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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
4 the 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 individualized
22 dangerousness findings. It was a sort of
23 judgment made often by magistrates or justices
24 of the peace as to whether someone's conduct
25 was frequent and putting them in a status of a

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

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

16 JUSTICE GORSUCH: Well, Ms. Harris --

17 MS. HARRIS: Second --

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

1 as a habitual user, and I want to explore that
2 before we lose track of it.

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

7 (Laughter.)

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

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

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

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

23 JUSTICE GORSUCH: Okay. If they're
24 not, then what do we know about Mr. Hemani? We
25 know he uses marijuana a few times -- about

1 every other day. That's all we have in the
2 record, right?

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

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

13 Disarm him for life?

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

16 JUSTICE GORSUCH: Potentially.

17 MS. HARRIS: Well --

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

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

25 JUSTICE GORSUCH: I think the answer's

1 yes under the government's theory.

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

8 JUSTICE GORSUCH: Is it? I mean --

9 MS. HARRIS: Yes.

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

15 MS. HARRIS: Respect --

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

24 So tell me how it's so clear.

25 MS. HARRIS: Okay. A couple things to

1 help you with this. One, I'm going to set
2 aside the forfeiture issue, but I would like to
3 return to that later. Just deal with the
4 substance.

5 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, it's

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 III 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 I and
4 even if it's on Schedule III, 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
23 armed" laws as saying that's an even sort of
24 more 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 I or Schedule II.

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 I, II, 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 I? Is it
17 Schedule II? 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: But my backup is, if you
24 have a problem with that, you can look with
25 respect to the gradations of the scheduling

1 scheme, and if you wanted to calibrate it
2 further --

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

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

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

13 MS. HARRIS: That is our position --

14 JUSTICE GORSUCH: Yeah.

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

21 JUSTICE SOTOMAYOR: But all --

22 JUSTICE JACKSON: Ms. -- Ms. --

23 JUSTICE SOTOMAYOR: -- of the safety
24 factors that you mentioned in my mind go --
25 come down to the second part of the statute,

1 which is "addicted to drugs," meaning you say
2 there's a danger that you will become addicted
3 or that you're going to act out in your
4 addiction.

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

8 MS. HARRIS: Because --

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

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

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

19 MS. HARRIS: Because --

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

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

9 JUSTICE JACKSON: But -- but -- but --

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

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

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

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

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

25 MS. HARRIS: Respectfully, I think

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

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

12 MS. HARRIS: Right.

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

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

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

24 If you -- if you do it at that level
25 here, then you are -- you don't even have that

1 original point. In other words, you don't have
2 the determination that people who are doing
3 what today's Congress says is dangerous were
4 dangerous to people at the founding. This is
5 Justice Gorsuch's point, right? The dangerous
6 people at the founding were well beyond just
7 one, you know, item, one intoxicant every other
8 day.

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

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

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

1 subject to the same determinations, is enough
2 on all fours.

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

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

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

22 JUSTICE JACKSON: But, to the extent
23 your argument both accepts what was happening
24 at the founding and distances -- distances
25 itself, I think that's a problem. You've said

1 many times this is not like alcohol. This is
2 different from alcohol. This is illegal.

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

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

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

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

24 MS. HARRIS: With respect, there's a
25 lot of laws that did not just -- were not just

1 confined to addicts. At least -- I think at
2 least a dozen of them either port in the
3 federal definition or otherwise.

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

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything further?

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

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

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

21 MS. HARRIS: Anabolic steroids, I
22 believe, are either Schedule III or Schedule
23 IV. So I would give similar answers to Justice
24 Barrett with respect to my front-line and my
25 backup. I think the front-line is there are

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

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

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

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

15 MS. HARRIS: That is correct.

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

21 MS. HARRIS: Correct.

22 JUSTICE ALITO: There's talk --
23 there's a lot of talk about alcohol. Do you
24 think that the regulation of alcohol is exactly
25 the same as the regulation of illegal drugs?

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

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

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

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

1 things? At what point do you might have a
2 tipping-point situation where someone goes into
3 a greater risk of addiction or having
4 additional mind-altering effects?

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

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

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

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

24 Or other parts of (g)(4), and then
25 there's a lot of issues with respect to (g)(1),

1 but I think we could all agree it would be
2 passing strange to suggest that it's
3 constitutionally required for serial murderers
4 to be subject to individualized dangerousness
5 determinations for Second Amendment purposes.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice --

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

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

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

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

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

1 or drinks socially somewhere else, takes a
2 stick of marijuana at a party, whether you can
3 prosecute that person?

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

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

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

13 JUSTICE SOTOMAYOR: At parties?

14 MS. HARRIS: Anywhere.

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

17 MS. HARRIS: That is correct.

18 JUSTICE SOTOMAYOR: All right.

19 MS. HARRIS: They cannot --

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

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Ms. Harris, I think
24 I'd like to know more about how controlled
25 substances are identified. I mean, the

1 Controlled Substances Act is obviously not
2 written with 922(g)(3) in mind, right? It's
3 like the separate statute which presumably has
4 its own purposes and methods and so forth.

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

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

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

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

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

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

1 when mixed with firearms. The point is it's
2 dangerous at any level when it's being used in
3 an illegal way.

4 JUSTICE KAGAN: Okay. So a different
5 question. In thinking about these analogues
6 and what counts and what doesn't, do you
7 recognize a difference between statutes that go
8 to public safety, like we're really afraid that
9 this person is going to commit crimes against
10 other people, and statutes that go to what we
11 might call public order, so there's a person
12 who keeps on falling down dead drunk in the
13 town square, and we want to remove that person
14 from 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 the manner of handling them and just
17 historically how those laws were understood
18 with respect to 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: And you're asking us
2 now 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 morals, 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 is 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, as
16 perhaps here, where --

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

19 MS. HARRIS: Okay.

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

1 a Schedule I drug, but the government itself is
2 considering rescheduling it to a Schedule III
3 drug? Why -- why bring this case? Why -- why
4 is this the 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 I 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 III 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 II. 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 III 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 II 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 V or Schedule IV
14 for 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
18 as-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 -- I
25 understand that. It's just an odd case to have

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

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

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

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

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

23 JUSTICE KAVANAUGH: Please elaborate.

24 MS. HARRIS: Okay. Thank you. So
25 drugs are similar in -- to alcohol in the sense

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

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

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

1 tradition with respect to illegal drug users.

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

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

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

24 MS. HARRIS: I'm not sure I would
25 concede that. I think it's a little hard to

1 parse exactly what all of them cover. I think
2 a lot of them do cover addiction, but a lot of
3 them also cover unlawful users.

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

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

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

1 endanger the public morals, that's enough.

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

5 MS. HARRIS: Right.

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

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

20 Second, with respect to how clear is
21 the definition, I mean, I would remind the
22 Court the case comes to the Court with the
23 proposition universally accepted by the court
24 of appeals that someone who repeatedly uses
25 marijuana multiple times a week is in the

1 heartland of an unlawful user. And when you're
2 trying to tease out who is an unlawful user
3 versus addict, I agree with you it helps --

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

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

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

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

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

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

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

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

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

24 I think these are virtues of the
25 approach here. The government doesn't normally

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

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

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

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

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

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

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

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

24 Is proclivity to violence expressly
25 one of the things that's taken into account in

1 putting a drug on the schedule?

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

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

12 JUSTICE BARRETT: I mean, I -- I
13 understand that. I think where I'm stuck, I --
14 I agree with you that you don't need to have
15 just alcohol because that's all there was at
16 the finding and that would be trapped in
17 ander -- amber.

18 Let's say that I think that the
19 principle is, if you have reason to know that
20 someone would pose a risk of violence, is
21 dangerous, that the -- the legislature can
22 disarm.

23 I guess, when I look at these drugs,
24 however, I mean, Robitussin, Ambien, Tylenol
25 with codeine, testosterone, Adderall, I mean,

1 none of those drugs strike me -- I mean, I --
2 I'm not a pharmacologist, but none of those
3 drugs strike me as drugs for which it is
4 obvious that a risk of violence would ensue.

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

8 MS. HARRIS: So what I'm saying is
9 those drugs in Schedule IV and Schedule V --

10 JUSTICE BARRETT: Oh, actually,
11 Adderall is in Schedule II.

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

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

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

1 help you take exams?

2 MS. HARRIS: Yeah. And I think we're
3 going to get to a place where you're into
4 Ketamine and other drugs, Ketamine being
5 Schedule III. It's a lesser version of PCP.
6 And --

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

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

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

20 And so I guess my concern is let's say
21 that I think Congress could make a
22 determination, maybe, I don't know, I mean,
23 there was just an article in the New York Times
24 about the dangers of marijuana, and, you know,
25 maybe that's true. Maybe THC concentrations

1 are higher nowadays and that does have bad
2 effects on -- bad mind-altering effects and
3 maybe it gives rise to violence. I just don't
4 see that -- my -- my -- my concern, and maybe
5 you can dispel it, my concern is I just don't
6 see that that determination was made here.

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

12 And I think the other thing to
13 consider is, if you were going --

14 JUSTICE BARRETT: And where does it
15 say that it leads to violence --

16 MS. HARRIS: There are --

17 JUSTICE BARRETT: -- in the history?

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

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

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

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

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

1 What about an as-applied challenge
2 just to that particular drug? Why -- why can't
3 Mr. Hemani simply say, you don't have to take
4 into account all of my personal circumstances,
5 but, you know, government, I would like to put
6 you to your proof about whether marijuana has
7 an established link to violence?

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

18 JUSTICE BARRETT: So the person with
19 Robitussin shouldn't be able to -- who's caught
20 with Robitussin and -- and uses it for coughing
21 and sleeping, you know --

22 MS. HARRIS: Okay.

23 JUSTICE BARRETT: -- three nights a
24 week, that person can't make an as-applied
25 challenge?

1 MS. HARRIS: I think the government is
2 willing to entertain the idea, as we would
3 with, like, sugar or caffeine, that if -- if
4 there is not -- if there is not sort of a
5 factual record, but I think here, again, you
6 can either carve out Schedule V or do some
7 other things that --

8 JUSTICE BARRETT: So you're not
9 rejecting out of hand the possibility of
10 as-applied challenges to the particular drugs.
11 You're just resisting that it would apply as to
12 marijuana?

13 MS. HARRIS: I'm resisting the idea
14 that it could be constitutionally required for
15 Second Amendment purposes because I think you
16 would be fundamentally altering the Rahimi
17 framework in a problematic way by discounting
18 the ways in which the modern analogue of
19 922(g)(3) is more tailored and only focusing on
20 the idea that you need, like, some exact
21 comparator as if you could go back in time and
22 figure out exactly the mental effects of
23 intoxication to feel -- figure out how violent
24 someone is. I think that's an impossibility.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I guess maybe I
3 just don't understand how the tests work
4 anymore. Maybe it's post-Rahimi, I'm not sure,
5 but it seems like you're asking us to trust
6 Congress's legislative judgment here that
7 unlawful drug users pose a heightened risk of
8 misuse but that this test really doesn't
9 provide us a way to check that in any
10 meaningful sense.

11 And -- and I guess the benefit of the
12 pre-Bruen kind of means-end scrutiny is that
13 you got to the bottom of whether what Congress
14 was actually doing here was legitimate and
15 whether the means that they had chosen, the
16 disarmament of this person, was tailored,
17 sufficiently tailored, to that aim.

18 And what's worrying me is that the
19 current Bruen test modified by Rahimi or
20 whatnot is not allowing us to assess that, and
21 that's really the problem in this situation,
22 that the concerns, the questions that you're
23 being asked seem to all relate to people's
24 concern that even if we all agree that Congress
25 can legislate to disarm people who are

1 dangerous as a general matter, that this person
2 in this circumstance really is not dangerous.

3 And -- and your test doesn't seem to
4 get to allow us the way we're -- we're --
5 you're talking about it to assess that. Can
6 you help me with -- with how the means-end
7 scrutiny analysis is being folded into Bruen?

8 MS. HARRIS: Sure. I don't think the
9 means-ends analysis is or should be folded into
10 Bruen.

11 JUSTICE JACKSON: But then how do we
12 keep it from having this very situation where
13 it just boils down to us believing what the
14 modern Congress says about whether or not
15 someone is dangerous?

16 MS. HARRIS: We would also reject the
17 "trust us" position.

18 JUSTICE JACKSON: Okay.

19 MS. HARRIS: Here's the guardrails
20 again. I think I would start with
21 post-ratification history because history is
22 the touchstone of the Bruen inquiry, and the
23 Court has repeatedly recognized that when you
24 have a principle from the founding with respect
25 to how to classify which kinds of people

1 present a special danger of misuse, it's not a
2 law trapped in amber situation. You don't have
3 to accept the founding generation's judgments
4 as to exactly who is or is not dangerous.

5 JUSTICE JACKSON: Right, but your
6 principle --

7 MS. HARRIS: But, when --

8 JUSTICE JACKSON: -- is just the
9 Congress -- the -- the -- the founding era
10 identified certain people as dangerous. Your
11 principle has to be specific enough to allow us
12 to adequately or accurately match it.

13 MS. HARRIS: Yes.

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

21 We're just looking at -- like, you say
22 there's a really good reason to do this and
23 Congress's judgments are, you know, grounded in
24 important policy determinations. All that's
25 true, but that's not what the Bruen test is

1 asking us to do.

2 MS. HARRIS: Respectfully, I'm not
3 saying Congress is doing great work here. I'm
4 saying that the tests are in addition to
5 post-ratification history, which tells you the
6 principle is a lot more specific than here's a
7 dangerous category of people, you know, have at
8 it.

9 JUSTICE JACKSON: So what is the
10 specific thing about habitual drunkards as a
11 category obviously identified at the founding
12 that is parallel to the every other day
13 marijuana user here?

14 MS. HARRIS: It is that when you
15 habitually use intoxicating substances, you can
16 present special dangers that weren't
17 confinement or imprisonment or other restraints
18 that are greater than what 922(g)(3) is doing.

19 JUSTICE JACKSON: Yes. But you're
20 just defining "habitual user" differently in
21 those two situations. I mean, you -- you --
22 you've just defined away the problem. Yes,
23 fine, when you habitually use, but the founding
24 people said, when you habitually use, you're
25 falling down drunk in the street, it's -- it's

1 like, you know, whatever Justice Gorsuch
2 identified at the beginning, that's what it
3 means to be a habitual user back then, and,
4 therefore, it presents a category of
5 dangerousness.

6 That's not what we have here. So you
7 can't just redefine it and still say there's a
8 match.

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

17 JUSTICE JACKSON: Well, that may be
18 it. I mean, I -- I -- I guess I'm concerned
19 that Bruen and Rahimi are going to be allowing
20 for arbitrary identifications of analogues and
21 producing inconsistent results.

22 You were here in January with respect
23 to the Woford case when you argued that
24 historical antipoaching laws were different
25 enough from what Hawaii was doing that it's

1 unconstitutional. Here, you're arguing that
2 historical laws that have nothing to do with
3 guns, very little to do with unlawful users of
4 intoxicants, as, you know, was going on in the
5 history, are similar enough to cause this law
6 to be unconstitutional.

7 I don't understand how this works
8 anymore in any meaningful way.

9 MS. HARRIS: Okay. Wolford is a case
10 about a handful of founding-era putative
11 analogues that missed out on what we considered
12 to be the relevant principle with respect --

13 JUSTICE JACKSON: Yes, what you
14 considered -- what I'm asking you is how does
15 that -- how do we know what is the relevant
16 principle --

17 MS. HARRIS: Okay. Again --

18 JUSTICE JACKSON: -- here versus
19 there?

20 MS. HARRIS: -- I think there's a
21 couple ways of figuring it out. One is with
22 respect to how it's liquidated in
23 post-ratification history. I think it is a far
24 superior approach than what Justice Gorsuch
25 aptly described in his Rahimi concurrence as a

1 sort of free-for-all in which courts of appeals
2 were imposing -- or having free wheel to impose
3 their own policy preferences. So I think that
4 is an important check.

5 Two, we're not just saying trust us,
6 Congress. We're saying the process by which
7 you test whether illegal drugs are illegal, are
8 deemed dangerous in whatever it is, the range
9 of things, is something that provides a check
10 for a specific fact-finding that well exceeds
11 the kinds of individual -- the determinations
12 that were made with respect to being a habitual
13 drunkard at the framing.

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

22 The Ludwick decision shows that the --
23 the mine-run of cases are not even saying
24 someone was incapable of handling their own
25 affairs.

1 JUSTICE JACKSON: Thank you.

2 MS. HARRIS: So that is a helpful
3 check.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Murphy.

8 ORAL ARGUMENT OF ERIN E. MURPHY

9 ON BEHALF OF THE RESPONDENT

10 MS. MURPHY: Mr. Chief Justice, and
11 may it please the Court:

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

25 The government reads the "unlawful

1 user" prong to cover anyone who is engaged in
2 habitual use of a controlled substance. But
3 the only historical tradition it has offered is
4 one of imposing restrictions on habitual
5 drunkards. That entire line of argument rests
6 on a category mistake because the laws to which
7 the government points applied only to habitual
8 drunkards, not to habitual drinkers.

9 Indeed, the whole point of the
10 doctrine was to distinguish those who consumed
11 alcohol frequently but mostly in moderation
12 from those who so habitually consumed alcohol
13 to the point of intoxication as to impair their
14 ability to function even in whatever moments of
15 sobriety they may have had.

16 And that distinction was critical as
17 deeming anyone who regularly consumed alcohol a
18 habitual drunkard would have given the
19 government sweeping power to subject much of
20 the populace to hard labor, guardianship, civil
21 commitment, and incarceration.

22 Now, to be sure, the habitual drunkard
23 tradition may well support disarming people who
24 are addicted to a controlled substance, which
25 is, in fact, the dominant approach in the

1 States today. And perhaps it could justify a
2 categorical approach as to certain substances
3 if the government is able to actually prove
4 that a particular substance is, in fact, so
5 addictive and dangerous as to make anyone who
6 regularly consumes it akin to a habitual
7 drunkard of yore.

8 But it cannot support disarming
9 someone based solely on the fact that he
10 consumes a few times a week something that
11 Congress has designated a controlled substance.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: The government takes
14 the view that -- or seems to suggest that your
15 argument boils down to a facial challenge on
16 the statute.

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

1 And at the end of the day, we don't --
2 I mean, my client just wants to see the
3 decision below affirmed. Whether that's done
4 on facial or as-applied grounds is -- is not of
5 particular importance to us.

6 CHIEF JUSTICE ROBERTS: Well, I know
7 your client just wants to prevail, which is
8 understandable, but your argument, it seems to
9 me -- I mean, why doesn't it apply to any drug,
10 whether it's PCP, methamphetamine, whatever?

11 It seems that, again, to the extent
12 that you're overriding the judgment of Congress
13 and the executive branch with respect to the
14 listing of particular drugs, I don't know why
15 that -- that same approach doesn't apply to any
16 drug.

17 MS. MURPHY: So we think the same
18 principle should govern in -- with respect to
19 any drug, but that doesn't mean that the
20 statute is unconstitutional as to every drug.
21 If you take the principle underlying -- as to
22 habitual drunkards, the concept that the
23 statutes back then required, is somebody
24 drinking to such excess that they can't care
25 for themselves or their affairs, that they've

1 lost self-control, that they're posing a public
2 safety risk, if you apply that, there are going
3 to be some substances where it may be that
4 pretty much anybody who uses them regularly --

5 CHIEF JUSTICE ROBERTS: So we're going
6 to -- we're going to assess those on a
7 case-by-case basis and apparently on a
8 individual-by-individual basis?

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

17 But, if the government wants to try to
18 say a particular substance is so categorically,
19 you know, addictive, dangerous that you can't
20 use it regularly, okay, but it has to do that
21 under the burden of proof that Bruen assigns
22 it, of proving that the category it has
23 identified maps onto that category of habitual
24 drunkard. It's not enough to just come in and
25 do APA, discretionary, government gets the

1 benefit of the doubt review because that's
2 eliminating the burden of proof that we
3 think --

4 JUSTICE SOTOMAYOR: So, Ms. Murphy --

5 CHIEF JUSTICE ROBERTS: I think --

6 MS. MURPHY: -- is required by the
7 government.

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

23 And you say, well, no, those are going
24 to have to be litigated on a case-by-case
25 basis, in every individual instance, is this --

1 and that's going to be hashed out in court, is
2 this drug one that's particularly dangerous or
3 particularly addictive?

4 And it just seems to me that takes a
5 fairly cavalier approach to the necessary
6 consideration of expertise and the judgments we
7 leave to Congress and the executive branch.

8 MS. MURPHY: So I want to be clear
9 about two things. First, we are not saying --
10 we're not arguing that the Second Amendment
11 doesn't allow for categorical prohibitions.
12 That is not our position. And we're not even
13 arguing that Congress couldn't perhaps have
14 categorical restrictions as to particular
15 substances.

16 Our core point is, if Congress wants
17 to do that, then the government needs to prove
18 with its burden of proof under Bruen not just
19 that this was a reasonable determination
20 supported by substantial evidence that gets
21 past APA review with highly discretionary,
22 we'll assume the government knows what it's
23 talking about, that it has, in fact, identified
24 the category in a way that maps onto the
25 historical tradition it is invoking.

1 JUSTICE SOTOMAYOR: So, Ms. --

2 JUSTICE ALITO: Well, Ms. Murphy, I
3 don't really -- I don't understand what you
4 just said. 922(g) sets out various categories
5 of people who are prohibited from possessing a
6 firearm.

7 And I thought you began what you
8 just -- I thought you said to start out that a
9 categorical approach is permitted. Is that
10 correct? So -- or are you saying that as to
11 everybody in all of those categories, there
12 must be an individualized showing when that
13 person is prosecuted?

14 MS. MURPHY: We accept that the
15 government can take categorical approaches. I
16 think you're going to have to look at each --
17 any given prohibition and examine the history
18 behind it to determine what categorical
19 approach can be taken, but we're -- we are not
20 here to suggest that the only time the
21 government can ever restrict the exercise of
22 right --

23 JUSTICE ALITO: Okay. So, as -- as to
24 at least some of these categories, there's no
25 right to an individualized determination under

1 the Second Amendment? Is that what you're
2 saying?

3 MS. MURPHY: I mean, I think that, you
4 know, you could have a discussion and a case
5 involving certain provisions about the need for
6 as-applied challenges, some way to allow
7 somebody to show that, you know, yes, you might
8 have the category right as a general matter,
9 but I am somebody who happens to be outside it.

10 But I think that that's something you
11 confront once you've determined that the
12 government got the category right, which is the
13 threshold question, did they get the category
14 right as compared to the historical tradition
15 that they are in.

16 JUSTICE ALITO: So I -- I'm not -- I
17 don't completely understand -- understand that.
18 Can -- is it -- can -- must there be an
19 individualized determination as to anybody who
20 is prosecuted under any of the subsections of
21 922(g)? Yes or no?

22 MS. MURPHY: No.

23 JUSTICE ALITO: No? Okay.

24 MS. MURPHY: That is not our position.

25 JUSTICE KAGAN: Suppose, Ms. Murphy,

1 Congress tomorrow says, you know, we're afraid
2 that this Controlled Substances Act is not
3 really doing it for us in this area, so we're
4 going to come up with a list of particular
5 drugs that we -- we want to be able to take
6 away people's guns.

7 And the first on that list -- I'm
8 going to say I don't know a lot about this
9 drug, I'm assuming you don't know a lot about
10 this drug, so what I'm going to tell you about
11 this drug let's just assume is the truth about
12 this drug.

13 MS. MURPHY: Fair enough.

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

24 So -- but that to me, when you give
25 the description of the historical analogue, to

1 me, that's going to fail your test. Should it
2 fail your test?

3 MS. MURPHY: Not necessarily. I guess
4 I would say two things. First, obviously, we
5 agree that -- that you can be prohibited from
6 carrying while you're taking that drug, but --
7 but I don't think --

8 JUSTICE KAGAN: Well, it's not --

9 MS. MURPHY: -- I don't think it stops
10 there.

11 JUSTICE KAGAN: -- it's not a question
12 of carrying. It's like, you know, there you
13 are in your house, you have a gun in your house
14 as well, so you're owning a gun even though you
15 use this drug, let's say, once every two weeks.

16 MS. MURPHY: Yeah, I think that it
17 would be a little bit difficult to -- to show
18 that merely using that drug every few weeks is
19 going to be enough to render you akin to the
20 concept that the historical drunkard laws were
21 getting at, which is that your consumption
22 rendered you -- we're not saying that you had
23 to be intoxicated all the time, but your
24 consumption impaired your ability to function
25 even in your moments of sobriety.

1 That's what the courts are talking
2 about. They're asking whether -- it doesn't
3 have to be addiction, it can be addiction
4 certainly, but it could also be you're
5 consuming so frequently that, you know, that's
6 really all you do and during the day, you're
7 not functioning, and --

8 JUSTICE KAGAN: Yes. So -- so it's
9 definitely going to fail your test, though.

10 MS. MURPHY: It -- it -- it may. It
11 may not. I think, you know, you'd have to look
12 at what -- what the lasting --

13 JUSTICE KAGAN: On my facts, it will,
14 right?

15 MS. MURPHY: -- how lasting the impact
16 is. But, if a person is -- if -- if what
17 you're essentially saying is there's a
18 substance that leaves a person impaired once
19 every two weeks, but the other 13 days of those
20 two weeks they are perfectly fine, I don't
21 think it's consistent with the historical
22 tradition the government has invoked.

23 Just as I don't think that tradition
24 would support incarcerating that person,
25 subjecting them to guardianship, or committing

1 them to a drug treatment facility.

2 JUSTICE ALITO: Well, what if a
3 person --

4 JUSTICE KAVANAUGH: Do you --

5 CHIEF JUSTICE ROBERTS: Well --

6 JUSTICE ALITO: I'm sorry.

7 CHIEF JUSTICE ROBERTS: I was just
8 going to say you're -- I mean, the hypothetical
9 focused on a particular time period, but I
10 think it could be used every -- every week, not
11 just every third week or every other day, and,
12 again, I think that's something -- the judgment
13 about that, you say that that's going to be
14 made in court.

15 MS. MURPHY: And -- and that kind of
16 judgment gets made in court all over the
17 country all the time in the hearings that are
18 routinely held to decide whether somebody can
19 be subject to things like guardianship or civil
20 commitment because of their substance abuse.

21 CHIEF JUSTICE ROBERTS: Well, but
22 they're made under the determinations set forth
23 by Congress and the executive in statutes. You
24 don't -- you know, it turns -- if -- if they
25 want to categorize this particular drug as

1 something that's dangerous, that's not enough
2 for you.

3 MS. MURPHY: Well, that's not enough
4 for the types of civil commitment and
5 guardianship laws the government's pointing to
6 either. It -- it is not enough to just walk
7 into state court and say: This person
8 sometimes uses a controlled substance and then
9 you say okay, therefore, we will commit them to
10 treatment for substance abuse.

11 There is a process that has been
12 developed in courts that requires all sorts of
13 individualized inquiries into the nature of
14 someone's use and whether it, in fact, renders
15 them a danger to themselves and others on a
16 regular basis.

17 CHIEF JUSTICE ROBERTS: There's a
18 broad range of determinations like that where
19 we leave the question of its addictive
20 difficulties and the consequences of -- of that
21 to a determination by the legislature with the
22 Schedule I, Schedule III, and all that, and in
23 each case, you don't go in and get to reweigh
24 the legislative determination.

25 MS. MURPHY: But the point is to get

1 to the types of restrictions the government is
2 pointing to as its analogues, being able to say
3 your use of a substance has become so extreme
4 that you can be appointed a guardian, you can
5 be committed for treatment.

6 I mean, alcohol was never illegal at
7 those times. So it's not enough that someone's
8 made a determination about the substance. What
9 you had to look at was how the use of that
10 substance was impacting somebody's ability to
11 function in their day-to-day life.

12 JUSTICE BARRETT: Ms. Murphy --

13 JUSTICE KAGAN: This might be a
14 strange question, Ms. Murphy, but do you think
15 a Congress that really wants to get this
16 Ayahuasca drug, you know -- you know, really
17 wants to disarm people who use it, could they
18 pass a statute that says something like this?

19 You know, here are the findings. The
20 findings are we live in a post-Bruen world.
21 And it's been pointed out to us that the best
22 analogues are these habitual drunkard statutes.
23 And Congress -- so Congress says, so we're
24 going -- we think -- we've looked at all these
25 statutes and we've looked at the modern-day

1 evidence, and Ayahuasca fits our idea of what
2 the habitual drunkard statutes we're getting
3 at.

4 Now, as we just talked about, it
5 doesn't fit your idea. In other words, it's --
6 I'm just going to stipulate that it doesn't
7 meet your test. Could Congress say it meets
8 our test, thanks, and that's good enough?

9 MS. MURPHY: I think, at that point,
10 you've sort of abandoned the Bruen inquiry of
11 saying it has to actually map onto historical
12 tradition and you're in the world of simply
13 saying Congress can make its own reasonable
14 determinations about who is and is not
15 dangerous.

16 Now, you know, I -- I appreciate
17 there's some on this Court who may think that's
18 the better approach, but I do -- do think --

19 JUSTICE SOTOMAYOR: I think I
20 signed --

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

24 JUSTICE SOTOMAYOR: I -- I signed onto
25 that.

1 MS. HARRIS: Understood, understood.

2 JUSTICE JACKSON: Well, Ms. Murphy --
3 Ms. Murphy, isn't --

4 JUSTICE BARRETT: Ms. Murphy --

5 JUSTICE SOTOMAYOR: However, I do want
6 to follow up on something that Justice Kagan
7 asked. I think the government gave this away
8 when it said that there was no determination by
9 the legislature on the dangerousness of the
10 drug with guns in terms of listing it on the
11 schedules.

12 So doesn't that give away the whole
13 game for them?

14 MS. MURPHY: I -- I think it goes to
15 show why this Court would have to do or a court
16 would have to do its own inquiry, because
17 the bare fact --

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

21 MS. MURPHY: Correct.

22 JUSTICE SOTOMAYOR: But, if no one has
23 actually done the analysis whatsoever --

24 MS. MURPHY: Correct. And I think it
25 is a fair point, you know, I think it's a

1 correct concession on the government's part
2 that the Controlled Substances Act does not
3 reflect a determination that every substance
4 that is labeled a controlled substance is too
5 dangerous for people to regularly consume.

6 JUSTICE ALITO: Well, didn't
7 Congress --

8 MS. MURPHY: In fact, it represents
9 the opposite.

10 JUSTICE SOTOMAYOR: We can't -- we
11 can't make that -- given for all the reasons
12 that Justice Barrett pointed out, all the
13 different scheduling, you can't really say that
14 every single drug on there Congress could have
15 reasonably, rationally, whatever.

16 MS. MURPHY: Congress, I mean, the
17 point of the scheduling is to say some of these
18 substances, even though controlled substances,
19 are capable of being used regularly in
20 moderation without making somebody a walking
21 public safety risk.

22 So, if you are serious about ensuring
23 that the modern, you know, the modern law fits
24 that historical understanding, this law doesn't
25 even reflect Congress's determination that

1 everything designated a controlled substance is
2 inherently the kind of thing that cannot be
3 used responsibly or in moderation.

4 JUSTICE JACKSON: And, Ms. Murphy, I
5 thought your point --

6 JUSTICE BARRETT: Ms. Murphy --

7 JUSTICE JACKSON: I thought your point
8 was that even if it had, even if it did,
9 deferring to Congress with respect to that kind
10 of judgment is what Bruen tells us we're not
11 supposed to do, that you would be abandoning in
12 a sense the Bruen test to kind of take the
13 Chief Justice's what I think reasonable view
14 of, you know, thinking about what Congress has
15 said and assessing what Congress wants to do in
16 evaluating whether it's doing it in a -- a
17 narrowly tailored way, if we're doing that,
18 then what work does the historical analogue
19 have to do?

20 I thought we had to look at the
21 historical analogue to constrain Congress in
22 its ability to disarm people today.

23 MS. MURPHY: That is -- that is
24 exactly -- I mean, that is our core submission.
25 And the government said multiple times today

1 that they agree that they have to actually map
2 onto a historical tradition, and if that is the
3 principle --

4 JUSTICE JACKSON: And so the question
5 is, how does that mapping happen? At what
6 level does that mapping happen?

7 MS. MURPHY: Sure.

8 JUSTICE JACKSON: And I hear the
9 government saying it happens just at the level
10 of the old cases were looking at people and
11 making judgments about when they were dangerous
12 and should be committed or whatever. And it
13 can't be that broad, I think.

14 MS. MURPHY: We certainly don't think
15 it can be that broad. I think it has to be
16 attached to a principle. So the principle in
17 Rahimi was not simply Congress decided certain
18 people were dangerous. The Court focused in
19 particular on the fact that that part of (g) --
20 of 922(g) required an individualized
21 determination of dangerousness.

22 Now we're not saying that's the only
23 way you can map onto historical tradition, but
24 it was that. The Court didn't stop at the high
25 level of saying a determination -- you know,

1 that -- that there was just a legislative view
2 of dangerousness. It looked at that
3 individualized inquiry.

4 JUSTICE KAVANAUGH: Well --

5 MS. MURPHY: Here, I think that you'd
6 have to say, okay, you know, what was -- what
7 was the historical principle surrounding
8 dangerous substances, intoxicating substances?
9 And when you have a tradition that's all about
10 ensuring that the regular user doesn't get
11 swept up with the habitual drunkard, I don't
12 think you can point to that tradition and say
13 this is our tradition that allows us to bring
14 the regular user in along with the person whose
15 abusive use is actually impairing their ability
16 to function in their day-to-day life.

17 JUSTICE KAVANAUGH: Can I ask about
18 the tradition with respect to addiction?

19 MS. MURPHY: Yes.

20 JUSTICE KAVANAUGH: Because I think
21 you and the government agree -- I want to find
22 places of agreement here.

23 MS. MURPHY: Yeah.

24 JUSTICE KAVANAUGH: I think you and
25 the government agree that there is a tradition

1 of prohibiting gun ownership, possession, by
2 those who are addicted to drugs, correct?

3 MS. MURPHY: Yes. We agree that the
4 historical -- I mean, you know, we agree that
5 the historical tradition of habitual drunkards
6 can support laws with respect to addiction,
7 which is -- I'm happy to talk about the state
8 laws -- is really the dominant approach that's
9 just taken -- had been taken.

10 JUSTICE KAVANAUGH: Well, as my
11 questions indicated, I think you have a strong
12 point there on -- on that being the dominant
13 approach when it -- when it started up.

14 Now then, on this statute, so taking
15 what you just said and applying it to this
16 statute, this statute does cross-reference the
17 Controlled Substances Act, which then does
18 define "addict" as a habitual user so as to
19 endanger the public morals.

20 MS. MURPHY: Yeah.

21 JUSTICE KAVANAUGH: I'll just leave it
22 at that. And my question is, is that
23 definition of "addict" good enough in your view
24 to satisfy the tradition of prohibiting gun
25 ownership, possession, by addicts, and, if not,

1 what is the delta?

2 MS. MURPHY: Yeah. I think that
3 definition pretty -- pretty well maps onto the
4 historical tradition. It's a little bit of an
5 unusual definition because it has these two
6 prongs. It refers to a habitual user as
7 someone whose habitual use either is
8 essentially because they're addicted or just is
9 endangering public safety.

10 But I actually think, you know, while
11 that may be a bit of an odd way to think,
12 like --

13 JUSTICE KAVANAUGH: It says
14 endangering the public morals too --

15 MS. MURPHY: It does say I think
16 some --

17 JUSTICE KAVANAUGH: -- which means
18 anything.

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

21 JUSTICE KAVANAUGH: Right.

22 MS. MURPHY: -- there's some
23 discussion to have about whether some of that
24 language is a little bit broad and a little
25 bit --

1 JUSTICE KAVANAUGH: Right.

2 MS. MURPHY: -- problematic from --
3 from maybe just -- but I think what the -- what
4 the definition is getting at is, if your use is
5 so excessive either because you're addicted or
6 if it's a product of choice, either way, if
7 your addiction is rendering you a threat to
8 yourself and others -- your use is -- your
9 habitual use is rendering you a threat to
10 yourself or others, I think that maps onto
11 historical tradition --

12 JUSTICE KAVANAUGH: So you're good --
13 let me just summarize. You're good with
14 addiction being a tradition and with this
15 definition of "addiction" being good enough?

16 MS. MURPHY: The only --

17 JUSTICE KAVANAUGH: Is that correct?

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

24 JUSTICE KAVANAUGH: As a legal matter.

25 MS. MURPHY: -- we don't have a

1 problem with the historical tradition
2 supporting the use -- as supporting laws that
3 prohibit drug addicts from possessing firearms.

4 JUSTICE SOTOMAYOR: The government
5 didn't accept that. They said that that
6 definition doesn't control.

7 MS. MURPHY: The -- I think what I
8 heard --

9 JUSTICE KAVANAUGH: Well, they --

10 MS. MURPHY: So --

11 JUSTICE SOTOMAYOR: In fact, they said
12 it had to be more focused.

13 MS. MURPHY: -- I think what I -- if I
14 understood the government, I think they're
15 focused on the fact that the definition
16 specifically refers to narcotic drugs, which is
17 a narrower category than controlled substances.

18 We aren't suggesting that the
19 definition has to be read, like, literally in
20 haec verba into the -- the -- you know,
21 922(g)(3). I think you could say the standard
22 that the definition of "addict" is
23 accomplished -- is -- is setting out for
24 addiction can apply as to a controlled
25 substance.

1 And this is actually the way -- when
2 the government does prosecute under "addicted
3 to," several courts use this as the jury
4 instruction to give content to what the conduct
5 is.

6 JUSTICE KAVANAUGH: So you think we
7 could --

8 JUSTICE SOTOMAYOR: I want -- we
9 interrupted Justice Barrett, and I want to make
10 sure you get back to her.

11 JUSTICE BARRETT: Justice Kavanaugh,
12 you can finish.

13 JUSTICE KAVANAUGH: Go ahead.

14 JUSTICE BARRETT: I was just going to
15 give you a variation of Justice Kagan's
16 hypothetical. I have never heard of the drug
17 that she was -- is that real? Okay.

18 (Laughter.)

19 JUSTICE BARRETT: Let's imagine that
20 it's marijuana, okay? So let's say that you
21 win this case and Congress comes back and
22 says -- you know, it conducts hearings, it
23 hears all this evidence about the
24 concentrations of THC and marijuana that's made
25 today, documents that marijuana users who use

1 it several times a week have a proclivity for
2 violence, violence with firearms, and then
3 passes the same statute with findings along the
4 lines I just sketched out.

5 Can Congress do that consistently with
6 the Second Amendment?

7 MS. MURPHY: So I think you'd have to
8 look at that evidence yourself and decide does
9 it suffice to show that someone fits this
10 pattern. If they could show that --

11 JUSTICE BARRETT: I have to look at
12 the evidence to see if the person satisfies the
13 pattern or I have to --

14 MS. MURPHY: No, the category. If
15 Congress wants to say we're going to do it at a
16 categorical level, then I think you look and
17 say, did they get the category right? I think
18 that --

19 JUSTICE BARRETT: Okay. How do I make
20 that judgment?

21 MS. MURPHY: By look -- by thinking
22 about the -- the test that was applied
23 historically. Is it -- has the government
24 demonstrated that anybody who uses at the
25 degree of this -- you know, that substance in

1 that amount in that frequency is actually a
2 danger not even just when they're using but in
3 their day-to-day life? Are they unable to care
4 for themselves and their affairs? That's the
5 language --

6 JUSTICE BARRETT: Do I have experts?

7 MS. MURPHY: I mean, if the government
8 wants to do it on a categorical basis, it is
9 going to have to prove up its case. If they
10 don't want to do it that way, then applying the
11 same test on an individualized basis should get
12 you to the same result if they define the
13 category correctly.

14 JUSTICE BARRETT: So the judge would
15 then conduct an evidentiary hearing, hearing
16 from experts on both sides about whether
17 marijuana actually --

18 MS. MURPHY: If --

19 JUSTICE BARRETT: -- poses a risk of
20 gun violence?

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

25 JUSTICE BARRETT: Meth? Like, could

1 it do that for meth? Could it --

2 MS. MURPHY: I don't -- as to some
3 substances, I think it's not going to be that
4 hard. It's just marijuana, you know, we're all
5 here and these cases arise because marijuana,
6 boy, it would be difficult for the government
7 to make that showing when it is the considered
8 judgment of 40 states, the District of
9 Columbia, three territories, and the
10 President --

11 JUSTICE BARRETT: But you concede --

12 MS. MURPHY: -- that it's not that
13 kind of substance.

14 JUSTICE BARRETT: But you concede that
15 there are some substances that the government
16 would have a pretty easy time on a categorical
17 basis? Maybe cocaine, maybe meth?

18 MS. MURPHY: Absolutely. We are not
19 here to suggest that you couldn't ever have a
20 categorical approach as to a particular
21 substance. It's just that if the government
22 wants to do that, I think it has to do it under
23 Bruen, not just --

24 JUSTICE BARRETT: So it could have a
25 categorical approach with respect to Justice

1 Kagan's drug?

2 MS. MURPHY: They can come make their
3 case and then you decide -- you know, I think
4 the right test to apply is, did they define the
5 category close enough to the habitual drunkard
6 concept? Maybe -- you know, maybe the level of
7 generality is enough to capture your drug, but
8 it's not going to be enough to capture
9 something that is the type of thing that people
10 regularly all throughout the country lawfully
11 use a few days a week and most states and the
12 President have made the judgment that that is
13 not so categorically addictive or --

14 CHIEF JUSTICE ROBERTS: Well, your --

15 MS. MURPHY: -- dangerous that nobody
16 can use it safely.

17 CHIEF JUSTICE ROBERTS: Your -- the --
18 the trial you're contemplating after Congress
19 has gone through whatever it's gone through in
20 establishing the record and making the
21 determination, and then it's going to be
22 relitigated in a trial, the fact that your
23 client wins in one trial there doesn't mean
24 there's not going to be another trial in
25 another district and the -- the --

1 MS. MURPHY: If --

2 CHIEF JUSTICE ROBERTS: -- develop --
3 case law developed until I suppose there's a
4 conflict among the circuits, and then we would
5 have to evaluate the scientific record.

6 MS. MURPHY: I mean, for one, the
7 government does have to do this anyway as to
8 its scheduling determinations, which can be
9 challenged through APA review. The only
10 difference is they want a lesser burden of
11 proof, which they get in the APA context, than
12 they would get under Bruen. They have to
13 defend them in exactly this way. They don't
14 just get to say trust us, we got it right.

15 Now, if the government's getting it
16 right, I just don't think this is going to be
17 that hard as to the substances that it's pretty
18 clear can't be used on a regular basis by
19 anybody safely. And that's why you're not
20 seeing these cases come up to you, and -- and
21 you're not seeing the lower courts struggle as
22 much when it's somebody who's admitting that
23 they take heroin every day.

24 You know, nobody's -- nobody's getting
25 as concerned about the scope of the statute as

1 applied to certain substances. But applying
2 the test ensures that the government doesn't
3 make category mistakes in the way that the
4 President himself seems to think the government
5 currently has done as to marijuana.

6 JUSTICE KAVANAUGH: Do you think the
7 statute when -- with the word "habitual"
8 added -- you make a big deal about that in --
9 in your brief -- really does then reduce to
10 addiction?

11 MS. MURPHY: So it certainly
12 captures -- the addiction prong would be
13 irrelevant at that point because you have to be
14 a habitual user to fall within the definition
15 of addiction.

16 And it would be particularly odd
17 because that's not enough to make you addicted
18 to. You need to be habitually using so as to
19 either endanger the public health and safety,
20 et cetera, or to have lost the power of
21 self-control. So it's really, you know, the
22 "addicted to" prong is designed to kind of be
23 narrower, yet all of a sudden, you'd have this
24 unlawful user prong that's so broad that it
25 renders that prong irrelevant.

1 I -- I don't think that that's really
2 an available interpretation, a -- kind of a
3 coherent interpretation of this statute when
4 Congress set out two different concepts that it
5 was trying to get at.

6 JUSTICE GORSUCH: Ms. -- Ms. Murphy, I
7 wonder, do we need to get into much of this
8 about how the government could proceed or --
9 with categorical versus individual or how it
10 applies to addicts? He wasn't charged under
11 that part of 922(g)(3).

12 And all we know -- I mean, the -- the
13 only thing we know in the record is he uses
14 some marijuana, we don't know how much or in
15 what potency, a few times a week. And why
16 isn't it just enough to say whatever else may
17 be true, that is not an habitual drunkard?

18 MS. MURPHY: We would be happy for the
19 Court to resolve the case on that narrow
20 ground. I mean, I'm trying to be very
21 responsive. I appreciate the Court wants to
22 think about this statute as a whole, but you
23 really don't need to answer any of the
24 questions about the "addicted to" prong today.

25 And, really, even as to the unlawful

1 user prong, all you have to say is either,
2 whether the government's thinking about this
3 individually or categorically, they just can't
4 get there simply by saying somebody uses some
5 unknown quantity of marijuana some unknown time
6 of day a few times a week. We're -- we are
7 very happy to prevail on that narrow ground.

8 JUSTICE JACKSON: Which sounds to me
9 very much like it is sounding in traditional
10 understandings of this category being
11 overbroad, that to the extent that we are
12 concerned about the match -- the -- the -- the
13 perceived mismatch between historical drunkards
14 and regular users, it really is just that
15 Congress's purpose here, which is to prevent
16 dangerous people from having guns, is not, you
17 say, furthered by including this kind of person
18 in that statute.

19 MS. MURPHY: That's right. And
20 that's --

21 JUSTICE JACKSON: And so it's just an
22 overbroadness kind of -- right.

23 MS. MURPHY: And -- and -- and, you
24 know, I think, under Bruen, the right way to
25 say it is it's overbroad as to the historical

1 category.

2 JUSTICE JACKSON: Right.

3 MS. MURPHY: But I think you could
4 kind of get to the same place by saying, even
5 if you were doing means-end scrutiny, it's
6 overbroad.

7 JUSTICE JACKSON: Right.

8 MS. MURPHY: It's just overbroad in
9 the sense that this particular -- at least as
10 to what you've got before you in this case, it
11 is overbroad even under a traditional
12 conception of giving the government a little
13 bit more room for deference on its
14 determinations. That doesn't mean the
15 government might not have a much stronger case
16 with somebody who regularly uses a different
17 substance. If you apply the same principle
18 across the board, the government's going to win
19 when it got those categorizations correct.

20 JUSTICE KAVANAUGH: So you think the
21 government could say someone's an unlawful user
22 but not an addict as to particular kinds of
23 drugs, and that would be sufficiently connected
24 to a historical tradition that it would satisfy
25 the Second Amendment? That's what you're

1 saying?

2 MS. MURPHY: I think the one way to
3 understand this statute, which isn't the
4 easiest statute in the world to completely
5 understand, but would be that the "addicted
6 to" prong is focused on people who -- who --
7 who use so excessively and routinely as to fit
8 the habitual drunkard category is focused on
9 people who do that out of physical or
10 psychological compunction, and the unlawful
11 user can reach the people who do the same thing
12 out of choice.

13 And so, either way, you have the same
14 ultimate principle, but you could read this
15 statute as saying one is about addiction in the
16 most traditional conception of addiction, and
17 the other is about abuse of use even if it's
18 just that somebody chooses to spend much of
19 their life in a drunken stupor or intoxicated,
20 you know, high on drugs.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 JUSTICE ALITO: You say that there is

1 not a problem with, at least I understand what
2 you're saying, that there is not a problem with
3 prohibiting everybody who is addicted to a
4 controlled substance from possessing a gun. Is
5 that correct?

6 MS. MURPHY: We do not have a problem
7 with that.

8 JUSTICE ALITO: And that applies to
9 everything, every controlled substance? So
10 that would --

11 MS. MURPHY: I think the concept of
12 addiction, the determination that's made to
13 show that someone is addicted to something is,
14 I understand, the kind of determination that's
15 going to show that somebody is engaged in the
16 kind of use that renders them a risk all the
17 time.

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

21 JUSTICE ALITO: Seriously? You think
22 that being addicted to every single drug in the
23 schedule renders that person a -- a danger?

24 MS. MURPHY: I -- I -- I --

25 JUSTICE ALITO: You would be

1 willing -- you -- you don't think arguments can
2 be made that being addicted to, I don't know,
3 the illegal use of Ambien --

4 MS. MURPHY: I'm not sure you'd be
5 able --

6 JUSTICE ALITO: -- somebody's charged
7 with that, that person couldn't come in and
8 say, whoa, that doesn't make me dangerous --

9 MS. MURPHY: Sure. And --

10 JUSTICE ALITO: -- I'm doing this
11 while I am sleeping?

12 MS. MURPHY: And this is where we
13 might have a marginal disconnect about, you
14 know, when I think of what would be necessary
15 to prove that someone's addicted to some --
16 something, it's going to need to -- it's going
17 to incorporate something like the definition of
18 the Controlled Substances Act that's asking
19 about whether you are a threat to yourself or
20 others.

21 And maybe there are some substances
22 you just can't make a showing that somebody's
23 addicted in that sense, but -- but -- but, if
24 you accept so --

25 JUSTICE ALITO: Can an addict -- can

1 an addict as to every substance in the list
2 insist on an individualized determination or
3 not?

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

6 JUSTICE ALITO: So there has to be an
7 individualized determination? So --

8 MS. MURPHY: There -- there --

9 JUSTICE ALITO: -- the mere fact that
10 someone is addicted to something that is a
11 controlled substance is not enough for Second
12 Amendment purposes?

13 MS. MURPHY: I don't know how you
14 determine that someone's addicted to a
15 controlled substance without engaging in an
16 individualized inquiry into their use. Once
17 you've determined that someone's an addict,
18 you've determined that they fit into --

19 JUSTICE ALITO: No, not -- not as to
20 what their -- not as to their use or even their
21 reason for the use but whether their -- their
22 situation renders them dangerous.

23 MS. MURPHY: I mean, that is what the
24 definition of "addict" in the Controlled
25 Substances Act contemplates, that you have to

1 assess somebody's use by reference to the
2 impact it is having in their life.

3 So I don't think it works under the
4 statute to say someone's an addict without
5 having engaged in an individualized inquiry
6 into the nature of their use. And that's
7 what -- what's required all across the country.

8 If you want to adjudicate somebody, a
9 drug addict, who can be subject to confinement
10 or guardianship, you have to actually
11 individually assess their use of the drug --

12 JUSTICE ALITO: If -- if an
13 individual --

14 MS. MURPHY: -- and the impact it has
15 on their life.

16 JUSTICE ALITO: I'm sorry. Are you
17 finished?

18 MS. MURPHY: No, no. Go ahead.

19 JUSTICE ALITO: Yeah. If an
20 individualized determination is required under
21 (g)(3), is it an individualized determination
22 as to that particular individual, or is it as
23 to the drug across the board?

24 MS. MURPHY: So I think the
25 individualized inquiry is to whether you are

1 addicted to a controlled substance.

2 JUSTICE ALITO: Well, no, I'm not
3 talking about addiction now, just -- just use.
4 Whether somebody -- someone is -- is prosecuted
5 for being a user of drugs.

6 MS. MURPHY: Sure.

7 JUSTICE ALITO: And you say, you can't
8 do that, you have to have an individualized
9 determination as to something. And what is
10 this thing that there must be an individualized
11 determination?

12 MS. MURPHY: I -- I -- I want to be
13 clear, again, we are not actually saying that
14 the only way to do this is through an
15 individualized inquiry. For addiction, I think
16 it is because I think the -- the concept of
17 addiction requires it.

18 But, if the government wanted to say
19 that there is a particular degree of
20 consumption of a particular substance that it
21 considers virtually anybody who -- who consumes
22 in that quantity to be someone who cannot
23 possess a firearm, we are not asking you to
24 rule out the possibility that the government
25 could make the showing that that category is

1 categorically analogous to the concepts that
2 the habitual drunkard laws reflected.

3 We are not saying the only way they
4 can do it is by coming in and making a
5 case-by-case determination. They can proceed
6 either way. It's just that if they want --
7 whichever way they want to do it, they have to
8 meet their burden under Bruen of proving that
9 they did, in fact, make the right
10 determination; they put either the person or
11 the substance use into the correct category.

12 JUSTICE ALITO: Yeah, I -- I struggle
13 to figure out how these individualized
14 determinations can be made in the context of a
15 criminal prosecution. The whole -- the way in
16 which criminal prosecutions are conducted makes
17 this extremely difficult.

18 Now the Third Circuit issued a very
19 thoughtful opinion about what they thought is
20 required in an individualized determination,
21 and what they said was that the test is whether
22 disarming a drug user is needed to address a
23 risk that he would pose a physical danger to
24 others.

25 Is that the test that you would apply?

1 MS. MURPHY: That's not necessarily
2 the test. We would ask you to apply a test
3 more akin to the historical one, but I -- I
4 just --

5 JUSTICE ALITO: Okay. What is it?
6 What is your test?

7 MS. MURPHY: Sure. The test is
8 whether somebody's use is rendering them a --
9 unable to function in their day-to-day life all
10 the time, whether it's because they're always
11 intoxicated or because their use is such that
12 it's impairing their ability to function in
13 their day-to-day life.

14 That is what the civil commitment laws
15 ask. They said is someone a drunkard incapable
16 of taking care of himself or his property,
17 where you had to prove that a person, by
18 excessive drinking, is unable to attend to
19 business or has lost self-control. You had to
20 prove these things.

21 JUSTICE ALITO: I -- I -- I'm just
22 puzzled by -- by most of your argument.

23 Suppose somebody -- I just don't
24 understand what you're arguing for.

25 Suppose someone regularly takes a

1 drug, and during the period when that person is
2 taking the drug, that person is super
3 dangerous. Congress couldn't -- the Second
4 Amendment would not permit Congress to say
5 that's too risky?

6 MS. MURPHY: It might. And if you
7 look at the laws, the definitions that were
8 used historically, some of the cases talked
9 about it in terms of is somebody the type of
10 person who's going to take the substance, you
11 know, going to drink to excess whenever the
12 opportunity presents themselves?

13 They're focused on that question of
14 saying not just are you always drunk, but are
15 you so habituated to it that you are drunk a
16 lot of the time and we can't trust enough for
17 you to just, you know, be around the one day a
18 week, that's why we're going to commit you or
19 have guardianship or have these severe
20 consequences.

21 And so we don't think -- I mean, you
22 know, the traditional way the addiction prong
23 is applied is to give juries the instruction
24 from the CSA definition which requires a jury
25 to make an individualized finding about whether

1 somebody's use is impacting their day-to-day
2 life.

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

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

19 MS. MURPHY: We are not suggesting
20 that juries would need to be instructed to
21 consider all of those things, but I certainly
22 think the government would -- would say that's
23 the type of evidence we should be able to
24 present when we want to show that a drug was --

25 JUSTICE ALITO: So experts --

1 MS. MURPHY: -- correctly categorized
2 in this way.

3 JUSTICE ALITO: -- would -- experts
4 would testify on all of these matters and the
5 jury would decide whether the person met the --
6 the -- the test for being a dangerous person?

7 MS. MURPHY: I don't think the
8 government's going to need to do that when it
9 comes to a lot of cases and a lot of
10 substances, but --

11 JUSTICE ALITO: Well, maybe not
12 always, but if -- if that's at issue, is that
13 what's going to be required?

14 MS. MURPHY: Again, I mean, the
15 government can't even put a substance on one of
16 these schedules without having to withstand if
17 somebody wants to bring a challenge to that.
18 They're going to have to prove it up.

19 JUSTICE ALITO: We're talking about
20 criminal prosecutions and what needs to be
21 shown in a criminal prosecution. I don't know
22 where the line -- the Sixth Amendment line is
23 as to all these things, but even -- let's
24 assume that some of them, all the ones that go
25 to questions of science, for example, you would

1 have every single -- potentially every district
2 judge in the country would make a finding, and
3 I find -- as to all of these drugs, I find that
4 this -- that the use of this drug being a --
5 that users of this drug are dangerous or
6 they're not dangerous. Every district judge
7 before whom that issue comes up would make a
8 determination on that scientific question?

9 MS. MURPHY: No. I think you can give
10 the jury a standard that asks whether
11 somebody's use is impairing their ability to
12 function, and the government can then choose to
13 present evidence. They can present evidence
14 about their life. They can present evidence
15 about the nature of the particular substance
16 and the fact that it is a substance that
17 carries with it effects for days at a time.

18 It can present evidence, and the jury
19 can make an ultimate determination, just as the
20 jury has to do as to the addicted person.

21 JUSTICE ALITO: It's been said that
22 Congress never made a judgment about the
23 dangerousness of using all of the substances on
24 the controlled substance list. Is that right?

25 MS. MURPHY: I don't think Congress

1 has made a determination that anybody who uses
2 those substances regularly is a public safety
3 risk.

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

6 MS. MURPHY: No, because Congress only
7 applies that if somebody's use is unlawful.
8 And so somebody can be using a controlled
9 substance regularly under the Controlled
10 Substances Act, and Congress deems them not to
11 be a public safety risk so long as they got the
12 prescription for the sleep aid and they aren't
13 the spouse who didn't.

14 JUSTICE ALITO: One final question.

15 In the cases in which we have
16 previously held that the Second Amendment
17 prohibits certain government regulations --
18 Heller, McDonald, Bruen -- there have been a
19 lot of "the sky is falling" arguments about the
20 consequences of that for public safety.

21 In Rehaif, I said that I think that
22 922(g) has a more direct and severe bearing on
23 public safety than the issue of whether a
24 law-abiding citizen can possess a gun in the
25 home or even, as in Bruen, carry the gun

1 outside the home.

2 Do you disagree with that?

3 MS. MURPHY: No.

4 JUSTICE ALITO: Here, we're talking
5 about disabling people like -- people who have
6 committed felonies.

7 MS. MURPHY: Sure. But I would note
8 that under 922(g)(3), it's only about five
9 prosecutions that are under (g)(3). The vast
10 majority of them are under provisions, other
11 provisions, and about 80 percent are under
12 (g)(1). So I don't think the arguments that we
13 are making today would vastly endanger the
14 government's prosecutorial efforts under
15 922(g).

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: If you look at the
19 statute, there's two components, unlawful user
20 of a controlled substance and someone who's
21 addicted to any controlled substance.

22 "Addiction" is defined by the statute,
23 correct?

24 MS. MURPHY: It's defined by the
25 Controlled Substances Act --

1 JUSTICE SOTOMAYOR: Yeah.

2 MS. MURPHY: -- not by the Gun Control
3 Act, but --

4 JUSTICE SOTOMAYOR: But it's --

5 MS. MURPHY: -- there is a
6 cross-reference which suggests Congress
7 intended the statutes to be read in pari
8 materia.

9 JUSTICE SOTOMAYOR: Means any
10 individual who -- this is the definition --
11 habitually uses any narcotic drug so as to
12 endanger the moral -- public morals, health,
13 safety, or welfare, or is so far addicted to
14 the use as to have lost the power of
15 self-control.

16 That would go to a jury?

17 MS. MURPHY: That does go to juries
18 often in cases.

19 JUSTICE SOTOMAYOR: And it has to go
20 to the juries. So --

21 MS. MURPHY: That goes to juries in
22 these cases, yes.

23 JUSTICE SOTOMAYOR: -- Justice Alito's
24 concern about each jury determining is inherent
25 in the definition, correct?

1 MS. MURPHY: It's inherent in an
2 "addicted to" prosecution.

3 JUSTICE SOTOMAYOR: Now, with respect
4 to who is an unlawful user, I've been surprised
5 that in your cert petition and even in this
6 brief, in your briefing, you haven't really
7 raised the vagueness issue.

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

11 MS. MURPHY: Correct, which is why
12 we -- you know, we -- we did lead with a
13 lengthy argument in our response brief that we
14 think the statute has an independent vagueness
15 problem that is sort of baked into trying to
16 analyze whether the statute is constitutional
17 under the Second Amendment.

18 JUSTICE SOTOMAYOR: And -- and --

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

21 JUSTICE SOTOMAYOR: -- historically,
22 the only thing that was ever given meaning to
23 was a habitual drunkard, correct? And that had
24 maybe a common-law background definition, but
25 there's nothing in the -- in any of our history

1 or tradition that has created a use definition,
2 correct?

3 MS. MURPHY: That's right. And if you
4 take the early statutes from the 1920s and
5 '30s, none of them had an "unlawful user"
6 prong. And even today, there's only eight
7 states that have an "unlawful user" prong.
8 Almost all of them are focused on addiction or
9 focused on it through the lens of, even more
10 concretely, things like have you been
11 adjudicated to have a substance disorder or
12 committed for treatment for a substance use
13 disorder.

14 JUSTICE SOTOMAYOR: Thank you,
15 counsel.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: Ms. Murphy, I wanted
18 to take you back to an answer that you gave to
19 Justice Alito a while ago because I was a
20 little bit surprised by it and I want to make
21 sure I understand your view on this.

22 So the question that I understood him
23 to ask you is that, take a drug, you know, any
24 drug you want that -- that is very dangerous
25 while you're in its grip. You know, you're in

1 some kind of psychosis or you've lost touch
2 with reality or whatever it is, and it's very
3 dangerous, and if there's a gun around, that's,
4 like, a real problem.

5 But what I understand your test to be
6 is, like, that's not enough because, if you're
7 not in its grip, if you're fine when you're not
8 in its grip, then you don't meet the historical
9 analogue. And I want to make sure that that is
10 your answer first.

11 MS. MURPHY: Yes. Yes.

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

14 MS. MURPHY: Yeah.

15 JUSTICE KAGAN: -- like, how do you
16 separate -- like, I guess what I'm looking for
17 is, like, how do you win with marijuana, but
18 you don't win with that kind of drug, where --
19 the kind of drug where, really, anybody looking
20 at it would say, oh, that is a dangerous thing
21 to have that drug and a gun in the same place?
22 Is it just you just can't do it?

23 MS. MURPHY: Well, I mean, the
24 government doesn't seem to think it can do it
25 because it's saying the statute requires

1 habitual use. I don't know exactly where they
2 draw the line at habitual use, but --

3 JUSTICE KAGAN: But I'm talking -- I'm
4 actually talking about a habitual user.

5 MS. MURPHY: Okay. Okay.

6 JUSTICE KAGAN: It's like, you know,
7 there's a person and it's every other day
8 they're using this drug, but on the day they're
9 not using this drug, everything's cool.

10 MS. MURPHY: Yeah. And I -- I think,
11 at a certain point, when you take that concept
12 of habitual drunkard, it does take into account
13 the nature of the substance and, you know -- I
14 mean, if you think about alcohol itself, that's
15 why the test was focused not just on somebody
16 regularly consuming it every day or every other
17 day or whatever it was but consuming it to the
18 point of intoxication.

19 And if you have a substance that, by
20 its nature, any consumption of it renders you
21 the equivalent of, like, massively, massively
22 intoxicated, then the habitual drunkard test
23 may be enough to capture the person who's using
24 that every other day because we -- we agree
25 that the habitual drunkard test didn't require

1 somebody to be intoxicated all the time.

2 But where the analogy falls apart
3 vis-à-vis marijuana is the government saying it
4 doesn't matter if it's somebody who's taken the
5 sleep gummy, smoking one joint a couple nights
6 a week when they come home after a long day at
7 work, or if it's the person who's smoking all
8 day before they drive their car and operate
9 heavy machinery at work or whatever it may be.
10 They say none of that matters, and we think it
11 does.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: On the percentage
17 of prosecutions, do you know how many -- and I
18 guess the government can also address this --
19 how many are under the addiction prong versus
20 under the use prong percentage-wise?

21 MS. MURPHY: I haven't seen anything
22 that breaks it down. Just from looking at
23 cases, there seem to be very few cases that are
24 only the "addicted to" prong, which isn't
25 surprising because it's a harder case for the

1 government to prove. But there are several
2 cases where, unlike this one, the government
3 proceeded under both the unlawful user and the
4 "addicted to" prong.

5 And that's where this body of law has
6 developed that says, well, we won't define
7 "unlawful user" the same way the CSA defines
8 "addict," but, as to the "addicted to" prong,
9 courts do sometimes look to that as the
10 definition for "addicted to."

11 JUSTICE KAVANAUGH: On the
12 individualized assessment issue, just so I
13 understand, on addiction cases, you're saying
14 there has to be an individualized assessment
15 whether the person is, in fact, an addict, but,
16 if so proved, there's no separate
17 individualized assessment of whether they're
18 therefore dangerous, correct?

19 MS. MURPHY: That's right. That's
20 why, I mean, it's like --

21 JUSTICE KAVANAUGH: And then, on
22 the --

23 MS. MURPHY: -- the language -- the
24 language gets a little confusing. There can be
25 a categorical judgment once there's been a

1 decision that you belong in the category.

2 JUSTICE KAVANAUGH: Exactly. Okay.

3 MS. MURPHY: Yes.

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

14 MS. MURPHY: Whether that degree of
15 use of that substance renders somebody -- you
16 know, impairs their ability to function most of
17 the time.

18 JUSTICE KAVANAUGH: Is that the jury
19 instruction?

20 MS. MURPHY: I think something -- I
21 mean, you know --

22 JUSTICE KAVANAUGH: Because that's
23 where -- that's where --

24 MS. MURPHY: -- I think courts could
25 get a little bit of effort to figure out the

1 best way to instruct it, but that's the concept
2 that I see as the tradition unifying the
3 historical laws about habitual drunkards.

4 JUSTICE KAVANAUGH: Is this going
5 to -- the rubber hits the road with the actual
6 jury instruction on this.

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

18 But I think that's the concept to get
19 at, is your use impairing you kind of most of
20 the time, even if it's not that you're, you
21 know, impaired in the sense of intoxicated
22 every moment every day, but it's impairing your
23 ability to function in your day-to-day life.

24 JUSTICE KAVANAUGH: And then last
25 question. Again, on the difference in the

1 technical definitions between use and
2 addiction, given the government's use of the
3 word "habitual" with use, can -- is there such
4 a person? Can there be a person who's a -- who
5 habitually uses who does not habitually use so
6 as to endanger the public morals?

7 MS. MURPHY: Sure. I mean, I think,
8 if you think about marijuana use, like somebody
9 could be -- I mean, I guess --

10 JUSTICE KAVANAUGH: Well, how you --

11 MS. MURPHY: -- it all depends what
12 you mean by habitual user.

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

16 MS. MURPHY: Yeah, and --

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

21 MS. MURPHY: Yeah. And -- and -- and,
22 look, like, you know, I -- I -- I would
23 probably resist in an "addicted to" case
24 whether that particular language about public
25 morals really maps onto the conception of

1 dangerousness that matters here.

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

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Justice Jackson?

10 Thank you, counsel.

11 Rebuttal, Ms. Harris?

12 REBUTTAL ARGUMENT OF SARAH M. HARRIS

13 ON BEHALF OF THE PETITIONER

14 MS. HARRIS: Thank you, Mr. Chief
15 Justice:

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

23 That is backed by the historical
24 habitual drunkard tradition, where there
25 weren't these sort of fine-grained lines that

1 Respondent appears to be drawing as to exactly
2 how incapacitated you are. It's sort of a
3 common-law approach that starts with
4 magistrates and justices of the peace in making
5 these determinations.

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

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

20 These seem to say you have to as a
21 constitutional matter, I think, on the
22 strength, again, of these modern laws, have
23 individual determinations for every single
24 addict under that prong, and, otherwise, they
25 seem to sometimes say category by category is

1 fine for some drugs, but I really don't know
2 how that would hold up.

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

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

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

25 I don't know how anyone would figure

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

10 Where does this leave the rest of
11 922(g)? I think that's a real problem also
12 with Respondent's approach. It's not just
13 apparently for 922(g)(3), where there has to be
14 what will back into individualized tailoring
15 and a mess of a position.

16 I think this is all the way down from
17 (g)(1) felons, every single category of felons,
18 even a serial murderer, you would have to be
19 able to second-guess is that person really
20 dangerous, is that a good proxy, how many
21 people, what are the kinds of offenses, to
22 (g)(2), the fugitive, if you're just out for a
23 couple days, are you really a dangerous
24 fugitive who should be disarmed, to (g)(4) with
25 respect to mental illness.

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

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

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

23 I don't think that's confusing. I
24 think the knowledge requirement presents a
25 large amount of checks, and I think that does

1 real work vis-à-vis the addict prong, which
2 deals with people who can't control their urges
3 even if they're not currently using the
4 substance.

5 The two work in tandem, and the fact
6 that Respondent seems to acknowledge that
7 perhaps lots of these unlawful users can, in
8 fact, be constitutionally prohibited from
9 possessing firearms at least only during the
10 period of their habitual use, I think, is a
11 problem for Respondent's position because, if
12 all they have at that point is this mess of
13 individualized determinations, then the
14 category-by-category approach is out the window
15 for every single drug no matter how dangerous,
16 no matter how different it is from alcohol,
17 even if it is the most dangerous hallucinogenic
18 drug, that even if you use it once a week
19 causes hallucinations at unpredictable periods
20 going forward.

21 I think that is the approach that is
22 risked here, and the better course is to say
23 habitual drunkards are a valid tradition. You
24 do not have to exactly match the degree of
25 alcohol impairment to fit in that tradition.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 The case is submitted.

5 (Whereupon, at 12:00 p.m., the case
6 was submitted.)

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