHY: By look -- by thinking
13 about the -- the test that was applied
14 historically. Is it -- has the government
15 demonstrated that anybody who uses at the
16 degree of this -- you know, that substance in
17 that amount in that frequency is actually a
18 danger not even just when they're using but in
19 their day-to-day life? Are they unable to care
20 for themselves and their affairs? That's the
21 language --

22 JUSTICE BARRETT: Do I have experts?

23 MS. MURPHY: I mean, if the government
24 wants to do it on a categorical basis, it is
25 going to have to prove up its case. If they

1 don't want to do it that way, then applying the
2 same test on an individualized basis should get
3 you to the same result if they define the
4 category correctly.

5 JUSTICE BARRETT: So the judge would
6 then conduct an evidentiary hearing, hearing
7 from experts on both sides about whether
8 marijuana actually --

9 MS. MURPHY: If --

10 JUSTICE BARRETT: -- poses a risk of
11 gun violence?

12 MS. MURPHY: I mean, if the government
13 wants to say we want to set a categorical rule,
14 I don't think it's too much to ask to hold them
15 to put it --

16 JUSTICE BARRETT: Meth? Like, could
17 it do that for meth?

18 MS. MURPHY: I don't -- as to some
19 substances, I think it's not going to be that
20 hard. It's just marijuana, you know, we're all
21 here and these cases arise because marijuana,
22 boy, it would be difficult for the government
23 to make that showing when it is the considered
24 judgment of 40 states, the District of
25 Columbia, three territories, and the

1 President --

2 JUSTICE BARRETT: But you concede --

3 MS. MURPHY: -- that it's not that
4 kind of substance.

5 JUSTICE BARRETT: But you concede that
6 there are some substances that the government
7 would have a pretty easy time on a categorical
8 basis, maybe cocaine, maybe meth?

9 MS. MURPHY: Absolutely. We are not
10 here to suggest that you couldn't ever have a
11 categorical approach as to a particular
12 substance. It's just that if the government
13 wants to do that, I think it has to do it under
14 Bruen, not just --

15 JUSTICE BARRETT: So it could have a
16 categorical approach with respect to Justice
17 Kagan's drug?

18 MS. MURPHY: They can come make their
19 case and then you decide -- you know, I think
20 the right test to apply is, did they define the
21 category close enough to the habitual drunkard
22 concept? Maybe -- you know, maybe the level of
23 generality is enough to capture your drug, but
24 it's not going to be enough to capture
25 something that is the type of thing that people

1 regularly all throughout the country lawfully
2 use a few days a week and most states and the
3 President have made the judgment that that is
4 not so categorically addictive or --

5 CHIEF JUSTICE ROBERTS: Well, your --

6 MS. MURPHY: -- dangerous that nobody
7 can use it safely.

8 CHIEF JUSTICE ROBERTS: Your -- the --
9 the trial you're contemplating after Congress
10 has gone through whatever it's gone through in
11 establishing the record and making the
12 determination, and then it's going to be
13 relitigated in a trial, the fact that your
14 client wins in one trial there doesn't mean
15 there's not going to be another trial in
16 another district and the -- the --

17 MS. MURPHY: If --

18 CHIEF JUSTICE ROBERTS: -- develop --
19 case will develop until I suppose there's a
20 conflict among the circuits, and then we would
21 have to evaluate the scientific record.

22 MS. MURPHY: I mean, for one, the
23 government does have to do this anyway as to
24 its scheduling determinations, which can be
25 challenged through APA review. The only

1 difference is they want a lesser burden of
2 proof, which they get in the APA context, than
3 they would get under Bruen. They have to
4 defend them in exactly this way. They don't
5 just get to say trust us, we got it right.

6 Now, if the government's getting it
7 right, I just don't think this is going to be
8 that hard as to the substances that it's pretty
9 clear can't be used on a regular basis by
10 anybody safely. And that's why you're not
11 seeing these cases come up to you, and -- and
12 you're not seeing the lower courts struggle as
13 much when it's somebody who's admitting that
14 they take heroin every day.

15 You know, nobody's -- nobody's getting
16 as concerned about the scope of the statute as
17 applied to certain substances. But applying
18 the test ensures that the government doesn't
19 make category mistakes in the way that the
20 President himself seems to think the government
21 currently has done as to marijuana.

22 JUSTICE KAVANAUGH: Do you think the
23 statute when -- with the word "habitual"
24 added -- you make a big deal about that in --
25 in your brief -- really does then reduce to

1 addiction?

2 MS. MURPHY: So it certainly
3 captures -- the addiction prong would be
4 irrelevant at that point because you have to be
5 a habitual user to fall within the definition
6 of addiction.

7 And it would be particularly odd
8 because that's not enough to make you addicted
9 to. You need to be habitually using so as to
10 either endanger the public health and safety,
11 et cetera, or to have lost the power of
12 self-control. So it's really -- you know, the
13 addicted-to prong is designed to kind of be
14 narrower, yet all of a sudden, you'd have this
15 unlawful user prong that's so broad that it
16 renders that prong irrelevant.

17 I -- I don't think that that's really
18 an available interpretation, a -- kind of a
19 coherent interpretation of this statute when
20 Congress set out two different concepts that it
21 was trying to get at.

22 JUSTICE GORSUCH: Ms. -- Ms. Murphy, I
23 wonder, do we need to get into much of this
24 about how the government could proceed or --
25 with categorical versus individual or how it

1 applies to addicts? He wasn't charged under
2 that part of 922(g)(3).

3 And all we know -- I mean, the -- the
4 only thing we know in the record is he uses
5 some, marijuana. We don't know how much or in
6 what potency, a few times a week. And why
7 isn't it just enough to say whatever else may
8 be true, that is not an habitual drunkard?

9 MS. MURPHY: We would be happy for the
10 Court to resolve the case on that narrow
11 ground. I mean, I am trying to be very
12 responsive. I appreciate the Court wants to
13 think about this statute as a whole, but you
14 really don't need to answer any of the
15 questions about the addicted-to prong today.

16 And really as to the unlawful user
17 prong, all you have to say is either, whether
18 the government is thinking about this
19 individually or categorically, they just can't
20 get there simply by saying somebody uses some
21 unknown quantity of marijuana, some unknown
22 time of day, a few times a week. We're -- we
23 are very happy to prevail on that narrow
24 ground.

25 JUSTICE JACKSON: Which sounds to me

1 very much like it is sounding in traditional
2 understandings of this category being
3 overbroad, that to the extent that we are
4 concerned about the -- the perceived mismatch
5 between historical drunkards and regular users,
6 it really is just that Congress's purpose here,
7 which is to prevent dangerous people from
8 having guns, is not, you say, furthered by
9 including this kind of person in that statute.

10 MS. MURPHY: That's right.

11 JUSTICE JACKSON: It's an
12 overbroadness kind of -- right.

13 MS. MURPHY: And, you know, I think
14 under Bruen the right way to say it is it's
15 overbroad as to the historical category.

16 JUSTICE JACKSON: Right.

17 MS. MURPHY: But I think you could
18 kind of get to the same place by saying, even
19 if you were doing means end scrutiny, it's
20 overbroad.

21 JUSTICE JACKSON: Right.

22 MS. MURPHY: It's just overbroad in
23 the sense that this particular -- at least as
24 to what you've got before you in this case, is
25 overbroad even under a traditional conception

1 of giving the government a little bit more room
2 for deference on its determinations. That
3 doesn't mean the government might not have a
4 much stronger case with somebody who regularly
5 uses a different substance. If you apply the
6 same principle across the board, the
7 government's going to win when it got those
8 categorizations correct.

9 JUSTICE KAVANAUGH: So you think the
10 government could say someone's an unlawful user
11 but not an addict as to particular kinds of
12 drugs and that would be sufficiently connected
13 to a historical tradition that it would satisfy
14 the Second Amendment; that's what you're
15 saying?

16 MS. MURPHY: I think it -- the one way
17 to understand this statute, which isn't the
18 easiest statute in the world to completely
19 understand, would be that the addicted-to prong
20 is focused on people who -- who -- who use so
21 excessively and routinely as to fit the
22 habitual drunkard category is focused on people
23 who do that out of physical or psychological
24 compunction and the unlawful user can reach the
25 people who do the same thing out of choice.

1 And so either way you have the same
2 ultimate principle, but you could read this
3 statute as saying one is about addiction in the
4 most traditional conception of addiction, and
5 the other is about abuse of use, even if it's
6 just that somebody chooses to spend much of
7 their life in a drunken stupor or intoxicated
8 -- you know, or high on drugs.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: You say that there is
14 not a problem with, at least I understand what
15 you're saying, there is not a problem with
16 prohibiting everybody who is addicted to a
17 controlled substance from possessing a gun. Is
18 that correct?

19 MS. MURPHY: We do not have a problem
20 with that.

21 JUSTICE ALITO: And that applies to
22 everything, every controlled substance? So
23 that would --

24 MS. MURPHY: I think the concept of
25 addiction, the determination that's made to

1 show that someone is addicted to something is,
2 I understand, the kind of determination that's
3 going to show that somebody is engaged in the
4 kind of use that renders them a risk all the
5 time.

6 So I just want to be very clear about,
7 you know, we're not conceding at, like, some
8 generic level, it's because the consequences --

9 JUSTICE ALITO: Seriously? You think
10 that being addicted to every single drug in the
11 schedule renders that person a -- a danger?

12 MS. MURPHY: I -- I --

13 JUSTICE ALITO: You would be willing
14 -- you don't think arguments can be made that
15 being addicted to, I don't know, the illegal
16 use of Ambien --

17 MS. MURPHY: I'm not sure you'd be
18 able --

19 JUSTICE ALITO: -- somebody tries with
20 that -- that person couldn't come in and say
21 whoa, that doesn't make me dangerous. I'm
22 doing this while I am sleeping?

23 MS. MURPHY: And this is where we
24 might have a marginal disconnect about, you
25 know, when I think of what about necessary to

1 prove someone is addicted to something, it's
2 going to need to -- it's going to incorporate
3 something like the definition of the Controlled
4 Substances Act, that's asking about whether you
5 are a threat to yourself or others.

6 And maybe there's some substances you
7 just can't make a showing that somebody's
8 addicted in that sense, but -- but -- but if
9 you accept --

10 JUSTICE ALITO: Can an addict -- can
11 an addict as to every substance in the list
12 insist on an individualized determination or
13 not?

14 MS. MURPHY: The statute requires
15 that. I mean, you can't figure --

16 JUSTICE ALITO: So it has to be an
17 individualized determination. So --

18 MS. MURPHY: There -- there --

19 JUSTICE ALITO: -- the mere fact that
20 someone is addicted to something that is a
21 controlled substance is not enough for Second
22 Amendment purposes?

23 MS. MURPHY: I don't know how you
24 determine that someone's addicted to a
25 controlled substance without engaging in an

1 individualized inquiry into their use. Once
2 you've determined that someone's an addict,
3 you've determined that they fit into --

4 JUSTICE ALITO: No, not -- not as to
5 what their -- not to their use or their reason
6 for the use, but whether their -- their
7 situation renders them dangerous.

8 MS. MURPHY: I mean, that is what the
9 definition of "addict" in the Controlled
10 Substances Act contemplates, that you have to
11 assess somebody's use by reference to the
12 impact it is having in their life.

13 So I don't think it works under the
14 statute to say someone's an addict without
15 having engaged in an individualized inquiry
16 into the nature of their use. And that's what
17 -- what's required all across the country.

18 If you want to adjudicate somebody a
19 drug addict, who can be subject to confinement
20 or guardianship, you have to actually
21 individually assess their use of the drug --

22 JUSTICE ALITO: If -- if -- if an
23 individual --

24 MS. MURPHY: -- and the impact it has
25 on their life.

1 JUSTICE ALITO: I'm sorry. Are you
2 finished?

3 MS. MURPHY: No. No. Go ahead.

4 JUSTICE ALITO: If an individualized
5 determination is required under (g)(3), is it
6 an individualized determination as to that
7 particular individual or is it as to the drug
8 across the board?

9 MS. MURPHY: So I think the
10 individualized inquiry is to whether you are
11 addicted to a controlled substance.

12 JUSTICE ALITO: Well, no. I'm not
13 talking about addiction now. Just -- just use.
14 Whether somebody -- someone is -- is prosecuted
15 for being a user of drugs.

16 MS. MURPHY: Sure.

17 JUSTICE ALITO: And you say, you can't
18 do that, you have to do an individualized
19 determination as to something. And what is
20 this thing that there must be an individualized
21 determination?

22 MS. MURPHY: I -- I -- I want to be
23 clear, again, we are not actually saying that
24 the only way to do this is through an
25 individualized inquiry. For addiction, I think

1 it is, because I think the concept of addiction
2 requires it.

3 But if the government wanted to say
4 that there is a particular degree of
5 consumption of a particular substance that it
6 considers virtually anybody who consumes in
7 that quantity to be someone who cannot possess
8 a firearm, we are not asking you to rule out
9 the possibility that the government could make
10 the showing that that category is categorically
11 analogous to the concepts that the habitual
12 drunkard laws reflected.

13 We are not saying the only way they
14 can do it is by coming in and making a
15 case-by-case determination. They can proceed
16 either way.

17 It's just that if they want --
18 whichever way they want to do it, they have to
19 meet their burden under Bruen of proving that
20 they did, in fact, make the right
21 determination; they put either the person or
22 the substance use into the correct category.

23 JUSTICE ALITO: I -- I struggle to
24 figure out how these individualized
25 determinations can be made in the context of a

1 criminal prosecution. The whole -- the way in
2 which criminal prosecutions are conducted makes
3 this extremely difficult.

4 Now, the Third Circuit issued a very
5 thoughtful opinion about what they thought is
6 required in an individualized determination.
7 And what they said was that the test is whether
8 disarming a drug user is needed to address a
9 risk that he would pose a physical danger to
10 others.

11 Is that the test that you would apply?

12 MS. MURPHY: That's not necessarily
13 the test. We would ask you to apply a test
14 more akin to the historical one, but I just --

15 JUSTICE ALITO: Okay. What is it?
16 What is your test?

17 MS. MURPHY: Sure. The test is
18 whether somebody's use is rendering them a --
19 unable to function in their day-to-day life all
20 the time, whether it's because they are always
21 intoxicated or because their use is such that
22 it's impairing their ability to function in
23 their day-to-day life.

24 That is what the civil commitment laws
25 ask. They said is someone a drunkard incapable

1 of taking care of himself or his property,
2 where you had to prove that a person by
3 excessive drinking is unable to attend to
4 business or has lost self-control. You had to
5 prove these things.

6 JUSTICE ALITO: I -- I -- I am just
7 puzzled by -- by most of your argument.

8 Suppose somebody -- I just don't
9 understand what you're arguing for.

10 Suppose someone regularly takes a
11 drug, and during the period when that person is
12 taking the drug, that person is super
13 dangerous. Congress couldn't -- the Second
14 Amendment would not permit Congress to say
15 that's too risky?

16 MS. MURPHY: It might. And if you
17 look at the laws, the definitions that were
18 used historically, some of the cases talked
19 about it in terms of is somebody the type of
20 person who's going to take the substance, you
21 know, going to drink to excess whenever the
22 opportunity presents themselves?

23 Their focused on that question of
24 saying not just are you always drunk, but are
25 you so habituated to it that you are drunk a

1 lot of the time, and we can't trust enough for
2 you to just, you know, be around the one day a
3 week, that's why we're going to commit you or
4 have guardianship or have these severe
5 consequences.

6 And so we don't think -- I mean, you
7 know, the traditional way the addiction prong
8 is applied is to give juries the instruction
9 from the CSA definition, which requires a jury
10 to make an individualized finding about whether
11 somebody's use is impacting their life.

12 JUSTICE ALITO: All right. Well,
13 speaking about -- speaking of jurors, this is
14 -- these are the factors that the Third Circuit
15 said an individualized determination should
16 entail. The length and recency of the
17 defendant's use during and shortly before his
18 gun possession; the drug's half-life; whether
19 use of the drug affects a person's judgment,
20 decision-making, attention, inhibition, or
21 impulse control; whether the drug may induce
22 psychosis; the drug's interference with a
23 user's perception of his own impairment; the
24 long-term physical and mental effects of the
25 use of that drug.

1 Are -- are those -- in a criminal
2 case, would those be submitted to the jury?

3 MS. MURPHY: We are not suggesting
4 that juries would need to be instructed to
5 consider all of those things, but I certainly
6 think the government would -- would say that's
7 the type of evidence we should be able to
8 present when we want to show that a drug was --

9 JUSTICE ALITO: So experts --

10 MS. MURPHY: -- correctly categorized
11 in this way.

12 JUSTICE ALITO: -- would -- experts
13 would testify on all of these matters and the
14 jury would decide whether the person met the --
15 the -- the test for being a dangerous person?

16 MS. MURPHY: I don't think the
17 government is going to need to do that when it
18 comes to a lot of cases and a lot of
19 substances, but --

20 JUSTICE ALITO: Well, maybe not
21 always, but if -- if that's at issue, is that
22 what's going to be required?

23 MS. MURPHY: Again, I mean, the
24 government can't even put a substance on one of
25 these schedules without having to withstand, if

1 somebody wants to bring, a challenge to that.

2 They're going to have to prove it up.

3 JUSTICE ALITO: We're talking about
4 criminal prosecutions and what needs to be
5 shown in a criminal prosecution. I don't know
6 where the line -- the Sixth Amendment line is
7 as to all these things, but even -- let's
8 assume that some of them, all the ones that go
9 to questions of science, for example, you would
10 have every single -- potentially every district
11 judge in the country would make a finding, and
12 I find -- as to all of these drugs, I find that
13 this -- that the use of this drug being a --
14 that users of this drug are dangerous or
15 they're not dangerous. Every district judge
16 before whom that issue comes up would make a
17 determination on that scientific question?

18 MS. MURPHY: No. I think you can give
19 the jury a standard that asks whether
20 somebody's use is impairing their ability to
21 function, and the government can then choose to
22 present evidence. They can present evidence
23 about their life. They can present evidence
24 about the nature of the particular substance
25 and the fact that it is a substance that

1 carries with it effects for days at a time.

2 It can present evidence, and the jury
3 can make an ultimate determination, just as the
4 jury has to do as to the addicted person.

5 JUSTICE ALITO: It's been said that
6 Congress never made a judgment about the
7 dangerousness of using all of the substances on
8 the controlled substance list. Is that right?

9 MS. MURPHY: I don't think Congress
10 has made a determination that anybody who uses
11 those substances regularly is a public safety
12 risk.

13 JUSTICE ALITO: Isn't that what
14 Congress did when it enacted (g)(3)?

15 MS. MURPHY: No, because Congress only
16 applies that if somebody's use is unlawful.
17 And so somebody can be using a controlled
18 substance regularly under the Controlled
19 Substances Act, and Congress deems them not to
20 be a public safety risk so long as they got the
21 prescription for the sleep aid and they aren't
22 the spouse who didn't.

23 JUSTICE ALITO: One final question.

24 In the cases in which we have
25 previously held that the Second Amendment

1 prohibits certain government regulations --
2 Heller, McDonald, Bruen -- there have been a
3 lot of "the sky is falling" arguments about the
4 consequences of that for public safety.

5 In Rehaif, I said that I think that
6 922(g) has a more direct and severe bearing on
7 public safety than the issue of whether a
8 law-abiding citizen can possess a gun in the
9 home or even, as in Bruen, carry the gun
10 outside the home.

11 Do you disagree with that?

12 MS. MURPHY: No.

13 JUSTICE ALITO: Here, we're talking
14 about disabling people like -- people who have
15 committed felonies.

16 MS. MURPHY: Sure. But I would note
17 that under 922(g)(3), it's only about five
18 prosecutions that are under (g)(3). The vast
19 majority of them are under provisions, other
20 provisions, and about 80 percent are under
21 (g)(1). So I don't think the arguments that we
22 are making today would vastly endanger the
23 government's prosecutorial efforts under
24 922(g).

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: If you look at the
3 statute, there's two components, unlawful user
4 of a controlled substance and someone who's
5 addicted to any controlled substance.

6 "Addiction" is defined by the statute,
7 correct?

8 MS. MURPHY: It's defined by the
9 Controlled Substances Act --

10 JUSTICE SOTOMAYOR: Yeah --

11 MS. MURPHY: -- not by the Gun Control
12 Act, but --

13 JUSTICE SOTOMAYOR: But it's --

14 MS. MURPHY: -- there is a
15 cross-reference which suggests Congress
16 intended the statutes to be read in pari
17 materia.

18 JUSTICE SOTOMAYOR: Means any
19 individual who -- this is the definition --
20 habitually uses any narcotic drug so as to
21 endanger the moral -- public morals, health,
22 safety, or welfare, or is so far addicted to
23 the use as to have lost the power of
24 self-control.

25 That would go to a jury?

1 MS. MURPHY: That does go to juries
2 often in cases.

3 JUSTICE SOTOMAYOR: And it has to go
4 to the juries. So --

5 MS. MURPHY: That goes to juries in
6 these cases, yes.

7 JUSTICE SOTOMAYOR: -- Justice Alito's
8 concern about each jury determining is inherent
9 in the definition, correct?

10 MS. MURPHY: It's inherent in an
11 "addicted to" prosecution.

12 JUSTICE SOTOMAYOR: Now, with respect
13 to who is an unlawful user, I've been surprised
14 that in your cert petition and even in this
15 brief, in your briefing, you haven't really
16 raised the vagueness issue.

17 But it seems to me that the government
18 is sort of giving "unlawful user" a definition
19 that's not present in the statute, correct?

20 MS. MURPHY: Correct, which is why
21 we -- you know, we -- we did lead with a
22 lengthy argument in our response brief that we
23 think the statute has an independent vagueness
24 problem that is sort of baked into trying to
25 analyze whether the statute is constitutional

1 under the Second Amendment.

2 JUSTICE SOTOMAYOR: And -- and --

3 MS. MURPHY: If you don't know exactly
4 what it means, that's its own problem.

5 JUSTICE SOTOMAYOR: -- historically,
6 the only thing that was ever given meaning to
7 was a habitual drunkard, correct? And that had
8 maybe a common-law background definition, but
9 there's nothing in the -- in any of our history
10 or tradition that has created a use definition,
11 correct?

12 MS. MURPHY: That's right. And if you
13 take the early statutes from the 1920s and
14 '30s, none of them had an "unlawful user"
15 prong. And even today, there's only eight
16 states that have an "unlawful user" prong.
17 Almost all of them are focused on addiction or
18 focused on it through the lens of, even more
19 concretely, things like have you been
20 adjudicated to have a substance disorder or
21 committed for treatment for a substance use
22 disorder.

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 JUSTICE KAGAN: Ms. Murphy, I wanted
2 to take you back to an answer that you gave to
3 Justice Alito a while ago because I was a
4 little bit surprised by it and I want to make
5 sure I understand your view on this.

6 So the question that I understood him
7 to ask you is that, take a drug, you know, any
8 drug you want that -- that is very dangerous
9 while you're in its grip. You know, you're in
10 some kind of psychosis or you've lost touch
11 with reality or whatever it is, and it's very
12 dangerous, and if there's a gun around, that's,
13 like, a real problem.

14 But what I understand your test to be
15 is, like, that's not enough because, if you're
16 not in its grip, if you're fine when you're not
17 in its grip, then you don't meet the historical
18 analogue. And I want to make sure that that is
19 your answer first.

20 MS. MURPHY: Yes. Yes.

21 JUSTICE KAGAN: And if that's a
22 somewhat problematic answer, if, you know --

23 MS. MURPHY: Yeah.

24 JUSTICE KAGAN: -- like, how do you
25 separate -- like, I guess what I'm looking for

1 is, like, how do you win with marijuana, but
2 you don't win with that kind of drug, where --
3 the kind of drug where, really, anybody looking
4 at it would say, oh, that is a dangerous thing
5 to have that drug and a gun in the same place?
6 Is it just you just can't do it?

7 MS. MURPHY: Well, I mean, the
8 government doesn't seem to think it can do it
9 because it's saying the statute requires
10 habitual use. I don't know exactly where they
11 draw the line at habitual use, but --

12 JUSTICE KAGAN: But I'm talking -- I'm
13 actually talking about a habitual user.

14 MS. MURPHY: Okay. Okay.

15 JUSTICE KAGAN: It's like, you know,
16 there's a person and it's every other day
17 they're using this drug, but on the day they're
18 not using this drug, everything's cool.

19 MS. MURPHY: Yeah. And I -- I think
20 at a certain point, when you take that concept
21 of habitual drunkard, it does take into account
22 the nature of the substance and, you know -- I
23 mean, if you think about alcohol itself, that's
24 why the test was focused not just on somebody
25 regularly consuming it every day or every other

1 day or whatever it was but consuming it to the
2 point of intoxication.

3 And if you have a substance that, by
4 its nature, any consumption of it renders you
5 the equivalent of, like, massively, massively
6 intoxicated, then the habitual drunkard test
7 may be enough to capture the person who's using
8 that every other day because we -- we agree
9 that the habitual drunkard test didn't require
10 somebody to be intoxicated all the time.

11 But where the analogy falls apart
12 vis-à-vis marijuana is the government saying it
13 doesn't matter if it's somebody who's taken the
14 sleep gummy, smoking one joint a couple nights
15 a week when they come home after a long day at
16 work, or if it's the person who's smoking all
17 day before they drive their car and operate
18 heavy machinery at work or whatever it may be.
19 They say none of that matters, and we think it
20 does.

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: On the percentage

1 of prosecutions, do you know how many -- and I
2 guess the government can also address this --
3 how many are under the addiction prong versus
4 under the use prong percentage-wise?

5 MS. MURPHY: I haven't seen anything
6 that breaks it down. Just from looking at
7 cases, there seem to be very few cases that are
8 only the "addicted to" prong, which isn't
9 surprising because it's a harder case for the
10 government to prove. But there are several
11 cases where, unlike this one, the government
12 proceeded under both the unlawful user and the
13 "addicted to" prong.

14 And that's where this body of law has
15 developed that says, well, we won't define
16 "unlawful user" the same way the CSA defines
17 "addict," but, as to the "addicted to" prong,
18 courts do sometimes look to that as the
19 definition for "addicted to."

20 JUSTICE KAVANAUGH: On the
21 individualized assessment issue, just so I
22 understand, on addiction cases you're saying
23 there has to be an individualized assessment
24 whether the person is, in fact, an addict but,
25 if so, proved, there's no separate

1 individualized assessment of whether they're
2 therefore dangerous, correct?

3 MS. MURPHY: That's right. That's why
4 it's like --

5 JUSTICE KAVANAUGH: Then on --

6 MS. MURPHY: -- the language -- the
7 language is a little confusing. There can be a
8 categorical judgment once there's been a
9 decision that you belong in the category.

10 JUSTICE KAVANAUGH: Exactly, okay. So
11 there's an individualized assessment and then
12 that's it. For use, though, I think you're
13 saying there has to be an individualized
14 assessment of whether they're a user, weekly, I
15 guess, is the government's test, and then on
16 top of that, I think you're saying, but just
17 correct me if I'm wrong, an individualized
18 assessment of whether that use makes them
19 dangerous or what -- how would you --

20 MS. MURPHY: Whether that degree of
21 use of that substance renders somebody -- you
22 know, impairs their ability to function most of
23 the time.

24 JUSTICE KAVANAUGH: Is that the jury
25 instruction?

1 MS. MURPHY: I think something -- I
2 mean, you know, I think courts could get a
3 little bit of effort to figure out the best way
4 to instruct it but that's the concept that I
5 see as the tradition unifying the historical
6 laws about habitual drunkards.

7 JUSTICE KAVANAUGH: Does this going
8 to -- the rubber hits the road with the actual
9 jury instruction on this.

10 MS. MURPHY: Yes. And that's why if I
11 were this Court, I'd leave a little bit of room
12 for courts to figure out the best way to do
13 this. I mean, as courts have been working
14 through the Second Amendment issues, they've
15 been kind of figuring out different ways to
16 come at it and they've been doing so in cases
17 where the government actually wasn't relying on
18 the habitual drunkard tradition so they were
19 operating in like even a little bit more of a
20 vacuum.

21 But I think that's the concept to get
22 at, is your use impairing you kind of most of
23 the time, even if it's not that you're, you
24 know, impaired, in the sense of intoxicated
25 every moment of every day but it's impairing

1 your ability to function in your day-to-day
2 life.

3 JUSTICE KAVANAUGH: And then last
4 question. Again, on the difference in the
5 technical definitions between use and
6 addiction, given the government's use of the
7 word "habitual" with use, can -- is there such
8 a person? Can there be a person who's -- who
9 habitually uses who does not habitually use so
10 as to endanger the public morals?

11 MS. MURPHY: Sure. I mean, I think if
12 you think about marijuana use, like somebody
13 could be -- I mean, I guess it all depends what
14 you mean by habitual user --

15 JUSTICE KAVANAUGH: Well, it may
16 depend what you mean by public morals. But
17 that's the statutory term. And I've seen --

18 MS. MURPHY: Yeah, and --

19 JUSTICE KAVANAUGH: I've seen jury
20 instructions -- I've looked at some that
21 actually use the phrase "public morals." I'm
22 not sure what that means.

23 MS. MURPHY: Yeah. And -- and -- and
24 look, like, you know, I -- I -- I would
25 probably resist an addicted to case whether

1 that particular language about public morals
2 really maps on to the conception of
3 dangerousness that matters here.

4 But if you kind of focus in particular
5 on are you endangering public safety, I think
6 that gets you there. And that is part of
7 the -- the definition.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 Justice Jackson?

12 Thank you, counsel.

13 Rebuttal, Ms. Harris?

14 REBUTTAL ARGUMENT OF SARAH M. HARRIS

15 ON BEHALF OF THE PETITIONER

16 MS. HARRIS: Thank you, Mr. Chief

17 Justice:

18 I'd like to contrast where this Court
19 might go with respect to people who present a
20 special danger of misuse. Our position is
21 Congress made a judgment in 922(g)(3) itself
22 that it is, in fact, dangerous to mix firearms
23 with habitual use or addiction to controlled
24 substances.

25 That is backed by the historical

1 habitual drunkard tradition where there weren't
2 these sort of fine-grained lines that
3 Respondent appears to be drawing as to exactly
4 how incapacitated you are. It's a common law
5 approach that starts with magistrates and
6 justices of the peace in making these
7 determinations.

8 Over time, there's more consensus but
9 I find it ironic that they're focused on modern
10 day civil commitment laws to try to superimpose
11 on a body of sort of case-by-case
12 determinations of a justice of the peace, do
13 you fit into the category of habitual drunkard
14 or not, some sort of unifying theme.

15 What they on the other hand want to do
16 with respect to these hundreds of prosecutions
17 a year under 922(g)(3), not a mere five, and
18 most of which are for the unlawful user prong,
19 the lion's share for sure, is to revert to what
20 I think ends up being individualized
21 determinations all the way down.

22 These seem to say you have to as a
23 constitutional matter, I think on the strength,
24 again, of these modern laws, have individual
25 determinations for every single addict under

1 that prong, and otherwise they seem to
2 sometimes say category by category is fine for
3 some drugs but I really don't know how that
4 would hold up.

5 What they seem to be saying is
6 actually even for categories like heroin, like
7 PCP, whatever it is, you still would have to
8 have a chance to say what is your frequency,
9 what is your mix of drugs in the mix, what are
10 other things that make you dangerous?

11 I think all that collapses. And that
12 is a rejection of what the Court accepted in
13 Heller onwards, which is there can be some
14 categories on a category-by-category basis of a
15 special danger of misuse.

16 I think where does this leave the rest
17 of the inquiry, it certainly creates a mess of
18 922(g)(3). I think what we've heard about are
19 mini trials in every single case in an attempt
20 to capture Justice Kagan's hypothetical of,
21 like, the hallucinogenic, non-addictive drug,
22 is that sufficiently similar to the effect of
23 alcohol on founding era generation people who
24 were sufficiently drunk, sufficiently amount of
25 the time in the same way as alcohol to be

1 sufficiently dangerous for this purpose?

2 I don't know how anyone would figure
3 that out. But certainly what's happening now
4 is not district courts finding an easy time of
5 it. As Chief Judge Colloton recent dissent in
6 Ledvina indicates, it's just remands all the
7 way down with no really good way to proceed and
8 making all these kind of pharmacological
9 judgments that are very, very difficult for
10 district courts and really do end up being
11 individual determinations.

12 Where does this leave the rest of
13 922(g)? I think that's a real problem also
14 with Respondent's approach. It's not just
15 apparently for 922(g)(3), where there has to be
16 what will back into individualized tailoring
17 and a mess of a position.

18 I think this is all the way down from
19 (g)(1), felons, every single category of felons
20 even a serial murderer, you would have to be
21 able to second-guess, is that person really
22 dangerous, is that a good proxy, how many
23 people, what other kinds of offenses.

24 To (g)(2), the fugitive, if you're
25 just out for a couple days, are you really a

1 dangerous fugitive who should be disarmed? To
2 (g)(4), with respect to mental illness.

3 I think the questions just cascade
4 from there and make an absolute hash of the
5 922(g) framework, which has been something the
6 government has relied on to deal with -- with
7 more than -- as Justice Alito's dissent over
8 Rehaif notes something that is a cornerstone of
9 violence prevention.

10 Third, I don't think you can shortcut
11 to who knows what a habitual user is. And how
12 -- I think courts of appeals have provided a
13 good yardstick for this. There is no confusion
14 on this. The distinction between a habitual
15 user and an addict is both very real and
16 important.

17 A habitual user, again, is judged by
18 the frequency of their use. We're at the
19 indictment stage here. The government will
20 have to prove beyond a reasonable doubt to a
21 jury that the frequency of use here, which,
22 again, is concededly multiple times a week of
23 an illegal substance, marijuana, is, in fact,
24 habitual use under the way courts of appeals
25 have interpreted this.

1 I don't think that's confusing. I
2 think the knowledge requirement presents a
3 large amount of checks. And I think that does
4 real work vis-à-vis the addict prong, which
5 deals with people who can't control their urges
6 even if they're not currently using the
7 substance.

8 The two work in tandem and the fact
9 that Respondents seems to acknowledge that
10 perhaps lots of these unlawful users can, in
11 fact, be constitutionally prohibited from
12 possessing firearms, at least only during the
13 period of their habitual use, I think is a
14 problem for Respondent's position.

15 Because if all they have at that point
16 is this mess of individualized determinations,
17 then the category-by-category approach is out
18 the window for every single drug. No matter
19 how dangerous, no matter how different it is
20 from alcohol, even if it is the most dangerous
21 hallucinogenic drug, that even if you use it
22 once a week causes hallucinations at
23 unpredictable periods going forward.

24 I think that is the approach that is
25 at risk here and the better course is to say

1 habitual drunkards are a valid tradition, you
2 do not have to exactly match the degree of
3 alcohol impairment to fit in that tradition.
4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 12:00 p.m., the case
8 was submitted.)

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1	11 5552:19,21 5553:20 5563:16 5596:11 5597:1 5619:5 abusers [2] 5533:19 5541:5 abusive [1] 5604:6 accept [6] 5525:24 5575:9 5578:22 5591:7 5607:21 5621:9 accepted [3] 5559:16 5565:22 5644: 12 accepts [1] 5543:22 access [2] 5557:13 5566:12 accomplished [1] 5608:14 account [3] 5569:24 5575:1 5636:21 accurate [1] 5561:19 accurately [1] 5579:6 accused [1] 5607:11 acknowledge [1] 5647:9 across [3] 5618:6 5622:17 5623:8 act [25] 5529:10 5532:8,20 5533:1 5534:13 5538:2 5545:14 5551:25 5558:5 5563:14 5564:23 5565:12,14 5566:14,17 5569:19 5572:14 5592: 20 5600:18 5605:8 5621:4 5622:10 5630:19 5632:9,12 acting [1] 5521:22 actively [1] 5566:10 act's [1] 5531:20 actual [3] 5557:25 5588:9 5640:8 actually [23] 5529:15 5531:15 5538:9 5557:24 5571:8 5574:13 5577:8 5585:22 5588:3 5599:2 5600:14 5602:17 5604:6 5606:1 5608:17 5610:17 5611:8 5622:20 5623:23 5636:13 5640:17 5641:21 5644:6 adams [1] 5524:13 added [2] 5564:20 5614:24 adderall [4] 5570:23 5571:9,11 5572:6 addict [33] 5526:21,22 5539:2 5556: 22 5557:7,10,14,18 5558:13 5564:20, 22 5565:18 5566:2,4,8,9,13 5605:9, 14 5607:11 5608:13 5618:11 5621: 10,11 5622:2,9,14,19 5638:17,24 5643:25 5646:15 5647:4 addicted [31] 5537:25 5538:1 5539:5 5585:18 5588:7,10 5604:18 5605:24 5606:11,21 5607:13 5608:18 5615:8 5619:16 5620:1,10,15 5621:1,8,20, 24 5623:11 5630:4 5632:5,22 5633: 11 5638:8,13,17,19 5641:25 addicted-to [3] 5615:13 5616:15 5618: 19 addiction [33] 5531:4 5535:21 5538:3, 11 5549:2 5552:19 5563:22 5564:1, 13 5594:20,20 5604:9,22 5606:23 5607:5,6 5608:15 5615:1,3,6 5619:3, 4,25 5623:13,25 5624:1 5627:7 5632: 6 5634:17 5638:3,22 5641:6 5642:23 addictive [6] 5585:24 5588:13 5589:	21 5593:11 5597:10 5613:4 addictiveness [1] 5546:16 addicts [13] 5520:13 5533:2,5 5544: 18,22,25 5545:4 5563:2 5564:13 5565:9 5605:16 5607:19 5616:1 adding [1] 5538:14 addition [1] 5579:23 additional [4] 5521:5 5549:3 5562:8, 11 address [2] 5625:8 5638:2 adduce [1] 5575:8 adequate [1] 5572:9 adequately [1] 5579:6 adjudicate [1] 5622:18 adjudicated [1] 5634:20 admitting [1] 5614:13 adopted [2] 5547:16 5558:8 adopting [1] 5527:7 adoption [2] 5547:2,3 aesthetic [1] 5555:23 affairs [3] 5583:19 5587:19 5610:20 affect [3] 5522:2 5535:24,25 affects [1] 5627:19 affirmed [1] 5586:22 afraid [2] 5554:8 5592:19 agencies [1] 5553:5 ago [1] 5635:3 agree [15] 5530:21 5532:15 5542:15 5549:25 5563:20 5566:2 5570:13 5577:18 5593:23 5602:17 5604:12, 16,19,20 5637:8 agreed [1] 5527:19 agreement [1] 5604:13 ahead [2] 5609:4 5623:3 aid [1] 5630:21 aim [1] 5577:11 akin [3] 5585:25 5594:11 5625:14 alcohol [22] 5521:13 5524:17 5542:24 5543:25 5544:1 5547:22,23,25,25 5548:3,11 5561:17,24 5570:14 5585: 5,6,11 5597:22 5636:23 5644:23,25 5647:20 alcoholic [1] 5522:12 alcoholics [1] 5521:18 ali [1] 5584:8 alito [45] 5546:24,25 5547:15,21 5548: 12 5549:7 5550:5 5561:16 5562:19 5574:16 5590:20 5591:16 5592:9,16 5595:19,22 5600:22 5619:12,13,21 5620:9,13,19 5621:10,16,19 5622:4, 22 5623:1,4,12,17 5624:23 5625:15 5626:6 5627:12 5628:9,12,20 5629:3 5630:5,13,23 5631:13 5635:3 alito's [2] 5633:7 5646:7 allow [5] 5577:23 5579:5 5589:12 5590:4 5591:24 allowing [2] 5577:14 5581:13
2	2 [8] 5535:3,12 5536:17 5546:5 5558: 22 5560:3,11 5571:9 20th [2] 5547:11 5556:7 21 [1] 5552:14	
3	3 [9] 5529:4 5530:4 5545:21 5558:22 5559:2,14 5560:6 5572:3 5597:13 30s [1] 5634:14	
4	4 [3] 5545:21 5560:13 5571:7 40 [1] 5611:24	
5	5 [3] 5560:13 5571:7 5575:25	
8	80 [1] 5631:20 811(c) [1] 5552:15	
9	922(g) [8] 5549:7 5590:22 5592:14 5603:11 5631:6,24 5645:13 5646:5 922(g)(3) [17] 5522:17 5523:9,12 5542: 21 5552:1 5556:20 5566:18 5576:13 5580:12 5584:8 5608:12 5616:2 5631:17 5642:21 5643:17 5644:18 5645:15	
A	abandoned [1] 5599:1 abandoning [1] 5602:2 ability [10] 5535:25 5585:8 5594:16 5598:1 5602:13 5604:6 5625:22 5629:20 5639:22 5641:1 able [8] 5526:12 5575:16 5585:22 5592:23 5597:18 5620:18 5628:7 5645:21 above [2] 5533:8 5568:3 absolute [1] 5646:4 absolutely [4] 5527:12 5528:4 5548:7 5612:9 abuse [11] 5535:20 5541:14 5546:7,	

<p>allows [1] 5604:4 almost [1] 5634:17 already [2] 5534:12 5562:13 altering [1] 5576:10 alternative [1] 5546:7 although [2] 5529:17 5561:18 amber [2] 5570:16 5578:21 ambien [12] 5522:5 5530:7,9,12 5531:6,10 5534:24 5536:18 5548:13 5560:14 5570:22 5620:16 amendment [25] 5520:16 5535:6 5547:3,4,17,18,18 5550:4 5560:10 5561:17 5568:16 5569:5 5576:9 5584:14,18 5590:3 5591:19 5609:22 5618:14 5621:22 5626:14 5629:6 5630:25 5634:1 5640:14 american [1] 5524:4 among [2] 5553:5 5613:20 amount [3] 5610:17 5644:24 5647:3 anabolic [2] 5545:19,20 analogous [2] 5523:25 5624:11 analogue [5] 5576:12 5593:18 5602:9,12 5635:18 analogues [8] 5540:3 5544:3 5554:5,19 5581:14 5582:5 5597:18 5598:13 analogy [1] 5637:11 analysis [5] 5578:1,3 5579:11 5588:8 5600:14 analyze [1] 5633:25 ancillary [1] 5530:18 ander [1] 5570:16 another [4] 5556:8 5569:22 5613:15,16 answer [7] 5554:24 5575:8 5584:9 5616:14 5635:2,19,22 answered [1] 5532:7 answers [1] 5545:22 answer's [1] 5526:1 antipoaching [1] 5581:18 anybody [7] 5587:23 5592:12 5610:15 5614:10 5624:6 5630:10 5636:3 anyway [1] 5613:23 apa [5] 5553:2 5588:19 5590:14 5613:25 5614:2 apart [4] 5540:1 5555:14 5562:18 5637:11 apparently [3] 5527:11 5588:1 5645:15 appeals [8] 5527:6 5558:9 5565:23 5566:22 5568:4 5582:20 5646:12,24 appears [1] 5643:3 applicable [1] 5586:17 application [1] 5520:24 applications [1] 5529:6 applied [20] 5548:16 5560:18 5574:17,18,20,21,23 5575:19 5576:4 5584:8,10,15,17 5585:1 5586:12,15 5591:24</p>	<p>5610:13 5614:17 5627:8 applies [4] 5529:23 5616:1 5619:21 5630:16 apply [9] 5576:5 5587:3,9,21 5608:15 5612:20 5618:5 5625:11,13 applying [3] 5605:6 5611:1 5614:17 appointed [1] 5597:20 appreciate [2] 5599:7 5616:12 approach [19] 5534:10 5546:8 5567:24 5582:18 5585:19,21 5587:9 5589:23 5591:2,12 5599:9 5604:24 5605:4 5612:11,16 5643:5 5645:14 5647:17,24 approaches [1] 5591:8 aptly [1] 5582:19 arbitrary [1] 5581:14 area [1] 5592:21 aren't [4] 5536:3 5548:2 5608:9 5630:21 argue [2] 5520:11 5526:18 argued [1] 5581:17 arguing [4] 5581:20 5590:3,6 5626:9 argument [16] 5539:25 5543:22 5550:14 5558:21 5559:22 5560:3 5561:4 5584:2,24 5586:9,12 5587:2 5607:13 5626:7 5633:22 5642:14 arguments [4] 5586:13 5620:14 5631:3,21 arise [2] 5538:24 5611:21 armed [1] 5533:22 around [8] 5521:17,18 5539:23 5555:22 5574:8 5593:16 5627:2 5635:12 article [1] 5572:21 as-applied [1] 5586:23 aside [3] 5527:3 5528:11 5574:19 asks [1] 5629:19 assess [5] 5577:14,24 5587:25 5622:11,21 assessing [2] 5599:13 5602:6 assessment [7] 5532:5 5638:21,23 5639:1,11,14,18 assigns [1] 5588:15 associated [1] 5521:7 assume [7] 5530:8 5564:10,12,15 5590:15 5593:4 5629:8 assuming [4] 5561:9 5584:15 5593:2,14 atf [4] 5526:17 5527:10,19,24 attached [1] 5603:7 attempt [1] 5644:19 attend [1] 5626:3 attention [1] 5627:20 attentive [1] 5554:23 attorney [2] 5532:12,18 available [1] 5615:18 away [4] 5580:16 5592:24 5599:23 5600:3</p>	<p>ayahuasca [3] 5593:8 5598:7,17</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back [13] 5524:5 5528:2 5540:15 5573:21 5574:15 5576:15 5579:13 5580:22 5587:17 5609:1,12 5635:2 5645:16 backed [5] 5536:5 5537:16 5574:1,1 5642:25 background [2] 5527:23 5634:8 backup [8] 5535:11 5536:23 5537:8 5545:24 5546:1 5558:21 5560:2 5561:4 bad [2] 5572:24,25 baked [1] 5633:24 ban [1] 5520:12 bar [2] 5550:24 5551:5 bare [1] 5600:8 barrett [36] 5529:18 5530:20 5532:10 5534:22 5535:4 5545:23 5569:16,17 5570:11 5571:8,20 5572:5,12 5573:12,15 5574:13 5575:15 5576:2 5579:13 5599:20 5601:3,22 5608:25 5609:2,5,10 5610:2,10,22 5611:5,10,16 5612:2,5,15 5642:10 barrett's [1] 5548:13 based [3] 5566:23 5586:3 5589:10 basically [3] 5524:1 5579:12 5593:13 basis [12] 5534:9 5562:3 5588:1,2,6 5589:18 5597:7 5610:24 5611:2 5612:8 5614:9 5644:14 bear [3] 5525:9,20 5528:3 bearing [1] 5631:6 become [3] 5534:25 5538:1 5597:19 began [1] 5590:25 begin [1] 5542:9 beginning [2] 5547:11 5580:21 behalf [2] 5584:3 5642:15 behavior [2] 5525:25 5571:5 behind [1] 5591:11 believe [2] 5545:21 5550:15 believing [1] 5578:7 belong [1] 5639:9 below [1] 5586:22 benefit [2] 5577:5 5588:20 best [3] 5598:13 5640:3,12 better [2] 5599:9 5647:25 between [13] 5527:17 5528:16 5533:13 5534:4 5548:10 5554:7 5555:21 5573:20 5575:11 5581:5 5617:5 5641:5 5646:14 beyond [6] 5527:22 5533:8 5535:2 5542:5 5568:4 5646:20 big [1] 5614:24 bigger [1] 5541:2 bit [11] 5545:10 5594:9 5605:20 5606:2,15,16 5618:1 5635:4 5640:3,11,19</p>
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<p>blackstone's [2] 5554:21 5555:6 blah [5] 5557:20,20,21,21,21 board [2] 5618:6 5623:8 body [3] 5536:9 5638:14 5643:11 boils [3] 5528:18 5578:7 5586:9 both [6] 5543:22 5555:14 5558:10 5611:7 5638:12 5646:15 bother [1] 5600:9 bottom [1] 5577:7 boundaries [1] 5562:15 boy [1] 5611:22 bracket [1] 5560:17 bracketing [1] 5559:12 brain [1] 5548:6 branch [3] 5536:6 5587:7 5589:25 brandishing [1] 5533:25 break [1] 5530:11 breakfast [1] 5524:14 breaks [1] 5638:6 breathalyzers [1] 5523:11 brief [3] 5614:25 5633:15,22 briefing [1] 5633:15 bring [4] 5559:3 5589:13 5604:4 5629:1 brings [1] 5529:10 broad [5] 5597:9 5603:4,6 5606:15 5615:15 broader [1] 5520:2 broadly [2] 5529:24 5568:3 bruen [24] 5539:14,20 5540:1,12,23 5542:14,16 5577:13 5578:1,4,16 5579:19 5581:13 5588:15 5590:11 5599:1 5602:1,3 5612:14 5614:3 5617:14 5624:19 5631:2,9 bunch [1] 5563:8 burden [5] 5588:15,21 5590:11 5614:1 5624:19 business [1] 5626:4</p>	<p>carry [1] 5631:9 carrying [2] 5593:24 5594:3 cars [1] 5568:24 carve [1] 5575:25 cascade [1] 5646:3 case [29] 5529:22 5558:24,24 5559:3,4,6 5560:5,25 5562:6 5564:17 5565:21 5581:17 5582:3 5584:6 5589:3 5591:22 5597:14 5606:11 5609:12 5610:25 5612:19 5613:19 5616:10 5617:24 5618:4 5628:2 5638:9 5641:25 5644:19 case-by-case [4] 5588:1 5589:17 5624:15 5643:11 cases [16] 5573:17,19 5583:17 5603:1 5611:21 5614:11 5626:18 5628:18 5630:24 5633:2,6 5638:7,7,11,22 5640:16 casual [1] 5551:5 casually [1] 5562:22 categorical [14] 5585:21 5590:4,7 5591:2,8,11 5610:7,24 5611:13 5612:7,11,16 5615:25 5639:8 categorically [4] 5588:12 5613:4 5616:19 5624:10 categories [18] 5520:4,6 5535:15 5549:8,14 5553:15 5555:18 5566:25 5569:12 5570:10 5571:13 5589:7,11 5590:22 5591:4,17 5644:6,14 categorizations [1] 5618:8 categorize [1] 5596:16 categorized [1] 5628:10 category [31] 5522:19 5529:11 5567:21 5569:7 5571:18 5580:1,5,23 5584:25 5588:16,17 5590:17 5592:1,5,6 5608:8 5610:5,8 5611:4 5612:21 5614:19 5617:2,15 5618:22 5624:10,22 5639:9 5643:13 5644:2,2 5645:19 category-by-category [2] 5644:14 5647:17 caught [1] 5575:16 cause [1] 5581:24 causes [1] 5647:22 causing [1] 5531:8 cavalier [1] 5589:23 caveat [1] 5607:9 cease [1] 5566:7 centered [1] 5521:18 centuries [1] 5548:4 century [3] 5547:11 5556:7,8 cert [1] 5633:14 certain [7] 5579:4 5585:21 5591:23 5603:8 5614:17 5631:1 5636:20 certainly [8] 5522:20 5537:5 5594:21 5603:5 5615:2 5628:5 5644:17 5645:3 cetera [2] 5573:9 5615:11</p>	<p>challenge [5] 5574:22,23 5575:19 5586:9 5629:1 challenged [1] 5613:25 challenges [9] 5548:16 5553:4 5560:18 5568:13 5574:17,18,20 5576:4 5591:24 chance [1] 5644:8 charged [1] 5616:1 check [5] 5528:5 5577:3 5582:23 5583:3,22 checks [2] 5527:24 5647:3 chewing [1] 5529:14 chief [31] 5545:6 5546:24 5548:18 5550:6 5551:21 5556:15 5561:13 5568:5 5569:15 5576:19 5583:24 5584:4 5586:25 5587:24 5588:23 5589:1 5595:21,23 5596:12 5597:8 5602:4 5613:5,8,18 5619:9 5631:25 5634:25 5637:22 5642:9,16 5645:5 choice [3] 5535:13 5606:22 5618:25 choose [2] 5593:11 5629:21 chooses [1] 5619:6 chosen [2] 5560:25 5577:9 cider [1] 5524:14 circles [1] 5528:2 circuit [2] 5625:4 5627:14 circuits [1] 5613:20 circuit's [4] 5532:3,10 5534:10 5575:6 circumstance [2] 5531:7 5577:21 circumstances [1] 5575:1 citizen [1] 5631:8 civil [8] 5520:7 5522:20 5555:1 5585:14 5596:10,20 5625:24 5643:10 clarify [1] 5562:15 class [3] 5574:4,9 5583:10 classify [1] 5578:19 clear [11] 5526:25 5527:15 5555:5 5559:11 5565:19 5566:6 5572:13 5590:1 5614:9 5620:6 5623:23 clearer [1] 5526:8 clearest [2] 5563:3,10 client [4] 5586:21 5587:1 5607:11 5613:14 close [2] 5581:5 5612:21 closely [1] 5556:5 cocaine [2] 5547:5 5612:8 codeine [1] 5570:23 coherent [1] 5615:19 collapses [1] 5644:11 college [1] 5571:21 colloquy [1] 5574:15 colloton [2] 5568:6 5645:5 colloton's [1] 5548:19 colorado [1] 5525:10 columbia [1] 5611:25 combined [1] 5537:15 come [9] 5537:24 5563:19 5588:18</p>
C		
<p>caffeine [3] 5529:14 5562:12 5575:22 calculus [3] 5535:22 5546:21 5556:9 calibrate [1] 5537:1 calibrated [1] 5537:3 call [1] 5554:11 cannot [5] 5536:4 5551:18 5586:2 5601:18 5624:7 capable [1] 5601:10 capacity [1] 5535:25 capture [4] 5612:23,24 5637:7 5644:20 captures [1] 5615:3 car [4] 5568:10,11 5569:9 5637:17 care [3] 5587:18 5610:19 5626:1 careful [1] 5557:24 cares [1] 5546:3 carries [1] 5630:1</p>		

Official - Subject to Final Review

<p>5592:22 5612:18 5614:11 5620:20 5637:15 5640:16 comes [6] 5544:10 5546:19 5565:21 5609:12 5628:18 5629:16 comfort [1] 5573:6 coming [1] 5624:14 commit [4] 5554:9 5561:11 5596:25 5627:3 commitment [8] 5520:7 5522:20 5555: 2 5585:15 5596:11,20 5625:24 5643: 10 committed [5] 5559:7 5597:21 5603:3 5631:15 5634:21 committing [1] 5595:17 common [2] 5573:25 5643:4 common-law [1] 5634:8 commonly [1] 5547:1 common-sense [1] 5573:25 comparable [1] 5538:17 comparator [1] 5576:15 compared [1] 5592:7 completely [2] 5592:10 5618:18 components [1] 5632:3 compulsion [2] 5566:9,11 compunction [1] 5618:24 concede [4] 5561:6 5563:24 5612:2,5 conceded [1] 5550:10 concededly [1] 5646:22 conceding [1] 5620:7 concentration [2] 5534:17 5548:23 concentrations [2] 5572:23 5609:15 concept [8] 5587:16 5594:12 5612:22 5619:24 5624:1 5636:20 5640:4,21 conception [3] 5617:25 5619:4 5642: 2 concepts [3] 5558:10 5615:20 5624: 11 conceptual [1] 5607:14 conceptually [1] 5539:14 concern [8] 5541:14 5553:21 5554:21 5572:18 5573:2,3 5577:18 5633:8 concerned [4] 5568:2 5581:12 5614: 16 5617:4 concerns [6] 5521:8 5543:20 5546:2 5554:16 5555:13 5577:16 concession [1] 5600:17 concretely [1] 5634:19 concurrence [1] 5582:19 conduct [8] 5520:3 5522:25 5534:2 5562:16 5566:8 5567:20 5608:20 5611:6 conducted [1] 5625:2 conducts [1] 5609:13 confined [1] 5544:25 confinement [4] 5542:20 5569:3 5580: 11 5622:19 conflates [1] 5526:19</p>	<p>conflating [1] 5526:23 conflict [1] 5613:20 conflicted [1] 5528:22 confront [1] 5592:3 confusing [2] 5639:7 5647:1 confusion [1] 5646:13 congress [54] 5529:13 5532:11,19 5536:4 5540:8,22 5542:2 5549:8 5553:22 5558:3 5566:17 5572:19 5577:7,18 5578:8 5579:3,22 5582:25 5586:5 5587:6 5589:25 5590:6,9 5592:19 5593:14 5596:14 5598:6,14, 14,23 5599:4 5600:10,23 5601:5,7, 25 5602:5,6,12 5603:8 5609:12,21 5610:6 5613:9 5615:20 5626:13,14 5630:6,9,14,15,19 5632:15 5642:21 congress's [5] 5531:15 5576:25 5579: 17 5601:16 5617:6 connected [1] 5618:12 connection [5] 5528:16 5570:4 5573: 19 5575:9,10 connections [1] 5553:8 consensus [2] 5564:5 5643:8 consequences [4] 5597:11 5620:8 5627:5 5631:4 consider [6] 5531:21 5532:22 5553:6, 8 5573:11 5628:5 consideration [1] 5589:24 considerations [2] 5543:19 5569:19 considered [5] 5552:5,11 5582:5,8 5611:23 considering [4] 5529:3 5532:25 5553: 23 5559:1 considers [1] 5624:6 consistent [4] 5547:12 5584:16,17 5595:13 consistently [1] 5609:21 constitutional [2] 5633:25 5643:23 constitutionally [5] 5550:2 5576:8 5584:8,10 5647:11 constrain [1] 5602:12 constrains [1] 5567:2 constraint [1] 5567:13 constraints [3] 5521:10 5568:4,21 consume [2] 5548:3 5600:21 consumed [4] 5547:9 5585:4,6,11 consumes [3] 5585:25 5586:4 5624:6 consuming [3] 5594:22 5636:25 5637: 1 consumption [4] 5594:13,16 5624:5 5637:4 contemplates [2] 5588:7 5622:10 contemplating [1] 5613:9 content [1] 5608:20 context [4] 5527:8 5568:1 5614:2 5624:25 continue [1] 5521:21</p>	<p>contrast [1] 5642:18 control [9] 5521:20 5523:16 5532:20, 25 5538:4 5607:22 5627:21 5632:11 5647:5 controlled [46] 5529:9 5531:20 5532: 7 5534:13 5545:13 5551:23,25 5552: 6,13 5558:5 5563:14 5564:22 5565: 11,13 5566:14,20 5569:19 5572:14 5584:13,21 5585:18 5586:5 5588:10 5592:20 5596:24 5600:18,20 5601:9, 17 5605:8 5608:8,15 5619:17,22 5621:3,21,25 5622:9 5623:11 5630:8, 17,18 5632:4,5,9 5642:23 controls [3] 5543:7,13,14 conversation [1] 5542:9 cool [1] 5636:18 core [2] 5590:9 5602:15 cornerstone [1] 5646:8 correct [26] 5530:16 5547:14,20 5550: 13,15 5551:16 5556:25,25 5557:4 5591:3 5600:12,15,17 5604:18 5607: 8 5618:8 5619:18 5624:22 5632:7 5633:9,19,20 5634:7,11 5639:2,17 correctly [3] 5566:16 5611:4 5628:10 coughing [1] 5575:17 couldn't [6] 5521:20 5531:8 5590:6 5612:10 5620:20 5626:13 counsel [5] 5545:7 5583:25 5619:10 5634:24 5642:12 count [1] 5559:25 country [4] 5596:8 5613:1 5622:17 5629:11 counts [1] 5554:6 couple [11] 5527:1 5531:18 5535:7 5537:10 5538:25 5556:17 5562:5 5565:10 5582:15 5637:14 5645:25 course [5] 5520:2 5526:19 5552:25 5553:4 5647:25 court [29] 5527:6 5533:17,22 5536:2 5553:16 5554:23 5560:16 5565:21, 21,22 5566:22 5568:2 5569:9 5578: 17 5584:5 5589:19 5596:5,7,23 5599: 8 5600:6,6 5603:9,15 5616:10,12 5640:11 5642:18 5644:12 courthouses [1] 5589:13 courts [15] 5558:9 5568:4 5582:20 5594:18 5597:3 5608:19 5614:12 5638:18 5640:2,12,13 5645:4,10 5646:12,24 court's [3] 5536:10 5573:17 5586:6 cover [8] 5538:13 5558:10 5563:2,4, 25 5564:1,2 5584:20 covered [2] 5520:2 5556:13 covers [2] 5558:11 5565:16 create [1] 5536:9 created [2] 5549:9 5634:10 creates [1] 5644:17</p>
---	---	---

<p>credit [1] 5539:15 crime [2] 5521:3 5553:9 crimes [2] 5554:9 5570:5 criminal [5] 5625:1,2 5628:1 5629:4,5 criteria [5] 5552:15 5558:12 5560:22 5570:2,6 critical [1] 5585:10 cross-reference [2] 5605:7 5632:15 csa [3] 5557:18 5627:9 5638:16 culture [1] 5548:2 current [1] 5577:13 currently [2] 5614:21 5647:6 cutoff [1] 5560:14</p>	<p>decide [4] 5596:9 5609:24 5612:19 5628:14 decided [1] 5603:8 decides [1] 5572:9 deciding [1] 5552:12 decision [7] 5532:3,13 5535:20 5561: 7 5583:16 5586:22 5639:9 decision-making [1] 5627:20 decisions [1] 5559:9 deemed [2] 5543:18 5583:2 deeming [1] 5585:11 deems [1] 5630:19 defend [1] 5614:4 defendant [3] 5524:1 5567:9 5574:21 defendant's [1] 5627:17 defense [1] 5528:10 defer [1] 5600:11 deference [1] 5618:2 deferring [1] 5601:25 deficiency [1] 5586:17 define [7] 5526:12 5564:16,19 5605:9 5611:3 5612:20 5638:15 defined [12] 5521:15 5522:7,20 5526: 7,22 5557:7 5566:8,16 5580:16 5583: 9 5632:6,8 defines [1] 5638:16 defining [2] 5565:17 5580:14 definitely [2] 5563:4 5595:1 definition [35] 5522:11,15 5527:18 5538:9 5545:2 5557:18 5558:1,3 5564:22 5565:12,15,16,20 5566:18 5567:17 5605:14,19,21 5606:20 5607:6,22 5608:6,10,13 5615:5 5621: 3 5622:9 5627:9 5632:19 5633:9,18 5634:8,10 5638:19 5642:7 definitions [6] 5521:17 5558:9 5565:6 5566:23 5626:17 5641:5 degree [5] 5541:15 5547:10 5610:16 5624:4 5639:20 delegate [1] 5532:13 delta [1] 5605:17 demonstrated [1] 5610:15 depend [1] 5641:16 depends [1] 5641:13 described [1] 5582:19 description [1] 5593:18 designated [2] 5586:5 5601:17 designed [1] 5615:13 determination [44] 5531:24 5533:6 5534:19 5536:5 5540:5,6,9,17 5541: 18 5542:1 5543:8 5546:15 5549:12 5572:20 5573:4,22 5589:3 5590:12 5591:18 5592:12 5597:12,15,24 5599:24 5600:19 5601:16 5603:12, 16 5613:12 5619:25 5620:2 5621:12, 17 5623:5,6,19,21 5624:15,21 5625: 6 5627:15 5629:17 5630:3,10</p>	<p>determinations [23] 5533:8 5536:21 5542:25 5545:14 5546:6 5549:6 5550:4 5553:1 5573:8 5579:18 5583: 5 5596:13 5597:9 5599:5 5613:24 5618:2 5624:25 5643:7,12,21,25 5645:11 5647:16 determine [2] 5591:11 5621:24 determined [4] 5543:10 5592:4 5622: 2,3 determining [2] 5552:5 5633:8 develop [2] 5613:18,19 developed [2] 5597:3 5638:15 dialogue [1] 5553:5 dictionary [2] 5558:8 5566:23 difference [7] 5520:20,23 5548:10 5554:7 5559:15 5614:1 5641:4 different [26] 5522:2,3,4,13 5526:21 5528:12 5533:24 5538:14 5544:1 5548:1 5551:6 5554:3,16 5555:14 5562:5,24 5563:13 5567:7 5568:15, 17 5581:18 5601:4 5615:20 5618:5 5640:15 5647:19 differently [1] 5580:14 difficult [6] 5548:9 5549:16 5594:9 5611:22 5625:3 5645:9 difficulties [2] 5529:19 5597:11 diminish [1] 5560:15 direct [1] 5631:6 disabling [1] 5631:14 disagree [3] 5564:11,12 5631:11 disagrees [1] 5527:11 disarm [6] 5525:14,16 5570:20 5577: 19 5598:8 5602:13 disarmament [7] 5533:4 5535:23 5537:11 5541:20 5544:10,19 5577: 10 disarmed [8] 5524:20 5539:17,24 5540:20 5541:16 5562:24 5564:14 5646:1 disarming [4] 5533:19 5585:17 5586: 2 5625:8 disconnect [1] 5620:24 discounting [1] 5576:11 discrepancy [1] 5527:25 discretionary [2] 5588:19 5590:14 discussed [2] 5556:21 5570:8 discussion [2] 5591:22 5606:14 disorder [2] 5634:20,22 dispel [1] 5573:3 dispositive [1] 5564:4 dissent [3] 5548:19 5645:5 5646:7 dissolves [2] 5593:13,15 distances [2] 5543:23,23 distinct [4] 5538:13 5561:17 5565:2 5567:1 distinction [4] 5527:16,17 5585:10 5646:14</p>
D		
<p>danger [24] 5521:12 5533:24,24 5534: 4 5538:1,24 5546:7,11,12 5549:9 5555:24 5562:4 5568:18,23 5569:6, 12 5574:4 5578:20 5597:6 5610:18 5620:11 5625:9 5642:20 5644:15 dangerous [67] 5530:24 5531:12,16 5532:5 5534:7,25 5535:8 5539:7,17, 23 5540:7,22 5541:3,10,19 5542:2,3, 4,18 5543:18 5549:19 5552:7 5553: 13,24 5554:1 5559:17 5570:19 5571: 5 5572:15 5575:13 5577:20,21 5578: 9,23 5579:4 5580:1 5583:2,15 5585: 24 5588:13 5589:20 5596:17 5599:6 5600:21 5603:2,9,24 5613:6 5617:7 5620:21 5622:7 5626:13 5628:15 5629:14,15 5635:8,12 5636:4 5639:2, 19 5642:22 5644:10 5645:1,22 5646: 1 5647:19,20 dangerousness [22] 5522:22 5531:8 5532:20,25 5534:19 5535:18 5536:4, 14 5537:4 5540:9 5550:3 5552:17 5560:15 5563:16 5572:10 5573:24 5580:24 5599:25 5603:12,18 5630:7 5642:3 dangers [4] 5537:18 5572:22 5575:11 5580:10 day [27] 5522:8,9 5524:5,6,14,16 5525: 2,8,13 5540:19 5542:7 5580:6 5586: 20 5594:23 5596:2 5614:14 5616:22 5627:2 5636:16,17,25 5637:1,8,15, 17 5640:25 5643:10 days [4] 5595:11 5613:2 5630:1 5645: 25 day-to-day [6] 5598:2 5604:7 5610:19 5625:19,23 5641:1 dea [2] 5546:18 5570:3 dead [1] 5554:12 deal [4] 5525:25 5527:4 5614:24 5646: 6 dealing [1] 5558:5 deals [1] 5647:5 dea's [1] 5553:7</p>		

<p>distinguish [2] 5555:21 5585:4 district [6] 5611:24 5613:16 5629:10, 15 5645:4,10 doctrine [1] 5585:4 documents [1] 5609:16 doing [21] 5521:24 5538:23 5540:19 5542:1 5543:6 5551:10 5553:22 5555:9 5562:12 5571:18 5574:5 5577:8 5579:22 5580:12 5581:19 5592:21 5602:7,8 5617:19 5620:22 5640:16 domestic [3] 5533:19 5541:5,14 dominant [3] 5585:19 5604:24 5605:3 done [5] 5542:11 5548:4 5586:22 5600:14 5614:21 double [1] 5524:12 doubt [3] 5527:23 5588:20 5646:20 down [16] 5528:2,19 5535:16 5536:17, 18 5537:24 5546:3 5549:17 5554:12 5578:7 5580:19 5586:9 5638:6 5643: 21 5645:7,18 dozen [1] 5545:1 drank [1] 5524:15 draw [1] 5636:11 drawing [1] 5643:3 drink [1] 5626:21 drinkers [2] 5551:5 5585:2 drinking [2] 5587:18 5626:3 drinks [6] 5540:17 5550:24,25 5562: 22,23,23 drive [1] 5637:17 driving [1] 5568:23 drugs [47] 5522:2,3 5528:12,24 5530: 19 5532:1 5536:3,8 5537:25 5544:18 5545:18 5547:1,24 5548:10 5549:10 5550:12,19 5552:24 5559:14 5561: 16,24 5562:5 5563:12 5564:8 5565: 15 5570:21,24 5571:1,1,4,7,13 5572: 2,7,16 5576:4 5583:1 5587:8 5592: 23 5604:18 5608:7 5618:12 5619:8 5623:15 5629:12 5644:3,9 drug's [2] 5627:18,22 drunk [6] 5539:2 5554:12 5580:19 5626:24,25 5644:24 drunkard [32] 5523:1,2,23 5524:4,7, 11 5526:8 5528:17 5539:1 5574:11 5583:7,14 5585:12,16 5586:1 5588: 18 5594:12 5598:13,18 5604:2 5612: 21 5616:8 5618:22 5624:12 5625:25 5634:7 5636:21 5637:6,9 5640:18 5643:1,13 drunkards [26] 5520:8 5522:16,19 5523:8 5524:19 5528:13 5540:7 5543:17,20 5544:16,17 5555:4 5556: 5 5562:21 5574:8,9 5580:4 5583:9, 10 5584:24 5585:2 5587:16 5589:9 5604:21 5617:5 5640:6</p>	<p>drunken [1] 5619:7 due [2] 5521:5 5584:16 duration [1] 5522:4 during [4] 5594:23 5626:11 5627:17 5647:12</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [6] 5534:20,22 5574:20 5591:9 5597:14 5633:8 early [2] 5556:7 5634:13 easier [2] 5522:18 5562:6 easiest [2] 5555:2 5618:18 easily [1] 5535:15 easy [2] 5612:7 5645:4 effect [3] 5521:19 5548:6 5644:22 effects [20] 5522:3 5529:16 5531:21 5532:1,14,16 5535:21 5536:9 5537: 15 5539:11 5546:13 5549:3 5553:11, 12 5563:17 5572:25,25 5576:16 5627:24 5630:1 effort [1] 5640:3 efforts [1] 5631:23 eight [2] 5524:5 5634:15 either [14] 5539:4 5545:1,21 5547:1 5575:25 5596:22 5605:23 5606:21, 22 5615:10 5616:17 5619:1 5624:16, 21 elaborate [2] 5561:21,22 eliminating [1] 5588:21 emerge [1] 5544:6 emerged [1] 5544:14 emerges [1] 5556:7 enacted [2] 5544:21 5630:14 end [4] 5554:17 5586:20 5617:19 5645:10 endanger [7] 5557:20 5564:25 5605: 10 5615:10 5631:22 5632:21 5641: 10 endangering [3] 5605:25 5606:5 5642: 5 endangers [1] 5565:2 ends [2] 5552:12 5643:20 enforce [1] 5528:22 engage [1] 5588:8 engaged [3] 5584:20 5620:3 5622:15 engaging [1] 5621:25 enough [29] 5525:19 5541:19 5542:25 5553:19,22 5564:25 5579:5 5581:5, 19,24 5588:18 5593:6 5594:11 5596: 17,19,22 5597:23 5598:24 5605:14 5607:6 5612:21,23,24 5615:8 5616:7 5621:21 5627:1 5635:15 5637:7 ensue [1] 5571:2 ensuing [1] 5559:13 ensures [1] 5614:18 ensuring [2] 5601:13 5604:1 entail [1] 5627:16</p>	<p>entertain [1] 5575:21 entire [2] 5539:19 5584:24 environment [1] 5554:14 episode [1] 5593:9 equivalent [1] 5637:5 era [4] 5524:10,11 5579:3 5644:23 erin [1] 5584:2 especially [1] 5531:24 essentially [2] 5595:9 5605:24 established [1] 5575:4 establishing [1] 5613:11 et [2] 5573:9 5615:11 evaluate [1] 5613:21 evaluating [1] 5602:7 eve [2] 5589:4,6 even [46] 5525:7,10,11 5530:4 5533:4, 23 5541:2,24 5542:9,23 5546:16 5550:17 5551:14 5559:13 5564:10 5572:16 5577:18 5583:17 5584:14 5585:8 5586:15 5589:13 5590:5 5594:6,17 5601:9,16,24,24 5610:18 5617:18,25 5619:5 5628:24 5629:7 5631:9 5633:14 5634:15,18 5640:19, 23 5644:6 5645:20 5647:6,20,21 everybody [2] 5591:4 5619:16 everyone [2] 5527:18 5532:15 everything [3] 5537:17 5601:17 5619: 22 everything's [1] 5636:18 evidence [16] 5527:22 5535:7 5541: 13 5546:20 5570:3 5574:1 5590:13 5598:17 5609:14,24 5610:3 5628:7 5629:22,22,23 5630:2 evidentiary [1] 5611:6 exact [2] 5542:23 5576:14 exactly [15] 5523:11 5547:23 5548:21, 23 5553:24 5563:25 5576:16 5578: 23 5588:6 5602:15 5614:4 5634:3 5636:10 5639:10 5643:3 examine [1] 5591:10 example [4] 5531:5 5555:3 5589:5 5629:9 examples [1] 5589:4 exams [1] 5571:24 exceeds [1] 5583:4 exceptionally [1] 5539:7 excess [2] 5587:18 5626:21 excessive [2] 5606:21 5626:3 excessively [1] 5618:21 exclusively [1] 5545:11 executive [4] 5536:6 5587:7 5589:25 5596:14 exercise [1] 5591:14 existed [2] 5547:7 5563:5 experience [1] 5583:13 expertise [1] 5589:24 experts [4] 5610:22 5611:7 5628:9,12</p>
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Official - Subject to Final Review

<p>explanation [1] 5526:4 explore [1] 5524:2 expressly [1] 5569:23 extent [5] 5540:1 5543:21 5568:2 5587:5 5617:3 externalities [2] 5561:9 5562:8 extreme [1] 5597:19 extremely [1] 5625:3</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facial [2] 5586:9,23 facilitate [1] 5529:5 facilities [1] 5558:6 facility [1] 5595:18 fact [34] 5520:5 5521:13 5527:24 5528:19 5529:9 5531:19 5533:1 5540:21 5541:5 5543:5 5544:7 5556:3 4 5575:13 5584:9 5585:19,23 5586:3 5590:16 5597:5 5600:8,24 5603:10 5607:10 5608:2,6 5613:13 5621:19 5624:20 5629:25 5638:24 5642:22 5646:23 5647:8,11 fact-finding [1] 5583:4 factor [1] 5543:2 factors [2] 5537:23 5627:14 facts [1] 5595:5 factual [1] 5575:24 fail [3] 5593:19,20 5595:1 fails [1] 5584:11 fair [5] 5539:6,13 5584:11 5593:6 5600:16 fairly [2] 5553:14 5589:23 fall [2] 5530:13 5615:5 fallback [1] 5560:19 falling [3] 5554:12 5580:19 5631:3 falls [2] 5539:25 5637:11 familiar [1] 5571:11 family [1] 5521:23 far [4] 5536:17 5550:17 5582:17 5632:22 farther [1] 5529:21 fashion [1] 5542:18 fathom [1] 5549:18 fear [1] 5555:7 feasible [1] 5548:15 features [1] 5562:8 federal [3] 5528:21 5529:8 5545:1 feel [1] 5576:17 felonies [1] 5631:15 felons [4] 5569:8,11 5645:19,19 fantanyl [2] 5546:9 5547:6 few [7] 5525:1 5586:4 5594:10 5613:2 5616:6,22 5638:7 figure [10] 5534:6 5563:18 5576:16,17 5588:9 5621:15 5624:24 5640:3,12 5645:2 figuring [3] 5534:14 5582:15 5640:15</p>	<p>final [2] 5559:9 5630:23 find [7] 5534:14 5546:6 5569:1 5604:12 5629:12,12 5643:9 finding [4] 5570:15 5627:10 5629:11 5645:4 findings [6] 5522:22 5543:16 5570:9 5598:10,10 5609:19 fine [5] 5560:1 5580:17 5595:12 5635:16 5644:2 fine-grained [1] 5643:2 finish [1] 5609:3 finished [1] 5623:2 firearm [4] 5540:20 5550:13 5590:24 5624:8 firearms [9] 5536:1,10 5544:11 5553:25 5569:6 5607:19 5609:18 5642:22 5647:12 first [11] 5523:13 5528:14 5535:10 5547:17 5556:24 5559:6 5573:16 5590:2 5592:25 5593:22 5635:19 fit [9] 5529:12 5534:4 5539:3 5553:14 5581:5 5598:21 5618:21 5622:3 5643:13 fits [4] 5543:11 5598:17 5601:14 5609:25 five [2] 5631:17 5643:17 fixed [1] 5570:6 floated [1] 5533:3 focus [1] 5642:4 focused [13] 5553:11 5555:3 5595:25 5603:9 5608:3,6 5618:20,22 5626:23 5634:17,18 5636:24 5643:9 focusing [1] 5576:13 folded [2] 5578:1,3 follow [2] 5539:21 5599:22 following [1] 5529:8 footing [1] 5551:6 foreclose [1] 5607:12 forfeiture [1] 5527:3 forth [3] 5552:3 5579:13 5596:13 forward [2] 5546:19 5647:23 founders [1] 5547:16 founding [20] 5524:10,11 5541:3,6,13 5542:3,5,12,17 5543:17,23 5544:6 5578:18,22 5579:3,10 5580:5,17 5589:8 5644:23 founding-era [5] 5523:10 5533:18 5539:22 5544:3 5582:4 four [4] 5524:18 5545:16 5567:19,20 fours [2] 5532:24 5543:1 fourteenth [2] 5547:4,18 framework [2] 5576:11 5646:5 framing [1] 5583:7 free [1] 5582:21 free-for-all [1] 5582:20 frequency [6] 5558:12 5567:4 5610:17 5644:8 5646:18,21</p>	<p>frequent [4] 5522:25 5523:2 5527:20 5533:6 frequently [4] 5539:4 5574:2 5585:5 5594:22 fridays [1] 5562:22 front [1] 5567:7 front-line [3] 5536:19 5545:23,24 fugitive [3] 5549:20 5645:24 5646:1 fugitives [1] 5549:18 function [10] 5544:17 5585:8 5594:16 5598:2 5604:7 5625:19,22 5629:21 5639:22 5641:1 functioning [1] 5594:24 fundamentally [1] 5576:10 further [4] 5535:16 5537:1 5545:8 5560:11 furthered [1] 5617:8</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>g)(1 [3] 5549:24 5631:21 5645:19 g)(2 [2] 5549:17 5645:24 g)(3 [6] 5530:14 5533:5 5549:13 5623:5 5630:14 5631:18 g)(4 [2] 5549:23 5646:2 game [1] 5600:4 gap [1] 5533:13 gate [1] 5567:13 gauge [1] 5539:2 gave [3] 5531:5 5599:23 5635:2 general [5] 5532:12,18 5553:21 5577:20 5592:1 generality [1] 5612:23 generation [1] 5644:23 generation's [1] 5578:22 generic [1] 5620:8 geographic [1] 5589:11 gets [7] 5539:21,23 5540:13 5588:19 5590:13 5596:7 5642:6 getting [5] 5594:13 5598:19 5606:20 5614:6,15 give [11] 5526:4 5545:22 5555:3 5563:3 5593:17 5600:3 5607:10 5608:20 5609:6 5627:8 5629:18 given [9] 5522:1 5557:7 5558:25 5567:8 5585:12 5591:10 5601:2 5634:6 5641:6 gives [1] 5573:1 giving [3] 5567:1 5618:1 5633:18 glad [1] 5574:13 glasses [1] 5524:18 gorsuch [39] 5523:17,19 5524:9,24 5525:6,17,19 5526:1,9,11,17 5527:10,14 5528:1,18 5536:12,22 5537:2,7,13 5556:16,17,20 5557:1,5,17 5558:17,20 5559:18,21,24 5560:2,24 5561:12 5564:18 5580:20 5582:18 5615:22 5637:23</p>
--	--	--

<p>gorsuch's [3] 5529:21 5540:16 5542:4 got [8] 5558:17,18 5577:7 5592:4 5614:5 5617:24 5618:7 5630:20 govern [1] 5587:12 government [75] 5526:11 5528:21 5529:2,3,6 5543:7,10,12,14 5546:3 5558:8 5559:1,9 5561:2,7 5567:2,24 5568:9 5575:2,20 5584:19 5585:1,13,22 5586:7 5588:4,11,19,25 5590:10,15 5591:8,14 5592:4 5595:14 5597:17 5599:23 5602:16,25 5604:12,16 5607:10,20 5608:5,18 5610:14,23 5611:12,22 5612:6,12 5613:23 5614:18,20 5615:24 5616:18 5618:1,3,10 5624:3,9 5628:6,17,24 5629:21 5631:1 5633:17 5636:8 5637:12 5638:2,10,11 5640:17 5646:6,19 government's [13] 5526:2 5530:4 5534:23 5535:6 5560:20 5567:16 5596:21 5600:17 5614:6 5618:7 5631:23 5639:15 5641:6 gradations [1] 5536:25 great [1] 5579:22 greater [2] 5549:2 5580:12 grip [4] 5593:12 5635:9,16,17 ground [3] 5549:11 5616:11,24 grounded [2] 5575:10 5579:17 grounds [1] 5586:23 grown [1] 5547:8 guardian [1] 5597:20 guardianship [6] 5585:14 5595:17 5596:10,21 5622:20 5627:4 guardrail [1] 5574:6 guardrails [2] 5528:12 5578:13 guess [17] 5530:20 5536:15 5539:12 5552:8 5568:12 5570:21 5572:18 5573:5,17 5576:21 5577:5 5581:12 5593:21 5635:25 5638:2 5639:15 5641:13 gum [1] 5529:14 gummy [5] 5525:9,20 5528:3,8 5637:14 gun [19] 5522:10 5532:19,25 5550:18,24 5551:15 5589:5 5594:5,6 5604:17 5605:15 5611:11 5619:17 5627:18 5631:8,9 5632:11 5635:12 5636:5 guns [7] 5530:23 5581:22 5589:13 5592:24 5593:16 5600:1 5617:8</p>	<p>15,17 5555:4 5556:4 5557:2,8 5562:3,21 5564:8,21 5565:1,2 5567:9,17,21 5568:9 5574:7,9,11 5580:4,14,22 5583:6,9,10,14 5584:21,23 5585:2,2,12,16,25 5587:16 5588:17 5589:9 5598:13,18 5604:2,21 5605:9,22,23 5606:25 5612:21 5614:23 5615:5 5616:8 5618:22 5624:11 5634:7 5636:10,11,13,21 5637:6,9 5640:6,18 5641:7,14 5642:23 5643:1,13 5646:11,14,17,24 5647:13 habitually [13] 5551:11 5557:19 5564:24 5571:15 5574:5 5580:9,17,18 5585:6 5615:9 5632:20 5641:9,9 habituated [1] 5626:25 haec [1] 5608:11 half [1] 5526:20 half-life [1] 5627:18 hallucinations [1] 5647:22 hallucinogen [1] 5593:9 hallucinogenic [2] 5644:21 5647:21 hand [4] 5527:21 5529:14 5576:3 5643:15 handful [1] 5582:4 handling [2] 5555:16 5583:18 hands [1] 5530:24 happen [2] 5602:21,22 happening [5] 5523:13 5535:14 5543:22 5544:4 5645:3 happens [3] 5559:13 5592:2 5602:25 happy [4] 5588:4 5604:23 5616:9,23 hard [10] 5522:1 5524:13 5549:4,17 5553:18 5563:18,24 5585:14 5611:20 5614:8 hard-and-fast [1] 5560:9 harder [1] 5638:9 hark [1] 5563:4 hash [1] 5646:4 hashed [1] 5589:19 hawaii [2] 5563:6 5581:19 hazard [1] 5536:10 health [4] 5552:22 5557:20 5615:10 5632:21 hear [2] 5579:12 5602:24 heard [3] 5607:24 5609:7 5644:18 hearing [2] 5611:6,6 hearings [2] 5596:8 5609:13 hears [1] 5609:14 heartland [2] 5565:25 5566:4 heavy [1] 5637:18 heightened [1] 5577:1 held [2] 5596:9 5630:25 heller [3] 5569:10 5631:2 5644:13 help [6] 5525:12 5527:2 5531:17 5555:20 5571:24 5577:25 helpful [1] 5583:21 helps [4] 5562:15 5565:6 5566:2 5568:</p>	<p>1 hemani [9] 5524:25 5556:23 5566:7 5574:22,25 5584:9,16 5586:13,18 hemp [1] 5547:8 heroin [5] 5539:4 5546:8 5547:5 5614:14 5644:6 high [3] 5567:4 5603:15 5619:8 higher [1] 5572:24 highly [1] 5590:14 himself [2] 5614:20 5626:1 historical [37] 5522:15 5538:20 5540:3,4,14,15 5554:25 5563:12 5569:7 5581:18,21 5584:22 5590:18 5592:7 5593:18 5594:12 5595:13 5599:2,14 5601:15 5602:9,12,18 5603:14,23 5604:20,21 5605:20 5607:2,17 5617:5,15 5618:13 5625:14 5635:17 5640:5 5642:25 historically [6] 5521:8 5555:16 5575:10 5610:14 5626:18 5634:5 history [32] 5521:9 5528:15 5533:15,18 5537:17 5544:8,14 5545:12 5548:2,8,11 5552:21 5555:20 5556:4 5561:25 5562:17,20,20 5564:13 5565:7,8 5569:1 5573:7,15 5578:15,15 5579:24 5581:7,24 5582:17 5591:10 5634:9 hits [1] 5640:8 hold [2] 5611:14 5644:4 home [5] 5522:10 5534:2 5631:9,10 5637:15 homeless [4] 5520:12,13 5521:2,3 house [2] 5594:4,5 however [2] 5570:22 5599:21 hundreds [1] 5643:16 husband [1] 5531:9 hypothetical [5] 5525:24 5565:7 5595:24 5609:7 5644:20</p>
<p style="text-align: center;">H</p> <p>habit [1] 5527:8 habitual [100] 5520:8 5521:13,15,18 5522:12,16,19 5523:1,8,23 5524:2,4,11,19 5526:7,19,22 5527:8,20 5528:3,13,17 5530:19 5533:1,7 5539:1 5540:6 5542:18,22 5543:17,20 5544:</p>	<p>15,17 5555:4 5556:4 5557:2,8 5562:3,21 5564:8,21 5565:1,2 5567:9,17,21 5568:9 5574:7,9,11 5580:4,14,22 5583:6,9,10,14 5584:21,23 5585:2,2,12,16,25 5587:16 5588:17 5589:9 5598:13,18 5604:2,21 5605:9,22,23 5606:25 5612:21 5614:23 5615:5 5616:8 5618:22 5624:11 5634:7 5636:10,11,13,21 5637:6,9 5640:6,18 5641:7,14 5642:23 5643:1,13 5646:11,14,17,24 5647:13 habitually [13] 5551:11 5557:19 5564:24 5571:15 5574:5 5580:9,17,18 5585:6 5615:9 5632:20 5641:9,9 habituated [1] 5626:25 haec [1] 5608:11 half [1] 5526:20 half-life [1] 5627:18 hallucinations [1] 5647:22 hallucinogen [1] 5593:9 hallucinogenic [2] 5644:21 5647:21 hand [4] 5527:21 5529:14 5576:3 5643:15 handful [1] 5582:4 handling [2] 5555:16 5583:18 hands [1] 5530:24 happen [2] 5602:21,22 happening [5] 5523:13 5535:14 5543:22 5544:4 5645:3 happens [3] 5559:13 5592:2 5602:25 happy [4] 5588:4 5604:23 5616:9,23 hard [10] 5522:1 5524:13 5549:4,17 5553:18 5563:18,24 5585:14 5611:20 5614:8 hard-and-fast [1] 5560:9 harder [1] 5638:9 hark [1] 5563:4 hash [1] 5646:4 hashed [1] 5589:19 hawaii [2] 5563:6 5581:19 hazard [1] 5536:10 health [4] 5552:22 5557:20 5615:10 5632:21 hear [2] 5579:12 5602:24 heard [3] 5607:24 5609:7 5644:18 hearing [2] 5611:6,6 hearings [2] 5596:8 5609:13 hears [1] 5609:14 heartland [2] 5565:25 5566:4 heavy [1] 5637:18 heightened [1] 5577:1 held [2] 5596:9 5630:25 heller [3] 5569:10 5631:2 5644:13 help [6] 5525:12 5527:2 5531:17 5555:20 5571:24 5577:25 helpful [1] 5583:21 helps [4] 5562:15 5565:6 5566:2 5568:</p>	<p>idea [8] 5565:11 5575:12,21 5576:7,14 5583:8 5598:18,21 identifications [1] 5581:14 identified [8] 5551:24 5568:5 5579:4 5580:5,21 5581:6 5588:17 5590:16 identify [1] 5569:11 identifying [1] 5562:1 ill [6] 5535:24 5553:16 5555:10 5569:11 5570:10 5573:23 illegal [44] 5521:6 5522:5 5523:8 5526:15 5528:12,20 5529:7 5530:17 5532:1 5533:7,10 5534:16 5536:7 5537:18 5542:22 5543:12 5544:1,5,13,18 5545:4,18 5547:1,19,24 5548:10,22 5550:12 5552:24 5554:2 5556:6 5562:9,25 5563:12 5564:8 5565:15 5567:12 5581:8 5583:1,1 5589:10</p>

<p>5597:22 5620:15 5646:23 illegality [8] 5528:19 5529:1,2,11 5543:6 5545:10,13 5562:7 illness [1] 5646:2 illustrated [1] 5562:19 illustrates [1] 5548:20 imagine [1] 5609:10 impact [3] 5595:7 5622:12,24 impacting [2] 5598:1 5627:11 impair [1] 5585:7 impaired [3] 5594:16 5595:10 5640: 24 impairing [5] 5604:6 5625:22 5629:20 5640:22,25 impairment [1] 5627:23 impairs [1] 5639:22 implicit [1] 5546:12 importance [1] 5586:24 important [11] 5526:5 5528:13 5531:6, 22,23 5548:14 5567:12 5568:7 5579: 17 5582:23 5646:16 impose [3] 5520:12 5568:1 5582:21 imposing [2] 5582:21 5584:23 impossibility [1] 5576:18 imprisoned [1] 5541:19 imprisonment [2] 5542:20 5580:11 impulse [1] 5627:21 incapable [2] 5583:18 5625:25 incapacitated [2] 5521:25 5643:4 incarcerating [1] 5595:16 incarceration [1] 5585:15 include [3] 5535:20 5559:14 5566:10 includes [1] 5546:15 including [6] 5520:3 5527:19 5536:5 5544:21 5553:15 5617:9 inconsistent [1] 5581:15 incorporate [1] 5621:2 increase [1] 5562:10 indeed [1] 5585:3 independent [1] 5633:23 indicate [2] 5558:15 5589:6 indicated [1] 5605:2 indicates [1] 5645:6 indication [1] 5532:17 indictment [1] 5646:19 individual [10] 5557:18 5574:21 5583: 5 5589:18 5615:25 5622:23 5623:7 5632:19 5643:24 5645:11 individual-by-individual [1] 5588:2 individualized [35] 5522:22 5534:8 5549:12 5550:3 5588:6 5591:5,18 5592:12 5597:4 5603:11,19 5611:2 5621:12,17 5622:1,15 5623:4,6,10, 18,20,25 5624:24 5625:6 5627:10,15 5638:21,23 5639:1,11,13,17 5643:20 5645:16 5647:16 individually [2] 5616:19 5622:21</p>	<p>individuals [1] 5589:11 induce [1] 5627:21 industrial [1] 5547:8 inherent [2] 5633:8,10 inherently [1] 5601:18 inhibition [1] 5627:20 inquiries [1] 5597:4 inquiry [9] 5578:16 5599:1 5600:7 5603:19 5622:1,15 5623:10,25 5644: 17 insist [1] 5621:12 instance [2] 5557:15 5589:18 instruct [1] 5640:4 instructed [1] 5628:4 instruction [4] 5608:20 5627:8 5639: 25 5640:9 instructions [1] 5641:20 intended [1] 5632:16 intense [1] 5593:8 interference [1] 5627:22 internal [1] 5566:9 interpretation [2] 5615:18,19 interpreted [1] 5646:25 interrupt [1] 5523:20 interrupted [1] 5608:25 intoxicant [2] 5540:18 5542:6 intoxicants [4] 5542:17 5544:11 5562: 2 5581:23 intoxicated [6] 5594:15 5619:7 5625: 21 5637:6,10 5640:24 intoxicating [6] 5521:14 5523:12 5529:16 5575:11 5580:9 5603:24 intoxication [6] 5521:16 5523:5,8 5576:17 5585:7 5637:2 intuition [1] 5553:10 intuitive [1] 5575:10 invalidate [1] 5586:19 invented [2] 5547:2,5 invoke [1] 5524:10 invoked [1] 5595:14 involved [4] 5529:10 5534:4 5560:5 5562:9 involvements [1] 5533:10 involving [1] 5591:23 ironic [1] 5643:9 irrelevant [3] 5540:23 5615:4,16 isn't [11] 5528:21 5547:25,25 5553:22 5566:10 5574:10 5599:19 5616:7 5618:17 5630:13 5638:8 issue [6] 5527:3 5628:21 5629:16 5631:7 5633:16 5638:21 issued [1] 5625:4 issues [2] 5549:24 5640:14 item [1] 5542:6 itself [14] 5521:3 5528:21 5531:7,10 5533:17 5543:7,24 5546:13 5559:1 5561:2 5565:12 5581:10 5636:23</p>	<p>5642:21</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>jackson [33] 5537:21 5539:8,12 5541: 8,12,21 5543:4,21 5576:20,21 5578: 5,12,24 5579:2,8 5580:3,13 5581:11 5582:7,12 5583:20,23 5598:3 5599: 18 5601:20,23 5602:20,24 5616:25 5617:11,16,21 5642:11 james [1] 5524:14 january [1] 5581:16 jar [1] 5530:12 jefferson [1] 5524:16 job [1] 5553:22 john [1] 5524:13 joint [1] 5637:14 judge [6] 5548:19 5568:5 5611:5 5629: 11,15 5645:5 judged [3] 5558:11 5567:3 5646:17 judgment [28] 5522:23 5531:15 5533: 16 5537:2 5539:6,13 5541:9 5542:12, 13,16,22 5563:12,15 5576:25 5581:6 5583:11,14 5587:6 5596:3,7 5602:1 5610:11 5611:24 5613:3 5627:19 5630:6 5639:8 5642:21 judgments [14] 5534:11 5537:15 5539: 16,22 5540:13 5545:25 5549:4,5 5578:22 5579:10,17 5589:24 5603:2 5645:9 judicial [3] 5536:7 5543:15 5553:2 jump [1] 5541:2 juries [5] 5627:8 5628:4 5633:1,4,5 jurors [1] 5627:13 jury [13] 5608:19 5627:9 5628:2,14 5629:19 5630:2,4 5632:25 5633:8 5639:24 5640:9 5641:19 5646:21 justices [2] 5522:24 5643:6 justice's [1] 5602:4 justify [3] 5522:18 5535:15 5585:20 justifying [1] 5533:4</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>kagan [19] 5551:21,22 5554:3 5556: 14 5569:18 5592:18 5593:7 5594:2, 25 5595:5 5598:4 5599:22 5634:25 5635:1,21,24 5636:12,15 5637:21 kagan's [3] 5609:6 5612:17 5644:20 kavanaugh [44] 5544:20 5545:3 5561: 14,15,22 5563:20 5564:10 5565:5 5566:3,13 5567:6 5568:8,22 5569:14 5603:20 5604:8,11,15 5605:1,12 5606:4,8,12,17 5607:3,8,15,25 5608: 22 5609:2,4 5614:22 5618:9 5637:24, 25 5638:20 5639:5,10,24 5640:7 5641:3,15,19 5642:8 keep [2] 5530:23 5578:6 keeps [1] 5554:12</p>
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<p>ketamine [5] 5539:9 5546:9 5559:15 5572:2,2 key [1] 5573:22 kind [38] 5521:10 5526:23 5529:20 5534:11,22 5535:22 5536:13 5540:5,9 5544:16 5545:25 5549:5 5553:20,21 5555:22,25 5563:13 5575:7 5577:6 5596:6 5601:18,25 5602:3 5612:4 5615:13,18 5617:9,12,18 5620:2,4 5635:10 5636:2,3 5640:15,22 5642:4 5645:8 kinds [10] 5522:2,3,4 5546:9 5554:16 5578:19 5579:11 5583:5 5618:11 5645:23 knowing [1] 5568:6 knowledge [1] 5647:2 knows [4] 5534:17,18 5590:15 5646:11</p>	<p>5567:17 5607:15 legislate [1] 5577:19 legislative [3] 5576:25 5597:15 5603:17 legislature [11] 5532:21 5539:16,21,22 5540:4,8,12,15 5570:19 5597:12 5599:25 legislatures [1] 5530:23 legitimate [1] 5577:8 length [1] 5627:16 lengthy [1] 5633:22 lens [1] 5634:18 less [2] 5523:15 5571:11 lesser [4] 5533:20 5552:15 5572:3 5614:1 level [12] 5523:4,7 5541:23 5546:5 5554:1 5563:18 5602:22,25 5603:16 5610:7 5612:22 5620:8 liberty [1] 5556:1 life [15] 5521:17 5524:20 5525:14,16 5598:2 5604:7 5610:19 5619:7 5622:12,25 5625:19,23 5627:11 5629:23 5641:2 likely [1] 5531:11 limitations [1] 5589:12 limited [1] 5558:4 limits [1] 5568:2 line [4] 5584:24 5629:6,6 5636:11 lines [2] 5609:20 5643:2 link [1] 5575:4 lion's [1] 5643:19 liquidated [1] 5582:16 list [7] 5549:8 5552:16 5572:17 5592:22,25 5621:11 5630:8 listed [1] 5531:1 listing [2] 5587:8 5600:1 lists [1] 5552:18 literally [2] 5607:12 5608:10 litigated [1] 5589:17 little [12] 5563:24 5581:22 5594:9 5605:20 5606:15,15 5618:1 5635:4 5639:7 5640:3,11,19 live [1] 5598:11 long [6] 5537:9 5574:5 5581:8 5593:10 5630:20 5637:15 longer [1] 5599:13 longstanding [1] 5564:7 long-term [3] 5531:21 5532:16 5627:24 look [25] 5521:11 5530:24,25 5532:3 5536:24 5546:16 5570:21 5572:14 5575:6 5579:9,10 5589:14 5591:9 5595:3 5597:25 5602:11 5606:10 5609:24 5610:2,7,12 5626:17 5632:2 5638:18 5641:24 looked [4] 5598:15,16 5603:18 5641:20</p>	<p>looking [7] 5534:3 5564:4 5579:15 5603:1 5635:25 5636:3 5638:6 lose [2] 5523:21 5524:3 lost [5] 5587:20 5615:11 5626:4 5632:23 5635:10 lot [21] 5523:3,9 5526:8 5543:6 5544:24 5547:22 5548:3,20 5549:24 5562:7 5564:1,1 5567:25 5579:25 5586:15 5593:1,2 5627:1 5628:18,18 5631:3 lots [1] 5647:10 lower [1] 5614:12 ludwick [1] 5583:16</p>
L		
<p>labeled [1] 5600:20 labor [1] 5585:14 land [1] 5572:17 language [5] 5606:15 5610:21 5639:6,7 5642:1 large [1] 5647:3 last [2] 5574:14 5641:3 lasting [2] 5595:4,7 lasts [1] 5593:9 late [1] 5556:7 later [1] 5527:4 laughter [2] 5524:8 5609:9 law [9] 5529:8 5544:22 5578:21 5581:24 5600:11 5601:14,15 5638:14 5643:4 law-abiding [1] 5631:8 lawful [3] 5530:3,5 5569:10 lawfully [3] 5529:25 5530:10 5613:1 lawfulness [2] 5531:12 5571:21 laws [37] 5520:1,7,7,7 5528:24 5533:22,23 5539:1 5541:7 5544:16,21,24 5550:10 5554:22 5555:2,11,17 5556:5,6,11,12 5563:21 5564:6 5581:18,21 5584:25 5594:12 5596:21 5604:22,24 5607:18 5624:12 5625:24 5626:17 5640:6 5643:10,24 lead [2] 5575:13 5633:21 leads [1] 5573:13 least [10] 5521:4 5544:25 5545:1 5547:11 5559:12 5561:4 5591:17 5617:23 5619:14 5647:12 leave [6] 5589:25 5597:10 5605:12 5640:11 5644:16 5645:12 leaves [1] 5595:10 ledvina [2] 5548:19 5645:6 left [1] 5557:5 legal [5] 5529:14 5542:24 5553:17</p>	<p>5567:17 5607:15 legislate [1] 5577:19 legislative [3] 5576:25 5597:15 5603:17 legislature [11] 5532:21 5539:16,21,22 5540:4,8,12,15 5570:19 5597:12 5599:25 legislatures [1] 5530:23 legitimate [1] 5577:8 length [1] 5627:16 lengthy [1] 5633:22 lens [1] 5634:18 less [2] 5523:15 5571:11 lesser [4] 5533:20 5552:15 5572:3 5614:1 level [12] 5523:4,7 5541:23 5546:5 5554:1 5563:18 5602:22,25 5603:16 5610:7 5612:22 5620:8 liberty [1] 5556:1 life [15] 5521:17 5524:20 5525:14,16 5598:2 5604:7 5610:19 5619:7 5622:12,25 5625:19,23 5627:11 5629:23 5641:2 likely [1] 5531:11 limitations [1] 5589:12 limited [1] 5558:4 limits [1] 5568:2 line [4] 5584:24 5629:6,6 5636:11 lines [2] 5609:20 5643:2 link [1] 5575:4 lion's [1] 5643:19 liquidated [1] 5582:16 list [7] 5549:8 5552:16 5572:17 5592:22,25 5621:11 5630:8 listed [1] 5531:1 listing [2] 5587:8 5600:1 lists [1] 5552:18 literally [2] 5607:12 5608:10 litigated [1] 5589:17 little [12] 5563:24 5581:22 5594:9 5605:20 5606:15,15 5618:1 5635:4 5639:7 5640:3,11,19 live [1] 5598:11 long [6] 5537:9 5574:5 5581:8 5593:10 5630:20 5637:15 longer [1] 5599:13 longstanding [1] 5564:7 long-term [3] 5531:21 5532:16 5627:24 look [25] 5521:11 5530:24,25 5532:3 5536:24 5546:16 5570:21 5572:14 5575:6 5579:9,10 5589:14 5591:9 5595:3 5597:25 5602:11 5606:10 5609:24 5610:2,7,12 5626:17 5632:2 5638:18 5641:24 looked [4] 5598:15,16 5603:18 5641:20</p>	<p style="text-align: center;">M</p> <p>machinery [1] 5637:18 made [26] 5522:23 5524:6 5533:9,14 5534:12 5535:13 5537:16 5541:1 5546:1 5559:9 5573:4,8 5583:6 5596:5,7,13 5597:24 5607:13 5609:15 5613:3 5619:25 5620:14 5624:25 5630:6,10 5642:21 madison [1] 5524:15 magical [1] 5560:10 magistrate [1] 5583:12 magistrates [2] 5522:23 5643:5 main [1] 5560:20 maine [1] 5563:6 majority [1] 5631:19 manner [1] 5555:16 many [8] 5521:4 5543:25 5567:15 5573:18 5581:7 5638:1,3 5645:22 map [3] 5599:2 5602:17 5603:14 mapping [2] 5602:21,22 maps [5] 5588:17 5590:17 5605:19 5607:1 5642:2 marginal [1] 5620:24 marijuana [42] 5522:6,9 5525:1 5528:20 5529:4,23 5530:2 5531:13 5534:15 5535:7,10,12 5545:10 5546:18 5547:7 5551:1,9 5559:8,10 5561:8 5565:24 5567:18,20 5572:22 5573:7,20 5575:3 5576:6 5580:7 5609:11,15,16 5611:8,20,21 5614:21 5616:5,21 5636:1 5637:12 5641:12 5646:23 maryland [1] 5563:6 massively [2] 5637:5,5 match [4] 5540:10 5542:10 5579:6 5581:2 matches [2] 5542:13 5543:9 materia [1] 5632:17 matter [9] 5548:15 5577:20 5592:1 5607:14,15 5637:13 5643:23 5647:18,19 matters [3] 5628:13 5637:19 5642:3 mcdonald [1] 5631:2 mean [48] 5522:11 5523:2 5526:9,13 5540:25 5551:24 5552:4 5557:2</p>

<p>5559:6 5565:20 5569:2 5570:11,22, 23,24 5572:20 5580:15 5581:12 5586:14,21 5587:3,13 5588:8 5591: 21 5595:24 5597:22 5601:7 5602:15 5604:20 5610:23 5611:12 5613:14, 22 5616:3,11 5618:3 5621:15 5622:8 5627:6 5628:23 5636:7,23 5640:2,13 5641:11,13,14,16 meaning [5] 5537:25 5558:7 5567:1 5600:10 5634:6 meaningful [3] 5568:1 5577:4 5582:2 means [8] 5527:20 5577:9 5580:22 5606:8 5617:19 5632:18 5634:4 5641:22 means-end [2] 5577:6,25 means-ends [1] 5578:3 medical [5] 5525:9,11,21 5529:5,5 medically [1] 5559:16 meet [3] 5598:23 5624:19 5635:17 meets [1] 5598:23 mens [2] 5567:7,7 mental [4] 5535:25 5576:16 5627:24 5646:2 mentally [6] 5535:24 5553:15 5555:10 5569:11 5570:10 5573:23 mentioned [3] 5537:23 5553:1 5571:4 mentioning [1] 5546:18 mere [4] 5538:9 5564:7 5621:19 5643: 17 merely [4] 5520:13 5521:13,18 5594: 10 merge [2] 5544:16 5565:6 merges [1] 5564:19 mess [3] 5644:17 5645:17 5647:16 met [1] 5628:14 meth [3] 5611:16,17 5612:8 methamphetamine [2] 5547:6 5587:4 methodological [1] 5520:25 methods [1] 5552:3 might [16] 5539:13 5548:25 5549:11 5552:5 5554:10,16,17 5560:5 5575: 13 5591:25 5598:4 5607:13 5618:3 5620:24 5626:16 5642:19 mind [2] 5537:23 5552:1 mind-altering [7] 5529:16 5536:3,8 5549:3 5553:12 5572:25 5574:3 minds [1] 5529:3 mine-run [1] 5583:17 mini [1] 5644:19 minnesota [1] 5563:6 minor [1] 5607:9 misdefined [1] 5566:14 mismatch [1] 5617:4 missed [1] 5582:5 missouri [1] 5563:7 mistake [1] 5584:25 mistakes [1] 5614:19</p>	<p>misuse [9] 5562:4 5568:18 5569:6,13 5574:5 5577:2 5578:20 5642:20 5644:15 mix [4] 5545:16 5642:22 5644:9,9 mixed [1] 5553:25 mixing [1] 5548:24 moderation [5] 5548:4,11 5585:5 5601:11,19 modern [10] 5539:16,21 5540:8,12 5576:12 5578:8 5601:14,14 5643:9, 24 modern-day [2] 5522:18 5598:17 modified [1] 5577:13 moment [3] 5549:20 5557:13 5640:25 moments [2] 5585:8 5594:17 moral [1] 5632:21 morals [9] 5564:25 5565:3 5605:10 5606:5 5632:21 5641:10,16,21 5642: 1 moral's [1] 5557:20 most [11] 5545:3 5546:25 5547:1 5586:15 5613:2 5619:4 5626:7 5639: 22 5640:22 5643:18 5647:20 mostly [1] 5585:5 motivating [1] 5532:18 move [1] 5533:13 much [17] 5520:2 5524:17 5525:7 5533:20 5543:15 5548:21 5560:8 5564:14 5585:13 5587:23 5611:14 5614:13 5615:23 5616:5 5617:1 5618:4 5619:6 multiple [3] 5565:24 5602:16 5646:22 murderer [1] 5645:20 murderers [1] 5550:2 must [4] 5567:22 5591:5 5592:11 5623:20</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narcotic [4] 5557:19 5564:24 5608:7 5632:20 narcotics [3] 5558:2,4 5565:16 narrow [3] 5584:6 5616:10,23 narrower [2] 5608:8 5615:14 narrowly [1] 5602:8 nature [7] 5545:15 5554:25 5597:4 5622:16 5629:24 5636:22 5637:4 necessarily [4] 5541:9 5572:15 5593: 21 5625:12 necessary [2] 5589:23 5620:25 need [13] 5525:10,11 5538:4 5558:22 5570:13 5576:14 5591:23 5615:9,23 5616:14 5621:2 5628:4,17 needed [2] 5532:22 5625:8 needs [3] 5539:17 5590:10 5629:4 nevada [1] 5563:7 never [6] 5530:3 5535:2 5589:14 5597: 22 5609:7 5630:6</p>	<p>new [4] 5563:7 5572:21 5589:4,6 nice [1] 5528:10 night [3] 5524:18 5525:21 5528:3 nights [2] 5575:18 5637:14 nightwalkers [1] 5520:3 nobody [1] 5613:6 nobody's [2] 5614:15,15 non-addictive [1] 5644:21 none [4] 5570:24,25 5634:14 5637:19 normally [2] 5546:19 5567:24 note [1] 5631:16 notes [1] 5646:8 nothing [3] 5532:11 5581:21 5634:9 notice [3] 5546:17 5562:11 5584:11 notion [1] 5573:25 nowadays [1] 5572:24 nprn [1] 5559:12</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective [2] 5558:12 5567:5 obvious [1] 5571:2 obviously [9] 5529:23 5551:25 5553:5 5555:12 5558:2 5568:23 5570:5 5580:5 5593:22 occasional [1] 5524:7 odd [3] 5560:25 5606:2 5615:7 offense [2] 5533:21 5559:7 offenses [1] 5645:23 offered [1] 5584:22 often [4] 5522:23 5523:16 5570:3 5633:2 ohio [1] 5563:7 okay [34] 5520:12 5524:12,18,24 5525: 6 5527:1 5528:1 5529:18 5530:20 5531:17 5535:9 5536:22 5544:2 5554:3 5558:19 5559:20 5560:4 5561:23 5571:10 5578:12 5582:3,11 5588:14 5591:16 5592:16 5596:25 5603:22 5609:8,11 5610:10 5625:15 5636:14,14 5639:10 old [1] 5603:1 once [9] 5538:10 5540:18 5592:4 5594:7 5595:10 5599:12 5622:1 5639:8 5647:22 one [65] 5520:23,23 5522:9,14 5523: 22,22,25 5525:8,12,20 5526:5 5527: 2 5528:3,6,25 5529:14,19,21 5530: 13,17,19 5531:1,11,18,19 5533:12 5534:5 5536:5 5538:25 5542:6,6 5549:11 5550:9 5552:4 5554:21 5556:21 5557:10,24 5559:6 5560:22 5562:7 5565:10 5567:11 5568:17 5569:20,22,24 5570:5 5574:8 5581:4 5582:15 5584:7,23 5589:20 5600:13 5613:14,22 5618:16 5619:3 5625:14 5627:2 5628:24 5630:23 5637:14 5638:11</p>
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<p>ones [4] 5540:14 5563:3,9 5629:8 one's [1] 5548:6 only [31] 5522:9 5524:6,17 5533:7 5536:8 5539:20 5540:13,17 5541:2,6 5546:3 5556:23 5565:16 5566:19 5576:13 5584:22 5585:1 5591:13 5600:10 5603:13 5607:7 5613:25 5616:4 5623:24 5624:13 5630:15 5631:17 5634:6,15 5638:8 5647:12 onwards [2] 5569:10 5644:13 operate [1] 5637:17 operating [1] 5640:19 operative [1] 5557:25 opinion [2] 5575:6 5625:5 opportunity [1] 5626:22 opposed [1] 5573:24 opposite [1] 5600:25 option [1] 5560:23 options [1] 5588:5 oral [1] 5584:2 order [2] 5554:11 5555:21 ordinary [1] 5558:7 original [4] 5541:25 5544:9,10,20 other [57] 5520:4 5521:24 5522:8 5525:2,8,13,20 5527:20 5528:3,12, 24 5529:24 5530:14 5533:12 5534: 16 5535:24 5539:10 5540:18 5541: 25 5542:6 5543:2 5545:18 5546:10, 20 5548:5,24 5549:13,23 5550:10 5552:24 5553:15 5554:9 5555:9 5561:8 5563:9,17 5568:14 5569:3 5570:10 5572:2,7 5573:10 5576:1 5580:6,11 5589:4 5595:11 5596:2 5598:21 5619:5 5631:19 5636:16,25 5637:8 5643:15 5644:10 5645:23 others [5] 5597:6 5606:24 5607:1 5621:5 5625:10 otherwise [3] 5534:6 5545:2 5644:1 out [44] 5520:1,8 5530:23 5534:6,14 5535:1 5538:2 5546:8 5549:7 5555:8 5556:11 5560:13 5563:1,18 5566:1,5 5567:13 5568:6 5570:3 5575:25 5576:3,16,17 5582:5,15 5588:9 5589: 19 5590:22 5591:1 5598:12 5601:3 5608:14 5609:20 5615:20 5618:23, 25 5624:8,24 5640:3,12,15 5645:3, 25 5647:17 outside [2] 5592:2 5631:10 over [7] 5565:13,14 5566:18,19 5596: 7 5643:8 5646:7 overbroad [5] 5617:3,15,20,22,25 overbroadness [1] 5617:12 overlap [2] 5558:14 5566:24 overlapping [4] 5520:6 5538:13 5554: 24 5566:25 overriding [1] 5587:6 overruling [1] 5540:25</p>	<p>own [8] 5552:3 5582:22 5583:13,18 5599:4 5600:7 5627:23 5634:4 ownership [2] 5604:17 5605:16 owning [3] 5568:10,11 5594:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>panoply [1] 5569:21 parallel [1] 5580:6 pari [1] 5632:16 parse [2] 5563:25 5566:5 part [10] 5537:24 5546:14,21,22 5557: 22 5565:13 5600:17 5603:10 5616:2 5642:6 particular [33] 5534:15 5536:8 5543: 11 5549:20 5553:13,24 5557:13 5567:25 5573:7,23 5574:11,22,24 5576:4 5585:23 5586:24 5587:8 5588:12 5589:10 5590:7 5592:22 5595:25 5596:16 5603:10 5612:11 5617:23 5618:11 5623:7 5624:4,5 5629:24 5642:1,4 particularly [4] 5549:17 5589:20,21 5615:7 parties [2] 5551:12 5562:23 parts [4] 5526:4,23 5531:19 5549:23 party [2] 5551:1,9 pass [1] 5598:9 passes [1] 5609:19 passing [1] 5550:1 past [2] 5526:15 5590:14 pattern [5] 5526:18 5527:14 5552:21 5610:1,4 pcp [4] 5539:10 5572:3 5587:4 5644:7 peace [5] 5522:24 5574:10 5583:12 5643:6,12 penalized [1] 5541:6 penalties [1] 5542:19 penalty [1] 5541:9 people [51] 5520:4,12 5530:24 5534:1 5540:6 5541:3,15 5542:1,3,5,10,17 5544:12 5547:10 5548:3 5549:8 5550:11 5554:10 5555:7,18 5562:1 5564:7 5566:25 5574:4 5577:19 5578:19 5579:4 5580:1,18 5583:8 5585:17 5586:15,16 5589:12 5590: 23 5598:8 5600:21 5602:13 5603:1,9 5612:25 5617:7 5618:20,22,25 5631: 14,14 5642:19 5644:23 5645:23 5647:5 people's [2] 5577:17 5592:24 per [2] 5536:14 5547:19 perceived [1] 5617:4 percent [1] 5631:20 percentage [1] 5637:25 percentage-wise [1] 5638:4 perception [1] 5627:23 perfectly [1] 5595:12</p>	<p>perhaps [5] 5558:16 5585:20 5586:15 5590:6 5647:10 period [3] 5595:25 5626:11 5647:13 periods [1] 5647:23 permissible [1] 5537:16 permit [2] 5521:16 5626:14 permitted [1] 5591:2 persistently [1] 5538:24 person [43] 5534:15,20 5540:22 5551: 2,8,10 5552:6,7 5554:9,11,13 5555: 22,25 5575:15,19 5577:10,20 5591:6 5595:8,10,16,20 5596:23 5604:5 5610:3 5617:9 5620:11,20 5624:21 5626:2,11,12,20 5628:14,15 5630:4 5636:16 5637:7,16 5638:24 5641:8,8 5645:21 personal [2] 5575:1 5583:13 person's [1] 5627:19 petition [1] 5633:14 petitioner [1] 5642:15 pharmacological [3] 5534:11 5552:20 5645:8 pharmacologist [1] 5570:25 phrase [1] 5641:21 physical [3] 5618:23 5625:9 5627:24 picking [1] 5564:17 piece [3] 5523:2 5555:14 5581:9 pieces [1] 5557:9 pint [1] 5524:15 place [5] 5538:22 5548:1 5572:1 5617: 18 5636:5 places [1] 5604:13 please [2] 5561:22 5584:5 plus [2] 5543:2 5545:15 point [31] 5520:24,25 5532:2 5533:12 5534:17 5535:1 5539:19 5540:16 5541:25 5542:4,23 5548:25 5553:25 5563:19 5573:5,17 5585:3,7 5590:9 5597:16 5598:25 5600:16 5601:8,21, 23 5604:3 5605:3 5615:4 5636:20 5637:2 5647:15 pointed [4] 5563:1 5568:6 5598:12 5601:3 pointing [4] 5554:19 5586:16 5596:21 5597:18 points [5] 5522:14 5526:14 5528:25 5538:25 5585:1 policy [9] 5535:13 5540:13 5541:9 5542:12,13,16 5579:11,18 5582:22 populus [1] 5585:14 port [1] 5566:18 ported [2] 5565:12,14 ports [1] 5566:19 pose [4] 5570:18 5571:4 5577:1 5625: 9 posed [1] 5565:8 poses [1] 5611:10</p>
---	--	---

Official - Subject to Final Review

<p>posing [1] 5587:20 position [15] 5534:23 5536:19 5537:8, 8,12 5560:20 5564:6 5571:3,17 5578:11 5590:5 5592:17 5642:20 5645:17 5647:14 possess [3] 5562:14 5624:7 5631:8 possesses [1] 5550:24 possessing [6] 5550:12,18 5590:23 5607:19 5619:17 5647:12 possession [4] 5549:10 5604:17 5605:16 5627:18 possibility [3] 5574:19 5576:3 5624:9 post-bruen [1] 5598:11 post-rahimi [1] 5576:23 post-ratification [16] 5521:9 5528:15 5533:15 5537:17 5544:8 5545:12 5548:8 5555:20 5556:3 5562:17,20 5564:5 5578:15 5579:24 5581:7 5582:17 potency [1] 5616:6 potential [9] 5521:19 5525:23 5529:5 5533:9 5535:20,21 5552:19 5561:8 5563:16 potentially [4] 5525:17 5560:17 5561:2 5629:10 power [3] 5585:13 5615:11 5632:23 practical [1] 5548:15 pre-bruen [1] 5577:6 precedents [1] 5536:11 precisely [1] 5539:14 precursor [1] 5552:23 preferences [1] 5582:22 prescribed [1] 5571:15 prescription [8] 5525:9,11,21 5530:9, 10,15 5531:9 5630:21 present [18] 5543:16 5559:17 5562:3 5569:5,12 5573:24 5574:4 5575:12 5578:20 5580:10 5588:5 5628:8 5629:22,22,23 5630:2 5633:19 5642:19 presently [1] 5558:25 presents [4] 5568:18 5580:23 5626:22 5647:2 president [3] 5612:1 5613:3 5614:20 presumably [2] 5549:9 5552:2 presumptive [1] 5535:23 presumptively [2] 5553:16 5569:10 pretty [7] 5546:22 5564:7 5587:23 5605:19,19 5612:7 5614:8 prevail [2] 5587:1 5616:23 prevent [1] 5617:7 prevention [1] 5646:9 previously [1] 5630:25 primarily [1] 5548:5 primary [4] 5537:8 5552:9 5559:21 5572:15 principle [19] 5544:9,10 5561:1 5570:</p>	<p>17 5578:18,25 5579:5,25 5581:6 5582:6,10 5587:12,15 5602:19 5603:7,7,23 5618:6 5619:2 probably [3] 5568:15 5569:8 5641:25 problem [33] 5523:6 5525:23,23 5533:4,11 5536:24 5539:13 5541:5,17 5543:24 5544:6,11,14 5556:6,11 5563:5 5565:17 5570:7 5572:5,8 5575:14 5577:15 5580:16 5581:10 5607:17 5619:14,15,19 5633:24 5634:4 5635:13 5645:13 5647:14 problematic [3] 5576:11 5606:18 5635:22 problems [2] 5548:20 5581:3 proceed [3] 5615:24 5624:15 5645:7 proceeded [1] 5638:12 process [10] 5521:5 5532:12 5536:6 5546:19 5553:3,4 5561:10 5582:25 5584:16 5597:2 processes [1] 5574:2 proclivity [2] 5569:23 5609:17 producing [1] 5581:15 product [1] 5606:22 prohibit [4] 5550:11,18 5568:9 5607:19 prohibited [5] 5562:16 5589:8 5590:23 5593:23 5647:11 prohibiting [4] 5529:13 5604:17 5605:15 5619:16 prohibition [1] 5591:10 prohibitions [1] 5590:4 prohibits [2] 5539:15 5631:1 prong [26] 5538:12,12 5556:24 5557:2, 6 5584:7,20 5607:14 5615:3,13,15, 16 5616:15,17 5618:19 5627:7 5634:15,16 5638:3,4,8,13,17 5643:18 5644:1 5647:4 prongs [2] 5556:21 5605:22 proof [5] 5575:3 5588:15,21 5590:11 5614:2 properly [1] 5524:20 properties [1] 5552:21 property [2] 5568:14 5626:1 proposed [1] 5546:17 proposition [1] 5565:22 prosecute [2] 5551:2 5608:18 prosecuted [5] 5535:2 5556:23 5591:6 5592:13 5623:14 prosecuting [1] 5546:4 prosecution [3] 5625:1 5629:5 5633:11 prosecutions [6] 5567:3 5625:2 5629:4 5631:18 5638:1 5643:16 prosecutorial [1] 5631:23 prove [11] 5527:21 5567:9 5585:22 5590:10 5610:25 5621:1 5626:2,5 5629:2 5638:10 5646:20</p>	<p>proved [1] 5638:25 provide [3] 5570:3 5577:3 5584:11 provided [1] 5646:12 provides [2] 5534:5 5583:3 proving [2] 5588:16 5624:19 provisions [3] 5591:23 5631:19,20 proxy [4] 5536:3 5552:18 5572:9 5645:22 psychological [3] 5532:14,16 5618:23 psychosis [2] 5627:22 5635:10 public [31] 5521:7 5531:2 5543:19 5546:20 5552:22 5553:8,21 5554:7, 11 5555:8,21,23 5557:20 5564:25 5565:3 5587:20 5601:12 5605:10,25 5606:5 5615:10 5630:11,20 5631:4,7 5632:21 5641:10,16,21 5642:1,5 publicly [1] 5533:25 punish [1] 5542:10 punished [1] 5533:21 purpose [4] 5558:4 5571:16 5617:6 5645:1 purposes [17] 5520:17 5521:6 5522:21 5527:23,24 5547:8 5548:5,5 5550:4 5552:3 5555:14 5561:18 5566:17 5568:17,20 5576:9 5621:22 put [8] 5545:1 5555:7 5567:21 5574:19 5575:2 5611:15 5624:21 5628:24 putative [1] 5582:4 putting [2] 5522:25 5569:25 puzzled [1] 5626:7</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifications [1] 5531:1 qualify [4] 5524:1 5528:2 5561:4,6 quantity [3] 5525:7 5616:21 5624:7 question [27] 5529:21 5530:21 5535:5 5536:16 5538:21 5548:13 5550:9,23 5551:4 5554:4 5568:16 5569:5 5574:14 5575:8 5584:6 5592:6 5594:3 5597:10 5598:5 5599:14 5602:20 5605:13 5626:23 5629:17 5630:23 5635:6 5641:4 questioning [1] 5562:18 questions [12] 5523:4 5530:18 5532:5, 6 5556:18 5575:7 5577:16 5586:6 5605:2 5616:15 5629:9 5646:3 quick [1] 5556:17 quite [4] 5528:23 5545:10 5548:14 5551:3</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rahimi [15] 5520:1 5521:1 5530:22 5533:17,18 5534:1 5540:25 5541:1 5556:12 5576:10 5577:13 5581:10, 13 5582:19 5603:8 raise [1] 5536:15 raised [1] 5633:16</p>
---	---	---

Official - Subject to Final Review

<p>range [4] 5552:11 5555:12 5583:2 5597:9</p> <p>rationaly [1] 5601:6</p> <p>rea [2] 5567:7,7</p> <p>reach [1] 5618:24</p> <p>read [3] 5608:10 5619:2 5632:16</p> <p>reads [1] 5584:19</p> <p>real [12] 5533:4,11 5541:4 5555:24 5565:17 5575:14 5581:9 5609:8 5635:13 5645:13 5646:15 5647:4</p> <p>reality [3] 5593:13,15 5635:11</p> <p>really [35] 5534:7 5544:22 5546:4 5549:4 5550:23 5554:8 5558:22 5563:18 5565:8 5577:2,15,21 5579:9, 16 5590:21 5592:21 5594:23 5598:6, 7 5601:4 5604:24 5614:25 5615:12, 17 5616:14,16 5617:6 5633:15 5636:3 5642:2 5644:3 5645:7,10,21,25</p> <p>realm [1] 5529:12</p> <p>reason [11] 5535:18 5540:2 5555:6 5569:22 5570:17 5572:15,16 5579:16 5586:18 5593:15 5622:5</p> <p>reasonable [5] 5527:23 5590:12 5599:4 5602:4 5646:20</p> <p>reasonably [1] 5601:6</p> <p>reasons [5] 5521:2 5555:23 5563:13 5570:8 5601:2</p> <p>rebuttal [2] 5642:13,14</p> <p>recency [1] 5627:16</p> <p>recent [3] 5546:17 5548:19 5645:5</p> <p>recognize [1] 5554:6</p> <p>recognized [4] 5554:22 5566:23 5569:9 5578:17</p> <p>record [5] 5525:3 5575:24 5613:11,21 5616:4</p> <p>redefine [1] 5581:1</p> <p>reduce [1] 5614:25</p> <p>reducing [1] 5531:3</p> <p>reference [1] 5622:11</p> <p>refers [2] 5605:22 5608:7</p> <p>reflect [3] 5531:24 5600:19 5601:16</p> <p>reflected [1] 5624:12</p> <p>reflecting [1] 5533:6</p> <p>reflects [1] 5531:15</p> <p>regard [2] 5542:11 5549:10</p> <p>regardless [2] 5539:5 5557:12</p> <p>regime [1] 5532:8</p> <p>regular [8] 5521:17 5522:7 5523:2 5597:7 5604:1,5 5614:9 5617:5</p> <p>regularly [14] 5531:25 5538:10 5585:11,25 5587:23 5588:14 5600:21 5601:10 5613:1 5618:4 5626:10 5630:11,18 5636:25</p> <p>regulate [1] 5530:23</p> <p>regulation [2] 5547:23,24</p> <p>regulations [2] 5522:18 5631:1</p> <p>rehaif [7] 5525:23,23 5528:10 5567:8,</p>	<p>25 5631:5 5646:8</p> <p>reject [1] 5578:10</p> <p>rejecting [1] 5576:3</p> <p>rejection [1] 5644:12</p> <p>relate [1] 5577:17</p> <p>relevant [3] 5520:10 5582:6,9</p> <p>reliable [1] 5534:14</p> <p>relied [2] 5533:22 5646:6</p> <p>relitigated [1] 5613:13</p> <p>rely [2] 5534:11 5545:9</p> <p>relying [1] 5640:17</p> <p>remands [1] 5645:6</p> <p>remember [1] 5524:9</p> <p>remind [1] 5565:20</p> <p>remotely [1] 5552:9</p> <p>remove [1] 5554:13</p> <p>render [2] 5557:6 5594:11</p> <p>rendered [1] 5594:14</p> <p>rendering [3] 5606:23,25 5625:18</p> <p>renders [7] 5597:5 5615:16 5620:4,11 5622:7 5637:4 5639:21</p> <p>repeatedly [3] 5551:11 5565:23 5578:17</p> <p>replicating [1] 5532:6</p> <p>reportedly [1] 5524:15</p> <p>represents [1] 5600:24</p> <p>require [1] 5637:9</p> <p>required [11] 5549:12 5550:2 5574:20 5576:8 5587:17 5588:24 5603:11 5622:17 5623:5 5625:6 5628:22</p> <p>requirement [3] 5562:11 5568:7 5647:2</p> <p>requires [5] 5597:3 5621:14 5624:2 5627:9 5636:9</p> <p>rescheduling [5] 5529:4 5553:3 5559:2 5561:2 5573:8</p> <p>resist [2] 5565:11 5641:25</p> <p>resisting [2] 5576:5,7</p> <p>resolve [1] 5616:10</p> <p>respect [57] 5520:24 5522:15,16 5523:4 5526:16 5527:5 5528:23,24 5529:1 5532:24 5535:9,13 5536:24 5538:5 5543:20 5544:23 5545:23 5546:2,18, 20 5548:9 5549:24 5551:4 5553:6 5554:22 5555:15,17 5559:10 5560:14 5561:7 5562:1,25 5563:9 5565:19 5568:13 5569:4 5570:4,9 5571:12 5573:6,9 5575:14 5578:18 5581:16 5582:16 5583:6,12 5587:7,12 5601:25 5604:9,22 5612:16 5633:12 5642:19 5643:16 5646:2</p> <p>respectfully [4] 5532:23 5540:24 5551:3 5579:21</p> <p>respondent [5] 5548:9 5557:23 5563:1 5584:3 5643:3</p> <p>respondents [1] 5647:9</p> <p>respondent's [2] 5645:14 5647:14</p>	<p>response [2] 5561:15 5633:22</p> <p>responses [1] 5565:10</p> <p>responsible [1] 5521:22</p> <p>responsibly [2] 5521:22 5601:19</p> <p>responsive [1] 5616:12</p> <p>rest [3] 5558:23 5644:16 5645:12</p> <p>restraints [1] 5580:11</p> <p>restrict [1] 5591:14</p> <p>restricted [1] 5541:4</p> <p>restriction [1] 5523:14</p> <p>restrictions [9] 5544:12 5545:15 5554:25 5556:2 5569:4 5584:23 5589:15 5590:7 5597:17</p> <p>restrictive [1] 5523:15</p> <p>rests [1] 5584:24</p> <p>result [4] 5539:18 5541:16 5561:11 5611:3</p> <p>results [1] 5581:15</p> <p>return [1] 5527:4</p> <p>revert [1] 5643:19</p> <p>review [6] 5536:7 5543:15 5553:2 5588:20 5590:14 5613:25</p> <p>reweigh [1] 5597:14</p> <p>rights [2] 5584:14 5591:15</p> <p>rise [1] 5573:1</p> <p>risk [17] 5534:21 5549:2 5553:20 5561:8 5570:18 5571:2,4 5573:24 5577:1 5587:21 5601:12 5611:10 5620:4 5625:9 5630:12,20 5647:25</p> <p>risks [3] 5546:21 5552:23 5562:10</p> <p>risky [1] 5626:15</p> <p>ritalin [1] 5571:22</p> <p>road [1] 5640:8</p> <p>roberts [25] 5545:6 5546:24 5550:6 5551:21 5556:15 5561:13 5569:15 5576:19 5583:24 5586:25 5587:24 5588:23 5589:1 5595:21,23 5596:12 5597:8 5613:5,8,18 5619:9 5631:25 5634:25 5637:22 5642:9</p> <p>robitussin [3] 5570:22 5575:16,17</p> <p>robust [2] 5521:9 5528:14</p> <p>room [2] 5618:1 5640:11</p> <p>roommate's [1] 5571:22</p> <p>round [1] 5545:5</p> <p>routinely [3] 5531:25 5596:9 5618:21</p> <p>rubber [1] 5640:8</p> <p>rule [4] 5560:10,13 5611:13 5624:8</p> <p>rulemaking [1] 5546:17</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safely [3] 5536:1 5613:7 5614:10</p> <p>safety [19] 5521:8 5531:3 5537:22 5543:19 5546:20 5553:8,21 5554:8 5555:24 5587:21 5601:12 5605:25 5615:10 5630:11,20 5631:4,7 5632:22 5642:5</p> <p>same [27] 5521:9 5527:7 5528:23</p>
--	---	---

Official - Subject to Final Review

<p>5533:15 5535:22 5539:9,9,10 5540:4,9 5542:23,25 5545:25 5547:24 5554:17 5587:9,11 5609:19 5611:2,3 5617:18 5618:6,25 5619:1 5636:5 5638:16 5644:25 sarah [1] 5642:14 satisfies [1] 5610:3 satisfy [2] 5605:15 5618:13 saying [48] 5529:6 5530:2,5 5533:23 5536:2 5540:2,11 5541:22 5542:22 5560:8,19 5562:21 5569:1 5571:6 5574:8,10 5579:13,22,23 5582:24,25 5583:17 5586:18 5590:2 5591:3,20 5593:15 5594:14 5595:9 5599:2,4 5602:25 5603:13,16 5616:20 5617:18 5618:15 5619:3,15 5623:23 5624:13 5626:24 5636:9 5637:12 5638:22 5639:13,16 5644:5 says [11] 5530:22 5542:2 5558:2 5560:10 5578:8 5592:19 5598:9,14 5606:4 5609:13 5638:15 scared [1] 5549:21 schedule [38] 5529:4 5530:3,4 5533:9 5535:3,3,12,17 5536:16,17 5543:12 5545:21,21 5546:3,4,5 5548:17 5558:21,22,25 5559:2,8,14 5560:3,6,11,13,13 5569:25 5571:7,7,9,13 5572:3 5575:25 5597:13,13 5620:11 scheduled [2] 5529:25 5537:9 schedules [5] 5531:2 5558:23 5569:20 5600:2 5628:25 scheduling [12] 5531:20 5532:11 5535:19 5536:6,25 5546:15 5549:6 5560:21 5571:12 5601:4,8 5613:24 scheme [3] 5531:14,21 5536:25 science [2] 5552:20 5629:9 scientific [2] 5613:21 5629:17 scope [2] 5552:22 5614:16 scrutiny [3] 5577:6 5578:1 5617:19 se [2] 5536:14 5547:19 second [33] 5520:16 5523:6,18 5526:20 5532:9 5535:5 5537:24 5538:16 5547:3,17 5550:4 5556:22 5557:6,22 5560:10 5561:17 5564:12,15 5565:19 5568:16 5569:4 5576:9 5584:14,18 5590:3 5591:19 5609:22 5618:14 5621:21 5626:13 5630:25 5634:1 5640:14 second-guess [1] 5645:21 secondly [1] 5558:20 see [12] 5522:1 5531:14 5540:7,14,20 5549:11 5560:21 5573:2,4 5586:21 5610:3 5640:5 seeing [2] 5614:11,12 seem [9] 5545:9 5550:20 5577:17,22 5636:8 5638:7 5643:22 5644:1,5 seems [13] 5534:10 5545:3 5554:15</p>	<p>5564:19 5576:24 5583:8 5586:8 5587:2,5 5589:22 5614:20 5633:17 5647:9 seen [3] 5638:5 5641:17,19 self-control [4] 5587:20 5615:12 5626:4 5632:24 sense [9] 5534:18 5561:24 5564:20 5573:25 5577:4 5602:3 5617:23 5621:8 5640:24 separate [3] 5552:2 5635:25 5638:25 serial [2] 5550:2 5645:20 seriatim [1] 5545:5 serious [4] 5532:1 5536:9 5546:6 5601:13 seriously [1] 5620:9 set [6] 5520:6 5527:2 5560:12 5596:13 5611:13 5615:20 sets [2] 5549:7 5590:22 setting [2] 5528:11 5608:14 several [3] 5608:19 5609:17 5638:10 severe [2] 5627:4 5631:6 share [1] 5643:19 shoot [1] 5589:5 shortcut [1] 5646:10 shortly [1] 5627:17 shots [1] 5524:6 shouldn't [2] 5522:5 5575:16 show [10] 5527:22 5536:11 5591:25 5594:9 5600:6 5609:25 5610:1 5620:1,3 5628:8 showed [1] 5521:24 showing [4] 5591:5 5611:23 5621:7 5624:10 shown [1] 5629:5 shows [3] 5528:15 5563:11 5583:16 side [2] 5532:1 5550:10 sides [1] 5611:7 signed [2] 5599:11,15 significance [1] 5552:22 similar [9] 5542:21 5544:15 5545:22 5555:9 5561:24,25 5581:24 5589:15 5644:22 similarities [1] 5561:18 simple [1] 5563:22 simply [5] 5529:7 5574:25 5599:3 5603:8 5616:20 single [7] 5601:5 5620:10 5629:10 5643:25 5644:19 5645:19 5647:18 singling [1] 5520:8 situation [9] 5522:12 5528:5 5534:7 5547:13 5549:1 5577:15 5578:6,21 5622:7 situations [3] 5538:14 5558:15 5580:15 sixth [1] 5629:6 sketched [1] 5609:20 sky [1] 5631:3</p>	<p>sleep [5] 5525:13 5530:7 5538:22 5630:21 5637:14 sleeping [4] 5521:23 5522:6 5575:18 5620:22 slide [1] 5572:6 smaller [1] 5533:13 smoking [2] 5637:14,16 sobriety [2] 5585:9 5594:17 socially [2] 5550:24,25 society [1] 5524:5 solely [1] 5586:3 somebody [22] 5587:17 5591:25 5592:2 5596:9 5601:11 5614:13 5616:20 5618:4 5619:6 5620:3,19 5622:18 5623:14 5626:8,19 5629:1 5630:17 5636:24 5637:10,13 5639:21 5641:12 somebody's [7] 5598:1 5621:7 5622:11 5625:18 5627:11 5629:20 5630:16 someone [34] 5526:14 5528:17 5530:7,8 5531:16 5535:8 5538:5 5540:17 5549:1,19 5550:23 5557:11 5558:11,13 5564:23 5565:23 5566:10 5568:18 5570:18 5576:18 5578:9 5583:18 5584:12 5586:3 5605:23 5609:25 5620:1 5621:1,20 5623:14 5624:7 5625:25 5626:10 5632:4 someone's [9] 5522:24 5548:21 5588:9 5597:5,23 5618:10 5621:24 5622:2,14 sometimes [3] 5596:24 5638:18 5644:2 somewhat [1] 5635:22 somewhere [2] 5550:25 5551:15 soon [2] 5544:13 5556:6 sorry [7] 5523:20 5543:4 5547:17 5556:18 5571:11 5595:22 5623:1 sort [31] 5522:23 5528:5,20,20 5530:18 5533:23 5534:1 5536:10 5538:12 5539:25 5546:2,7,12 5552:15 5553:12 5554:14 5555:6,8 5556:1 5560:12 5562:22 5566:8,21 5575:23 5582:20 5599:1 5633:18,24 5643:2,11,14 sorts [4] 5520:4 5535:21 5556:13 5597:3 sotomayor [44] 5520:9,11,15,18,21 5521:12 5523:21 5530:6 5537:20,22 5538:8,15,19 5550:7,9,16,22 5551:7,12,14,17,19 5588:22 5590:19 5599:10,15,21 5600:9,13 5601:1 5607:20 5608:2,24 5632:1,2,10,13,18 5633:3,7,12 5634:2,5,23 sound [1] 5555:1 sounding [1] 5617:1 sounds [1] 5616:25 source [1] 5534:16</p>
--	---	--

<p>speaking [2] 5627:13,13 special [11] 5549:9 5560:9 5562:4 5568:18 5569:6,12 5574:4 5578:20 5580:10 5642:20 5644:15 specific [6] 5520:24 5555:18 5579:5, 25 5580:4 5583:4 specifically [4] 5552:16 5553:23 5583: 15 5608:7 spectrum [1] 5562:4 spend [1] 5619:6 spoke [1] 5544:22 spot [1] 5555:12 spouse [2] 5530:9 5630:22 spouse's [2] 5530:8,12 square [1] 5554:13 stage [1] 5646:19 stages [1] 5559:13 standard [2] 5608:12 5629:19 starkly [1] 5562:24 start [2] 5578:14 5591:1 started [1] 5605:4 starts [1] 5643:5 state [7] 5521:16 5533:16,16 5552:20 5563:21 5596:23 5604:23 states [8] 5529:8 5547:10 5563:5 5581:7 5585:20 5611:24 5613:2 5634:16 status [1] 5523:1 statute [35] 5526:20,24 5529:23 5530: 25 5537:24 5552:2 5554:17 5557:7 5584:11,15 5586:10,17 5587:14 5588:7 5598:9 5605:5,7,7 5609:19 5614:16,23 5615:19 5616:13 5617:9 5618:17,18 5619:3 5621:14 5622:14 5632:3,6 5633:19,23,25 5636:9 statutes [10] 5523:23 5554:7,10 5587: 17 5596:14 5598:14,16,18 5632:16 5634:13 statutory [5] 5527:17 5560:22 5570:2, 6 5641:17 step [2] 5529:21 5573:21 steroids [2] 5545:19,20 stick [1] 5551:1 still [3] 5537:3 5581:1 5644:7 stipulate [1] 5598:22 stop [2] 5560:3 5603:15 stops [1] 5593:25 strange [2] 5550:1 5598:5 street [1] 5580:19 streets [2] 5521:23 5555:25 strength [1] 5643:23 strict [1] 5543:16 strike [2] 5570:24 5571:1 stripped [1] 5584:13 strong [2] 5573:19 5605:2 stronger [1] 5618:4 struggle [2] 5614:12 5624:23</p>	<p>stuck [1] 5570:12 student [1] 5571:22 stuff [1] 5556:13 stupor [1] 5619:7 subject [12] 5537:11 5541:19 5542:19, 25 5543:15 5544:19 5550:3 5553:2,3 5585:13 5596:10 5622:19 subjecting [1] 5595:17 submission [1] 5602:15 submitted [1] 5628:2 subsections [1] 5592:13 substance [53] 5521:14 5527:5 5543: 11 5552:13 5557:12 5566:12,20 5573:9 5584:13,21 5585:18,23 5586: 5 5588:10,12 5595:10 5596:11,24 5597:1,19,24 5598:1 5600:19,20 5601:17 5608:16 5610:16 5612:4,12 5618:5 5619:17,22 5621:11,21,25 5623:11 5624:5,22 5626:20 5628:24 5629:24,25 5630:8,18 5632:4,5 5634: 20,21 5636:22 5637:3 5639:21 5646: 23 5647:7 substances [45] 5529:10,15,15 5531: 20 5532:8 5533:7 5534:13 5545:14 5551:24,25 5558:5 5563:14 5564:23 5565:12,13 5566:14 5569:19 5572: 14 5574:3 5575:11 5580:9 5585:21 5587:22 5590:8 5592:20 5600:18 5601:9,9 5603:24,24 5605:8 5608:8 5611:19 5612:6 5614:8,17 5621:4,6 5622:10 5628:19 5630:7,11,19 5632: 9 5642:24 substantial [1] 5590:13 sudden [1] 5615:14 suffice [1] 5609:25 sufficient [2] 5527:22 5536:3 sufficiently [8] 5523:24,24 5577:11 5618:12 5644:22,24,24 5645:1 sugar [2] 5562:13 5575:22 suggest [5] 5550:1,20 5586:8 5591:13 5612:10 suggesting [2] 5608:9 5628:3 suggests [2] 5532:12 5632:15 summarize [1] 5607:4 super [1] 5626:12 superfluous [2] 5557:6,10 superimpose [1] 5643:10 superior [1] 5582:18 support [4] 5585:17 5586:2 5595:16 5604:22 supported [2] 5533:14 5590:13 supporting [2] 5607:18,18 suppose [4] 5592:18 5613:19 5626:8, 10 supposed [1] 5602:2 surety [6] 5520:1,7 5533:21 5541:6 5554:22 5556:12</p>	<p>surprised [3] 5552:8 5633:13 5635:4 surprising [1] 5638:9 surrounding [1] 5603:23 swath [1] 5520:2 sweeping [1] 5585:13 swept [1] 5604:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tailored [9] 5522:17 5523:10,14,15 5532:4 5576:13 5577:10,11 5602:8 tailoring [1] 5645:16 takings [2] 5568:14,20 talked [4] 5562:7 5563:14 5598:20 5626:18 talks [1] 5526:20 tandem [1] 5647:8 tankard [1] 5524:13 target [1] 5563:22 targeted [1] 5565:8 tease [1] 5566:1 technical [1] 5641:5 tells [2] 5579:24 5602:1 temperance [1] 5524:5 temporary [2] 5523:14 5545:15 tends [1] 5553:7 tennessee [1] 5563:7 term [1] 5641:17 terms [9] 5528:11 5529:11 5544:16 5548:20 5554:18 5564:16 5589:9 5600:1 5626:19 territories [1] 5611:25 terrorize [1] 5533:25 terrorizing [1] 5555:8 test [41] 5529:12,13 5539:15,20 5540: 1,13,23 5542:14,16 5559:4,5 5561:1, 1 5567:5 5577:2,13,22 5579:19 5583: 1 5593:19,20 5595:1 5598:23,24 5602:3 5610:13 5611:2 5612:20 5614:18 5625:7,11,13,13,16,17 5628: 15 5635:14 5636:24 5637:6,9 5639: 15 testify [1] 5628:13 testosterone [1] 5570:23 tests [2] 5576:22 5579:23 textually [1] 5565:14 thanks [1] 5598:24 thc [3] 5528:8 5572:23 5609:15 theme [1] 5643:14 themselves [1] 5626:22 themselves [4] 5539:1 5587:19 5597: 6 5610:20 theories [1] 5533:3 theory [4] 5524:21 5525:20 5526:2,3 therefore [4] 5540:10 5580:23 5596: 25 5639:2 there's [47] 5520:5 5521:4 5523:10 5528:9 5531:18,19 5532:17 5538:1</p>
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Official - Subject to Final Review

<p>5544:23 5547:21,22 5549:24 5550:13,13 5553:20 5554:11 5555:24 5560:9 5562:10 5563:8,15,21 5569:2 5574:7 5579:16 5581:1,5 5582:14 5583:13 5589:7 5591:17 5595:9 5597:8 5599:8 5606:13 5613:15,19 5621:6 5632:3 5634:9,15 5635:12 5636:16 5638:25 5639:8,11 5643:8 they've [5] 5550:12,17 5587:19 5640:14,16 thinking [4] 5554:5 5602:5 5610:12 5616:18 thinks [2] 5540:22 5557:25 third [8] 5532:2,10 5534:10 5575:6 5596:2 5625:4 5627:14 5646:10 thomas [8] 5524:16 5545:8,9,17 5546:10,23 5586:7 5619:11 though [8] 5523:25 5551:14 5563:21 5564:11 5594:6 5595:1 5601:9 5639:12 thoughtful [1] 5625:5 threat [3] 5606:23,25 5621:5 three [5] 5522:8 5524:17 5555:19 5575:18 5611:25 threshold [2] 5535:15 5592:5 throughout [1] 5613:1 throw [3] 5520:1 5546:8 5556:10 tight [3] 5528:16 5546:22 5553:14 tightest [1] 5546:5 tipping-point [1] 5549:1 today [10] 5542:13 5543:10 5585:20 5589:12 5602:13,16 5609:16 5616:15 5631:22 5634:15 today's [3] 5540:21 5542:2 5579:10 tomorrow [2] 5560:6 5592:19 took [2] 5524:13 5525:8 top [3] 5521:11 5537:19 5639:16 touch [1] 5635:10 touchstone [1] 5578:16 towards [1] 5521:22 town [1] 5554:12 track [3] 5523:21 5524:3 5534:20 trade [3] 5533:10 5537:18 5562:9 tradition [30] 5561:25 5562:25 5568:19 5569:1,3 5584:22 5585:17 5590:18 5592:7 5595:14,15 5599:3 5602:18 5603:14,25 5604:3,4,9,16,21 5605:15,20 5607:2,5,17 5618:13 5634:10 5640:5,18 5643:1 traditional [4] 5617:1,25 5619:4 5627:7 translate [1] 5556:5 translation [1] 5523:7 trapped [2] 5570:15 5578:21 treated [2] 5533:20 5581:8 treating [1] 5544:15 treatment [6] 5557:16 5558:6 5595:18</p>	<p>5597:1,21 5634:21 trial [4] 5613:9,13,14,15 trials [1] 5644:19 tries [1] 5620:19 troubled [1] 5525:5 true [5] 5565:6 5572:23 5579:18 5583:10 5616:8 trust [5] 5576:24 5578:11 5582:24 5614:5 5627:1 truth [1] 5593:4 try [2] 5588:11 5643:10 trying [5] 5544:8 5566:1 5615:21 5616:11 5633:24 turn [1] 5564:21 turns [1] 5596:15 twice [3] 5538:5,10 5571:23 twin [1] 5538:20 two [32] 5520:23,25 5522:7,14,16 5526:4,23 5528:25 5529:3 5531:19 5538:13 5544:16 5554:16 5556:20 5557:9 5559:8 5562:17 5565:6 5567:14 5580:15 5581:3 5582:24 5588:5 5590:2 5593:22 5594:7 5595:11,12 5605:21 5615:20 5632:3 5647:8 twofold [1] 5528:6 tylenol [1] 5570:22 type [6] 5527:21 5534:15,20 5612:25 5626:19 5628:7 types [5] 5536:7 5568:14 5589:15 5596:20 5597:17</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>u.s.c [1] 5552:15 ultimate [2] 5619:2 5630:3 un [1] 5589:14 unable [3] 5610:19 5625:19 5626:3 unbroken [1] 5544:14 unconstitutional [6] 5564:9 5581:20,25 5586:12,14 5587:14 uncontrollable [3] 5557:11 5558:13 5566:11 under [42] 5524:20 5525:20 5526:2,3 5530:14 5533:2,2,5 5538:8 5540:1,12,23 5542:13 5556:23 5561:4 5588:15 5590:11 5591:18 5592:13 5596:13 5608:18 5612:13 5614:3 5616:1 5617:14,25 5622:13 5623:5 5624:19 5630:18 5631:17,18,19,20,23 5634:1 5638:3,4,12 5643:17,25 5646:24 underlying [1] 5587:15 understand [20] 5538:15 5557:2 5559:18 5560:7,24 5570:12 5576:22 5582:1 5589:2 5590:21 5592:10,10 5618:17,19 5619:14 5620:2 5626:9 5635:5,14 5638:22 understandable [1] 5587:2 understanding [4] 5547:7,9,13 5601:</p>	<p>15 understandings [1] 5617:2 understood [5] 5555:17 5599:17,17 5608:5 5635:6 unfolded [1] 5561:10 uniform [2] 5527:7 5544:21 unifying [2] 5640:5 5643:14 united [1] 5547:10 universally [1] 5565:22 unknown [2] 5616:21,21 unlaw [1] 5527:9 unlawful [40] 5525:25 5526:6 5527:5,18 5528:7 5536:15 5538:12 5545:18 5556:22,24 5557:14 5558:11 5562:14 5563:4 5564:2 5565:18,25 5566:1 5567:3 5568:3 5577:1 5581:8,22 5584:7,12,19 5615:15 5616:16 5618:10,24 5630:16 5632:3 5633:13,18 5634:14,16 5638:12,16 5643:18 5647:10 unlawfully [4] 5530:1,11 5534:24,24 unless [1] 5575:8 unlike [3] 5521:6 5562:12 5638:11 unpredictable [1] 5647:23 unsafe [4] 5555:9 5563:17 5574:9,11 unsafely [1] 5589:14 until [3] 5545:5 5547:10 5613:19 unusual [2] 5566:21 5605:21 unworkable [1] 5574:17 up [17] 5552:12 5554:17 5560:5 5564:17 5569:20,21 5592:22 5599:22 5604:2 5605:4 5610:25 5614:11 5629:2,16 5643:20 5644:4 5645:10 uphold [1] 5600:10 urge [2] 5557:11 5558:14 urges [1] 5647:5 usage [1] 5521:7 user [63] 5522:5,6,9 5524:2,17 5526:6,12,21,22 5527:6,8,18 5528:3 5538:12 5550:18 5556:6,22,24 5557:3,8,15 5558:11 5563:22 5564:19 5565:1,2,18,25 5566:1 5567:3 5568:3,9 5580:7,14,22 5584:7,12,20 5604:1,5 5605:9,22 5615:5,15 5616:16 5618:10,24 5623:15 5625:8 5632:3 5633:13,18 5634:14,16 5636:13 5638:12,16 5639:14 5641:14 5643:18 5646:11,15,17 users [19] 5521:13 5522:12 5523:9 5533:1 5544:18 5545:4 5562:25 5563:4 5564:2,8,14 5568:23 5577:1 5581:9,22 5609:16 5617:5 5629:14 5647:10 user's [1] 5627:23 uses [18] 5522:9 5525:1,7 5538:5 5557:19 5559:16 5564:24 5565:23 5575:17 5587:23 5596:24 5610:15</p>
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Official - Subject to Final Review

<p>5616:4,20 5618:5 5630:10 5632:20 5641:9 using ^[28] 5521:14 5522:5 5523:16 5528:7,7 5531:25 5535:7 5539:4 5540:19 5542:17 5550:19 5558:3 5562:13 5566:10 5567:11,15,15 5571:14 5574:2 5594:10 5610:18 5615:9 5630:7,17 5636:17,18 5637:7 5647:6 utah ^[1] 5563:8</p>	<p>5602:8 5603:14 5606:2,22 5608:17 5611:1 5614:4,19 5617:14 5618:16 5619:1 5623:24 5624:13,16,18 5625: 1 5627:7 5628:11 5638:16 5640:3,12 5643:21 5644:25 5645:7,7,18 5646: 24 ways ^[5] 5531:18 5562:6 5576:12 5582:15 5640:15 weapon ^[1] 5533:25 week ^[22] 5522:9 5535:8 5537:10 5538:6,10,10 5565:24 5567:19,20 5571:23 5575:18 5586:4 5596:1,2 5609:17 5613:2 5616:6,22 5627:3 5637:15 5646:22 5647:22 weekly ^[1] 5639:14 weeks ^[4] 5594:7,10 5595:11,12 welcome ^[1] 5586:6 welfare ^[1] 5632:22 west ^[2] 5548:2 5563:8 whatever ^[15] 5535:16 5555:23 5568: 20 5580:20 5583:2 5585:8 5587:4 5601:6 5603:3 5613:10 5616:7 5635: 11 5637:1,18 5644:7 whatnot ^[1] 5577:14 whatsoever ^[1] 5600:14 wheel ^[1] 5582:21 whenever ^[2] 5566:12 5626:21 whether ^[50] 5522:24 5523:22 5524:1 5538:21,22,23 5539:5 5550:23 5551: 1 5552:5,12,23 5557:12 5566:7 5575: 3 5577:7,9 5578:8 5583:1 5586:22 5587:4 5588:9 5589:9 5594:19 5596: 9 5597:5 5602:7 5606:14 5611:7 5616:17 5621:4 5622:6 5623:10,14 5625:7,18,20 5627:10,18,21 5628:14 5629:19 5631:7 5633:25 5638:24 5639:1,14,18,20 5641:25 whichever ^[2] 5571:13 5624:18 whiskey ^[2] 5524:6,15 whoa ^[1] 5620:21 whole ^[7] 5549:8 5552:11 5573:7 5585:3 5600:3 5616:13 5625:1 whom ^[1] 5629:16 whoremongers ^[1] 5520:3 who's ^[10] 5526:6,14 5575:16 5614:13 5626:20 5632:4 5637:7,13,16 5641:8 wider ^[1] 5555:12 will ^[10] 5525:24 5535:1 5538:1 5555: 11 5595:5 5596:25 5607:9 5613:19 5645:16 5646:19 willing ^[3] 5575:9,21 5620:13 win ^[4] 5609:12 5618:7 5636:1,2 wind ^[2] 5560:5 5569:21 winding ^[1] 5569:20 window ^[2] 5556:11 5647:18 wine ^[1] 5524:18 wins ^[1] 5613:14</p>	<p>within ^[5] 5523:16 5534:12 5555:13 5583:11 5615:5 without ^[7] 5542:8 5556:1,2 5601:11 5621:25 5622:14 5628:25 withstand ^[1] 5628:25 wolford ^[2] 5581:17 5582:3 wonder ^[1] 5615:23 word ^[3] 5564:21 5614:23 5641:7 words ^[2] 5541:25 5598:21 work ^[14] 5523:3 5534:8 5540:11 5543:6 5567:8 5568:7 5576:22 5579: 9,22 5602:9 5637:16,18 5647:4,8 working ^[1] 5640:13 works ^[5] 5545:14 5560:22 5570:3 5582:1 5622:13 world ^[3] 5598:11 5599:3 5618:18 worlds ^[1] 5562:18 worrying ^[1] 5577:12 wrapped ^[1] 5543:5 written ^[1] 5552:1</p>
V		X
<p>vacuum ^[1] 5640:20 vagabond ^[1] 5538:21 vagabonds ^[1] 5520:15 vagrancy ^[3] 5520:6 5522:21 5555:11 vagueness ^[2] 5633:16,23 valid ^[1] 5554:20 variation ^[1] 5609:6 various ^[7] 5526:14 5541:1 5542:19, 19 5568:12,13 5590:22 vast ^[1] 5631:18 vastly ^[1] 5631:22 verba ^[1] 5608:11 version ^[1] 5572:3 versus ^[8] 5529:15 5534:1 5539:2 5565:18 5566:2 5582:12 5615:25 5638:3 view ^[10] 5527:7 5537:4 5543:6 5566: 22 5567:16 5586:8 5602:4 5603:17 5605:14 5635:5 views ^[1] 5553:7 violate ^[1] 5535:5 violence ^[13] 5569:23 5570:18 5571:2, 5 5573:1,13,20 5575:4,13 5609:18, 18 5611:11 5646:9 violent ^[1] 5576:17 virginia ^[1] 5563:8 virtually ^[1] 5624:6 virtues ^[1] 5567:23 vis-à-vis ^[3] 5599:14 5637:12 5647:4 voluntarily ^[1] 5566:7</p>	<p>yardstick ^[1] 5646:13 year ^[2] 5526:15 5643:17 year's ^[2] 5589:4,6 yore ^[1] 5586:1 york ^[2] 5563:7 5572:21 yourself ^[4] 5606:24 5607:1 5609:24 5621:5</p>	Y
W		
<p>wait ^[1] 5545:5 walk ^[1] 5596:22 walking ^[1] 5601:11 wanted ^[8] 5537:1 5560:12,12,18 5572:10 5573:6 5624:3 5635:1 wants ^[14] 5526:18 5586:21 5587:1 5588:11 5590:9 5598:6,8 5602:6 5610:6,24 5611:13 5612:13 5616:12 5629:1 way ^[47] 5521:10,15 5528:13,23 5534: 14 5537:4,6,9 5542:18 5545:13 5554: 2 5556:8 5560:21 5570:2 5576:11 5577:3,23 5582:2 5590:17 5591:24</p>		