

EXECUTIVE OFFICE APPROVAL REQUEST

AG PACKAGE #

JUS 409 (Rev. 10/2023)

EXECUTIVE OFFICE APPROVAL REQUEST

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FROM: Name: Lindsay M. Bailey
Location: Los Angeles
Phone: 213-269-6398

DATE: 12/15/2025
ROUTINE Item in BLUE FOLDER
URGENT Item in RED FOLDER

MUST BE PRINTED ON PINK PAPER

- Letter for Attorney General Signature
Letter/Material for Approval
Other: Approval to join multistate amicus

Note: Packages involving complex issues should be accompanied by a concise memo explaining the issues and the reasons for the recommendation.

RESPONSE DUE BY: 12/18/2025

CORRESPONDENCE TO BE DATED:

DESCRIPTION OF PACKAGE:

Government Law is requesting approval to join a multistate amicus brief in United States v. Hemani, (U.S. Sup. Ct., No. 24-1234) supporting the constitutionality of 18 USC 922(g)(3), which prohibits unlawful drug users from possessing firearms.

REVIEWERS' COMMENTS:

CHIEF DEPUTY ATTORNEY GENERAL'S COMMENTS:

ATTORNEY GENERAL'S COMMENTS:

NOT APPROVED (Check Box & Initial)

APPROVED (Signature Required)

DATE:

Table with 3 columns: Approval status (checkbox), Name and Title, Signature/Date. Includes entries for Mark Beckington, Thomas S. Patterson, Monica Anderson, Samuel Harbourn, Francesca Gessner, and Rob Bonta.

CDAG Log #



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**Memorandum**

To : Rob Bonta  
Attorney General  
**Office of the Attorney General – Sacramento**

Date: December 16, 2025  
Telephone: (213) 269-6398  
FACSIMILE: (916) 731-2124  
E-mail: Lindsay.Bailey@doj.ca.gov

From : Lindsay M. Bailey  
Deputy Attorney General  
Government Law Section  
**Office of the Attorney General – Los Angeles**

Subject: Request for Approval to Join Multistate Amicus Brief in *United States v. Hemani*  
Supporting the Federal Prohibition on Habitual Drug Users from Possessing Firearms  
(18 U.S.C. § 922(g)(3))

**I. EXECUTIVE SUMMARY**

Government Law requests approval to join a multistate amicus brief in *United States v. Hemani* supporting the constitutionality of 18 U.S.C. § 922(g)(3), a federal law prohibiting unlawful drug users or addicts from possessing firearms. *Hemani* is a Second Amendment challenge to that restriction pending before the Supreme Court, following the Fifth Circuit repeatedly concluding that section 922(g)(3) was unconstitutional as applied to casual drug users not under the influence at the time of their possession. The amicus brief would support the federal government's request that the Supreme Court overrule the Fifth Circuit's decision, finding section 922(g)(3) constitutional under the Second Amendment.

California has a strong interest in the Supreme Court upholding the constitutionality of section 922(g)(3). California has its own statute that closely tracks the language of section 922(g)(3) and has a continued interest in ensuring that potentially dangerous narcotics addicts do not and cannot possess firearms. *See* Cal. Penal Code § 29800(a)(1). Moreover, California has an interest in further clarifying the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022) to aid in its enforcement of its own gun safety laws in accordance with the Second Amendment, and in limiting the scope of any potential adverse decision issued by the majority.

Illinois circulated a draft of the amicus brief on December 11, 2025, which is attached to this memorandum. The amicus supplements the federal government's Second Amendment arguments by highlighting the states' perspective in regulating the unique dangers posed by habitual drug users accessing and possessing firearms, and discusses the impracticality of "dangerousness" inquiries imposed by other circuits. Government Law has consulted with Deputy Solicitor General Helen Hong, and OSG concurs with the recommendation to join the multi-state effort, subject to sharing recommended edits with Illinois and review of the final version of the amicus brief.

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## II. TIME FACTORS

The United States recently received an extension to file its opening brief until December 12, 2025. Under the Supreme Court rules, any amicus brief must be filed within seven days of the principal brief it supports. The current filing deadline for the amicus is thus **December 19, 2025**.

Illinois circulated the draft brief on December 11. Given the filing date, we seek approval to join by **Thursday, December 18**.

## III. BACKGROUND

*Hemani* is pending appeal before the Supreme Court following an order from the Eastern District of Texas dismissing the indictment of criminal defendant Ali Hemani for violating 18 U.S.C. § 922(g)(3): possession of a firearm by an unlawful drug user, after he was found in possession of a firearm while being an active marijuana, cocaine, and promethazine user. Section 922(g) generally prohibits certain dangerous individuals from possessing firearms, while Section 922(g)(3) specifically bars an individual who is “an unlawful user of or addicted to any controlled substance” from possessing any firearm or ammunition, or shipping or transporting the same in interstate commerce. The defendant moved to dismiss the indictment as a violation of his Second Amendment rights under the standard set forth in *Bruen*.<sup>1</sup> *United States v. Hemani*, 2023 WL 9659173 at \*1 (E.D. Tex., July 31, 2023).

Applying its interpretation of *Bruen*’s legal framework, along with relevant legal precedent within the Fifth Circuit, the district court granted the motion to dismiss.<sup>2</sup> First, although it acknowledged a circuit split on the issue, the district court rejected the government’s “virtuous citizen” theory – the idea that serious criminals are excluded from “the people” protected by the Second Amendment. *Hemani*, 2023 WL 9659173 at \*6. In so doing, the Court noted that Hemani is an American citizen who has resided in the United States his entire life, and is therefore part of the “national community” to whom the Second Amendment applies. *Id.* at \*5. The Court also noted that, while both the First and Fourth Amendments similarly grant rights upon “the people,” those amendments have consistently been upheld as applying to *all* citizens, not just virtuous ones. *Id.* at \*7. The Court therefore interpreted the Second Amendment the same way – as applying to all citizens, even those suspected of criminal activity. *Id.*

Next, the Court analyzed whether section 922(g)(3) was consistent with the “history and tradition” of firearm regulation, consistent with *Bruen*, noting that the government had the burden to find historical analogues to section 922(g)(3). *Id.* The government set forth three categories of historical analogues: (1) intoxication laws, (2) laws regarding the mentally ill, and (3) disarmament laws. *Id.* at \*7-13. The Court rejected all three. Specifically, the Court noted

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<sup>1</sup> Hemani also raised vagueness challenges which were rejected by the Court and not raised on appeal.

<sup>2</sup> The District Court did little more than adopt the Report and Recommendation of the Magistrate Judge. See *United States v. Hemani*, 2024 WL 5375143 at \*1 (E.D. Tex., Feb. 1, 2024). Between the Report and Recommendation and the issuance of the final Order, the Fifth Circuit held that Section 922(g)(3) was unconstitutional as applied in *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). The United States thereafter conceded that *Daniels* was controlling upon *Hemani* and therefore did not object to dismissal of the Indictment, but reserved the right to challenge *Daniels* as wrongly decided.

that intoxication laws were temporary in nature; that is, they only “proscribe[d] carrying or using firearms *while intoxicated*, constraining the length of time of the disarmament.” *Id.* at \*8 (emphasis in original). Similarly, because intoxication is temporary in nature, laws disarming drug users were not the same as laws disarming the mentally ill who suffered from long-term ailments. *Id.* at \*11. Thus, “[t]he difference in duration between intoxication and mental illness [wa]s critical” in finding them not analogous. *Id.* Finally, because Hemani was not a member of the groups historically disarmed (*i.e.*, Catholics or political enemies), the court found that laws for disarmament of the “dangerous” were not analogous and worried that a contrary finding “would create a ‘regulatory blank check’” for Congress. *Id.* at \*12 (citing *Bruen*, 142 S.Ct. at 2133). Because there was not a history and tradition of permanently disarming unintoxicated drug users, the Court found Section 922(g)(3) unconstitutional as applied to Hemani. *Hemani*, 2024 WL 5375143 at \*1 (adopting *Hemani*, 2023 WL 9659173).

Following the district court’s decision in *Hemani*, the Fifth Circuit issued a decision in *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), ruling that section 922(g)(3) was unconstitutional in an as applied challenge. Tracking the reasoning of the District Court in *Hemani*, the Fifth Circuit found both that Connelly was a member of “the public” protected by the Second Amendment, and that section 922(g)(3) did not comport with America’s history and tradition of firearm regulation. *Id.* at 274, 282. Accordingly, much like the government in *Hemani* conceded that *Daniels* was controlling in the District Court (see footnote 2, *supra*), it again conceded that *Connelly* was controlling and that *Hemani* was not “relevantly distinguishable,” but reserved the right to seek further review. *United States v. Hemani*, Not Reported in Fed. Rptr., 2025 WL 354982 (5th Cir. 2025). Accordingly, the Fifth Circuit granted summary affirmance, after which the United States appealed. *Id.*; see also *United States v. Hemani*, --- S.Ct. ----, 2025 WL 2949569 (Mem) (granting *certiorari*).

Other circuits have been more open to upholding section 922(g)(3) against as-applied challenges for non-intoxicated drug users if there is sufficient evidence showing that the individual’s drug use poses a danger to society. For example, the Tenth Circuit recently held that “the historical tradition supports a principle that legislatures may disarm those believed to pose a risk of future danger” and therefore remanded the case to determine whether “non-intoxicated marijuana users pose a risk of danger.” *United States v. Harrison*, 153 F.4th 998, 1035 (10th Cir. 2025). Similarly, the Eighth Circuit has remanded multiple cases to determine whether consistent “marijuana use alone could reasonably be seen to make a user ‘an unacceptable risk of dangerousness’ to others by merely possessing a firearm.” *United States v. Perez*, 145 F.4th 800, 808-09 (8th Cir. 2025); *United States v. Cooper*, 127 F.4th 1092, 1098 (8th Cir. 2025) (remanding to develop record on whether a defendant’s marijuana use caused him to act like someone “mentally ill and dangerous” or caused him to induce terror); see also *United States v. Harris*, 144 F.4th 154, 165 (3rd Cir. 2025) (remanding to develop record on whether defendant’s marijuana use “affected his mental state and riskiness”). Using this same logic, most circuits have also upheld as-applied challenges to section 922(g)(3) when the defendant was intoxicated at the time of possession. See, e.g., *United States v. VanOchten*, 150 F.4th 552, 560-61 (6th Cir. 2025) (upholding section 922(g)(3) because VanOchten was “drunk and high” when in possession of a rifle); *United States v. Seiwert*, 152 F.4th 854, 872 (7th Cir. 2025) (“we conclude that historical laws that keep guns out of the hands of the intoxicated and mentally ill are sufficiently analogous to section 922(g)(3)’s proscription of firearm possession by active and

persistent drug users like Seiwert” who admitted to using crack cocaine hours before possessing firearms).

At present, there is scant evidence in the record establishing whether Hemani would be considered dangerous under the above analysis. The government alleged that Hemani was attempting to sell promethazine, that he purchased cocaine one-to-two times a year, and that he used marijuana every other day. *United States v. Hemani*, No. 4:23-CR-18, Dkt. 18 at 2. The courts, however, made no such specific findings.

#### **IV. SCOPE OF PROPOSED AMICUS BRIEF**

Illinois is taking the lead on drafting the amicus brief to be filed with the Supreme Court in support of the United States and the constitutionality of section 922(g)(3). They provided the draft brief on December 11, and it is attached to this memorandum.

The brief primarily focuses on two topics. First, the brief includes a section highlighting the unique danger that habitual drug users pose in possessing firearms, and how that danger is separate and apart from individuals who possess firearms while intoxicated. For this reason, many states specifically regulate the ability of habitual drug users to possess firearms. Second, the brief focuses on states’ ability to broadly regulate categories of conduct, such as firearm possession, in order to avoid making fact-specific determinations for individual drug users who possess firearms. It also highlights how individual determinations of a drug user’s dangerousness, including through the tests employed by the Eighth and Tenth Circuits, creates vagueness issues as individuals will not be able to readily determine whether they are prohibited from possessing firearms absent a determination of dangerousness by a court.

#### **V. CALIFORNIA’S INTERESTS IN UPHOLDING 18 U.S.C. § 922(G)(3)**

California has a strong interest in supporting the federal government in its appeal of the Fifth Circuit’s decision. Much like section 922(g)(3), California Penal Code § 29800(a)(1) prohibits possession of firearms by any individual “who is addicted to the use of any narcotic drug.” Although rare, District Attorneys throughout the state have charged violations of this statute, often in conjunction with the felon-in-possession portion of the same statute. *See, e.g., People v. Hedly*, No. E080936, 2024 WL 3466281, at \*1 (Cal. Ct. App. July 19, 2024) (“defendant was charged with... unlawful possession of a firearm while addicted to narcotics and a convicted felon”); *People v. Albor*, No. E082309, 2024 WL 4553146, at \*1 (Cal. Ct. App. Oct. 23, 2024) (“Defendant was convicted of... being a felon addicted to narcotics in possession of a firearm”); *see also Williams v. Superior Ct. of Los Angeles*, No. 24-CV-456, 2024 WL 382438, at \*1 (C.D. Cal. Jan. 31, 2024) (“Petitioner was convicted on one count of deliberate and premeditated attempted murder... and one count of possession of a firearm by a narcotic addict”). California therefore has an interest in upholding enforcement of this law, upholding the government’s ability to regulate firearms generally, and keeping guns out of the hands of potentially dangerous narcotic addicts.

It is important to note, however, that while Cal. Penal Code section 29800(a)(1) prohibits possession only by narcotic addicts (including addicts of cocaine or heroin), section 922(g)(3) employs much broader language, prohibiting possession by any “unlawful user” or addict of

“any controlled substance” (including non-narcotic drugs like marijuana or methamphetamine). *See also* Drug Enforcement Administration, *Controlled Substances: Alphabetical Order*, [[https://www.deadiversion.usdoj.gov/schedules/orangebook/c\\_cs\\_alpha.pdf](https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf)] (last visited Dec. 9, 2025). Accordingly, individuals like Hemani, who used marijuana and cocaine but may not be classified as an “addict,” or individuals who habitually use marijuana or methamphetamine, might be subject to section 922(g)(3) but not Cal. Penal Code section 29800(a)(1).

California also has a strong interest in limiting the scope of any potential adverse decision by the Supreme Court. As mentioned above, many circuits have been skeptical of the “history and tradition” supporting section 922(g)(3), and those circuits that have generally limited their rulings to those who were either intoxicated at the time of possession or who are otherwise dangerous such that disarmament is appropriate. Based on this analytical context and the limited record present in *Hemani*, it is unlikely that the Supreme Court will uphold section 922(g)(3) outright, and could potentially find the law facially unconstitutional.<sup>3</sup> California may therefore benefit from joining an amicus that stresses the importance of limiting possession of firearms by active narcotic addicts due to their inherent dangerousness, hopefully ensuring that any limits placed upon section 922(g)(3) are not so broad as to swallow Cal. Penal Code section 29800(a)(1) as well. Many courts, including the court in *Hemani*, have also noted that they are “struggling with the historical analysis that *Bruen* sets forth.” *Hemani*, 2023 WL 9659173 at \*13 (citing *United States v. Quiroz*, 629 F. Supp. 3d 511, 526–27 (W.D. Tex. 2022) (“*Bruen* did not, however, erase societal and public safety concerns—they still exist—even if *Bruen*’s new framework prevents courts from making that analysis. As stated above, the new standard creates unknown unknowns, raising many questions.”)). Joining the amicus will therefore give the Attorney General the opportunity to clarify some of the more challenging aspects of *Bruen*, allowing California to better enforce its firearms laws in accordance with the Second Amendment.

Finally, joining the amicus will allow California to continue its support of Illinois, the District of Columbia, and many other states that have previously supported California’s gun safety laws. This will ensure that we continue to present a united front on Second Amendment issues, particularly in a post-*Bruen* landscape.

## VI. RECOMMENDATION

We recommend joining the multistate amicus brief for the following reasons:

*Pros:*

1. If section 922(g)(3) is not upheld, California’s similar restrictions codified in Cal. Penal Code section 29800(a)(1) could also be called into question, potentially limiting California’s ability to keep firearms out of the hands of dangerous narcotics addicts;

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<sup>3</sup> The issue presented on appeal to the Fifth Circuit and in the Petition for Certiorari to the Supreme Court is whether section 922(g)(3) is constitutional as applied to habitual drug users, like Hemani, that were not intoxicated at the time they possessed firearms.

2. The Attorney General would have the opportunity to provide input, clarifying the appropriate application of *Bruen* and potentially limit the scope of any adverse decision to protect California's own gun safety laws;
3. Joining the multistate amicus brief would align with the Attorney General's interest in preventing gun violence generally and addressing the gun violence epidemic; and
4. The Attorney General would continue to support other states that have supported California's gun safety laws and present a united coalition before the Supreme Court on Second Amendment issues.

*Cons:*

1. Section 922(g)(3) is unlikely to be upheld on the merits under the *Bruen* standard, at least as to persons not under the influence of drugs at the time of the offense; and
2. Preparing and submitting comments on the amicus brief will use resources that could be applied elsewhere.

Overall, California has a significant interest in joining the amicus to ensure that California is able to define and shape the issue presented. Therefore, subject to Government Law and OSG's review of the final brief, we recommend joining the amicus to protect California's unique interests.

No. 24-1234

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**In the Supreme Court of the United States**

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

ALI DANIAL HEMANI,

*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit**

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**BRIEF OF ILLINOIS, DISTRICT OF COLUMBIA,  
[INSERT STATES] AS AMICI CURIAE IN  
SUPPORT OF PETITIONER**

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BRIAN L. SCHWALB

*Attorney General*

*District of Columbia*

CAROLINE S. VAN ZILE

*Solicitor General*

ASHWIN P. PHATAK

*Principal Deputy*

*Solicitor General*

PERRY CAO

*Assistant Attorney General*

400 6th Street, NW,

Suite 8100

Washington, D.C. 20001

KWAME RAOUL

*Attorney General*

*State of Illinois*

JANE ELINOR NOTZ\*

*Solicitor General*

SARAH A. HUNGER

*Deputy Solicitor General*

MEGAN L. BROWN

BRIANNA YANG

*Assistant Attorneys General*

115 South LaSalle Street

Chicago, Illinois 60603

(312) 814-5376

jane.notz@ilag.gov

*\*Counsel of Record*

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### **QUESTION PRESENTED**

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

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## INTERESTS OF AMICI CURIAE

Amici States of Illinois, the District of Columbia [insert states] (collectively, “amici States”) submit this brief in support of the United States.

Amici States have a substantial interest in the health, safety, and welfare of their communities, which includes preventing firearms from coming into the hands of people likely to misuse them. *E.g.*, *United States v. Rahimi*, 602 U.S. 680, 690 (2024) (describing tradition of laws preventing dangerous individuals “from misusing firearms”). That interest is implicated by this case, which addresses the extent to which the federal government may prohibit an individual who is an “unlawful user of or addicted to any controlled substance” from possessing firearms. 18 U.S.C. § 922(g)(3); see *Smith v. United States*, 508 U.S. 223, 240 (1993) (“[D]rugs and guns are a dangerous combination.”).

As detailed below, the vast majority of States have furthered that interest by enacting laws that, like section 922(g)(3), restrict habitual drug users from possessing or carrying firearms.<sup>1</sup> Although amici States have come to different conclusions about how to regulate in this area, they agree that legislatures

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<sup>1</sup> States use a variety of terms to describe individuals who are restricted from possessing and carrying firearms because of habitual drug use. For example, California restricts the possession of firearms by those who are “addicted to” “narcotic drug[s],” Cal. Penal Code § 29800, while Texas restricts firearm carriage by those who are “chemically dependent” on “controlled substances or dangerous drugs,” Tex. Gov’t Code §§ 411.172(a), 411.171(2). This brief uses the phrase “habitual drug users” to refer to individuals who are subject to firearms restrictions under state laws analogous to section 922(g)(3).

may, consistent with the Second Amendment, protect the public by imposing restrictions on firearm possession and carriage by habitual drug users.

The Fifth Circuit’s decision—which concluded that the Second Amendment permits the prohibition of firearms by a habitual drug user only in the narrow circumstances where the user of a “controlled substance” was intoxicated at the time he or she was arrested, Pet. App. 1a-2a—undermines this authority by unduly limiting the category of individuals who may be prohibited from possessing firearms. Amici States thus agree with the United States that section 922(g)(3) is constitutional as applied to respondent and other habitual drug users and, accordingly, that the decision below should be reversed.

### SUMMARY OF ARGUMENT

The Fifth Circuit affirmed the dismissal of the indictment in this case because respondent was not under the influence of drugs at the time he was arrested for unlawful firearm possession. Pet. App. 1a-2a. This summary decision was based on binding precedent within the circuit—specifically, *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), and *United States v. Daniels*, 124 F.4th 967 (5th Cir. 2025)—holding that section 922(g)(3) is “unconstitutional where it seeks to disarm an individual solely based on habitual or occasional drug use.” *Daniels*, 124 F.4th at 974 (quoting *Connelly*, 116 F.4th at 282). According to these cases, the federal government failed to show that this application of section 922(g)(3) was consistent with the country’s historical tradition of regulating firearms because the historical laws identified by the

government barred habitual drug users from carrying firearms only while they are intoxicated. *Connelly*, 117 F.4th at 281. In other words, the Fifth Circuit determined that these analogues were insufficient to support the full range of conduct regulated by section 922(g)(3). *Ibid.*

As the United States explains, Pet. Br. [REDACTED], the reasoning underlying these decisions is flawed in multiple respects, including that it misdescribes the scope of the relevant historical tradition, misapplies this Court's precedents, and unduly ties the hands of legislatures seeking to protect the public from the full range of dangers associated with combining firearms and drugs. Amici States seek to highlight two aspects of the Fifth Circuit's reasoning that are particularly problematic for the States.

*First*, the Fifth Circuit's reasoning is based in part on the premise that habitual drug users present a public safety risk only while actively intoxicated. *E.g.*, *Daniels*, 124 F.4th at 976 (discussing how habitual drug users do not necessarily "pose a danger to others"). But as the States know from their regulatory and enforcement experience, this is incorrect. In addition to the undisputed public safety risks presented by possessing firearms while impaired, habitual drug use can cause some individuals to experience chronic psychological disturbances that affect their conduct and decision-making, including their ability to safely handle firearms. Further, because much drug use is illicit, habitual drug users frequently interact with the illegal drug trade, which is inherently dangerous and drives criminality.

In light of these public safety risks, the vast majority of States regulate firearm use by habitual drug users in much the same way as section 922(g)(3). The ubiquity of these laws reflects the widespread consensus that habitual drug users are a risk to public safety and should therefore not have access to firearms.

*Second*, the Fifth Circuit's decision improperly cabins legislative action in ways that the Second Amendment and this Court's precedent do not require. For instance, the lower court wrongly concluded that to justify the application of section 922(g)(3) to habitual drug users like respondent, the government must identify a historical regulation that is identical to section 922(g)(3) in all material respects. But as this case illustrates, imposing such a requirement would lead to a regulatory scheme "trapped in amber"—a prospect that this Court has rejected. *Rahimi*, 602 U.S. at 691.

In a similar vein, the Fifth Circuit's approach unduly restricts legislatures from making categorical determinations about who is likely to misuse firearms. In reaching its conclusion that section 922(g)(3) could not be applied to habitual drug users who were not actually intoxicated at the time of arrest, the court suggested that the government might be able to apply section 922(g)(3) to some of those individuals if it proved a "tight temporal nexus between an individual's drug use and his possession of firearms" or by establishing on a case-by-case basis "that a defendant's frequent or recent drug use renders him presumptively dangerous." *Daniels*, 124 F.4th at 976. This approach, if accepted, would create serious fairness and administrability problems.

In short, amici States have a substantial interest in retaining the flexibility to address new societal concerns with appropriately tailored firearms regulations that are consistent with the principles underlying this country's historical tradition. Section 922(g)(3), as well as its state counterparts, respect that balance.

### ARGUMENT

#### **I. Given the unique dangers associated with combining habitual drug use and firearms, most States have enacted restrictions similar to section 922(g)(3).**

As the United States explains, Pet. Br.     , section 922(g)(3) furthers the important public safety goal of protecting the public from the dangers associated with firearm use by a presumptively dangerous group of people: individuals who habitually use a “controlled substance.” In amici States’ experience, and contrary to the Fifth Circuit’s conclusion otherwise, see *Daniels*, 124 F.4th at 976, these dangers arise in circumstances beyond those where an individual was under the influence of drugs at the time of arrest. Indeed, the public can be endangered by habitual drug users who experience ongoing psychological deficits that cause them to make dangerous decisions while handling firearms, commit dangerous actions that put others at risk, and expose themselves to unsafe environments to obtain drugs. Given those dangers, a large majority of States have made a similar legislative choice as the federal government to regulate how habitual drug users may use firearms. These restrictions, like section 922(g)(3), typically regulate habitual drug users by

imposing a temporary restriction on their possession or carriage of firearms.

**A. Habitual drug use is associated with unique dangers when combined with firearms.**

For years, States have recognized that firearms present a danger to the public when combined with drug use. See, e.g., *State v. Woods*, 23 N.W.3d 258, 269 (Iowa 2025) (“[M]ixing drugs and guns together is inherently dangerous[.]”). As the Fifth Circuit recognized, these dangers frequently arise when an individual possesses a firearm while under the influence of drugs. Pet. App. 1a-2a. But there are also significant public safety risks associated with habitual drug use that extend beyond the time that the individual is using drugs.

At the threshold, many drugs cause psychological impairment to the user while intoxicated, and this psychological impairment can cause risks to the public when combined with firearms. As courts have noted, drug use “typically causes immediate deficits in cognitive function.” *United States v. Seiwert*, 152 F.4th 854, 866 (7th Cir. 2025). For example, after taking heroin, users will rapidly become drowsy and experience clouded mental function.<sup>2</sup> And when an individual ingests cocaine, the user’s behavior can quickly become “bizarre, erratic, and violent.”<sup>3</sup> Likewise, cannabis can cause impaired thinking and

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<sup>2</sup> National Institute on Drug Abuse, *Heroin Research Report*, <https://bit.ly/43N6HfA>. All websites last visited   .

<sup>3</sup> National Institute on Drug Abuse, *Cocaine*, <https://bit.ly/48vnars>.

movement, and, in large amounts, can cause anxiety and hallucinations.<sup>4</sup>

As criminal cases arising across the country show, the altered mental states caused by these and other drugs can be dangerous when combined with firearms, even when an individual user does not necessarily intend violence or harm or even fire the weapon. For instance, in *United States v. VanOchten*, 150 F.4th 552, 554 (6th Cir. 2025), the criminal defendant—who was both high and drunk—was shooting a rifle at a “flock of birds” in his backyard. While trying to shoot the birds, he also shot in the direction of a propane tank. *Ibid.* As the court noted, if the defendant had hit the tank, he could “have caused a major explosion,” injuring not only himself but also “the person or property of another.” *Id.* at 560-561 (internal quotations omitted).

In another case, a criminal defendant who regularly smoked marijuana purchased a pistol. *United States v. Harris*, 144 F.4th 154, 156-157 (3rd Cir. 2025). Five days later, he went to party, “got really drunk and high and, in the revelry, lost his new gun.” *Id.* at 156 (internal quotations omitted). Soon thereafter, the defendant’s lost pistol ended up in the hands of a felon, who should not have been able to obtain the pistol under federal law. *Id.* at 157. In yet another case, a man who engaged in daily heroin and cocaine use traded firearms that he had inherited from his father to his drug dealer to pay for drugs. *Seiwert*, 152 F.4th at 859.

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<sup>4</sup> National Institute on Drug Abuse, *Cannabis (Marijuana)*, <https://bit.ly/3XFUOVr>.

But the Fifth Circuit was wrong that the danger of mixing drugs and guns is limited to times when a drug user is actively intoxicated. In addition to the altered mental state that users experience while high, long-term drug use can lead to “severe ongoing psychological deficits.” *Id.* at 869. Indeed, many States have recognized that using drugs for an extended period of time can cause lasting mental disturbances by providing a “lack of penal responsibility defense” to defendants who suffer from permanent mental impairment resulting from chronic drug use. See, e.g., *State v. Abion*, 478 P.3d 270, 282 (Haw. 2020) (trial judge erred when it precluded the testimony of a psychologist who would testify that defendant was suffering from permanent effects of chronic methamphetamine use); *Currie v. State*, 254 A.3d 25, 43 (Md. Ct. Spec. App. 2021) (“Defendants may be found not criminally responsible based on evidence that their drug use resulted in a ‘settled’ disorder” such as “psychosis from prolonged use of marijuana.” (internal quotations omitted)); *White v. Commonwealth*, 636 S.E.2d 353, 357 (Va. 2006) (acknowledging that the defense of insanity caused by long-term substance abuse is “not new” and collecting cases). And, as this Court has noted, there have been “longstanding prohibitions on the possession of firearms by . . . the mentally ill.” *Heller v. District of Columbia*, 554 U.S. 570, 626 (2008). Given the potentially lasting effects of sustained drug use, habitual drug users may lack the ability to safely handle firearms even while not under the influence of drugs.

Additionally, habitual drug users can pose a danger to communities even while those users are not actively intoxicated or experiencing ongoing

psychological deficits. Even though drug addiction is an illness that “in some cases [can] be contracted innocently or inadvertently,” *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010), *abrogated on other grounds by N.Y. State Pistol & Rifle Ass’n v. Bruen*, 597 U.S. 1 (2022), a habitual user may be driven to violence or other criminal measures to obtain the substances on which he or she has become dependent. For example, in concluding that there was a strong link between drug use and violence, one court described several studies indicating that “chronic cocaine and opiate users were more likely than nonusers to engage in robbery and violence”; that “almost 50% of all state and federal prisoners who had committed violent felonies were drug abusers or addicts in the year before their arrest, as compared to only 2% of the general population”; and that “probationers who had perpetrated violence in the past were significantly more likely to have used a host of drugs—marijuana, hallucinogens, sedatives, and heroin—than probationers who had never been involved in a violent episode.” *United States v. Carter*, 750 F.3d 462, 467 (4th Cir. 2014).<sup>5</sup> These violent episodes and run-ins with law enforcement may happen because the “inflated price[s] of illegal drugs on the black market” can compel people addicted to those drugs to try to obtain them by any means necessary. *Id.* at 469. Indeed, approximately one in

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<sup>5</sup> Citing Carrie B. Oser et al., *The Drugs–Violence Nexus Among Rural Felony Probationers*, 24 J. Interpersonal Violence 1285, 1293 tbl. 1 (2009); Bureau of Justice Statistics, U.S. Dep’t of Justice, *Drug Use and Dependence, State and Federal Prisons, 2004*, at 7 & tbl.6 (2007); H. Virginia McCoy et al., *Perpetrators, Victims, and Observers of Violence: Chronic and Non-Chronic Drug Users*, 16 J. Interpersonal Violence 890, 900 (2001).

five state prisoners reported that “their most serious current offense was committed to get money for drugs or to obtain drugs.”<sup>6</sup>

Thus, habitual drug users can pose societal risks when seeking drugs, not just when they are intoxicated. And the addition of firearms necessarily increases the danger. When habitual drug users interact with drug dealers and traffickers to obtain drugs, they enter an inherently risky environment. The high “price per kilogram means that some people have enough incentive to steal [the drugs] that they may resort to violence.”<sup>7</sup> Traffickers also “carry around so much cash (after a sale) or precious cargo that many will resort to lethal force (immediately) to defend” that cargo.<sup>8</sup> And because rivals in the drug market have so much at stake, they may also “resort to lethal force to protect or expand their customer base.”<sup>9</sup> For all these reasons, courts have consistently recognized that illegal drug use and firearms possession are a dangerous combination even absent evidence of intoxication. See, e.g., *United States v. Yanez Sosa*, 513 F.3d 194, 202 (5th Cir. 2008) (crediting testimony that “drugs and guns are commonly found together and that drug dealers use guns to protect their business because of the inherent

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<sup>6</sup> Bureau of Justice Statistics, U.S. Department of Justice, *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2009-2009*, at 6 (2017).

<sup>7</sup> Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 Ohio St. J. of Crim. L. 211, 216 (2020).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

violence of the trade”); *Woods*, 23 N.W.3d at 269 (“[M]ixing drugs and guns together is inherently dangerous . . . .”); *State v. Jackson*, 697 A.2d 1328, 1331 (Me. 1997) (“[D]rugs and guns are a lethal combination . . . .”).

Thus, firearm possession by habitual drug users can pose a danger to the public both because of the dangerous choices that users may make, whether or not under the influence at the time, and because obtaining unlawful drugs exposes them to the inherent violence and criminality associated with the drug trade.

**B. Nearly every State has passed legislation addressing the danger of firearms possession or carriage by habitual drug users.**

Recognizing the dangers posed by combining habitual drug use with firearms, the vast majority of States impose firearm restrictions on such drug users. Although States have not reached identical conclusions on how to regulate in these circumstances, virtually every State and the District of Columbia have enacted laws to limit the possession or carriage of firearms by those who habitually use drugs. These laws share important characteristics with section 922(g)(3).

To start, at least 38 States and the District of Columbia have determined that restricting the possession or carriage of firearms by “habitual” drug users is appropriate to promote public safety and curb gun violence within their borders. Among those 39 jurisdictions, 14 States—Alabama, California, Illinois, Kansas, Maine, Maryland, Minnesota,

Missouri, Nevada, Ohio, South Carolina, Tennessee, Utah, and West Virginia—and the District of Columbia prohibit firearm possession by habitual drug users.<sup>10</sup> Twenty-five additional States—Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Dakota, Texas, Virginia, Washington, and Wyoming—prohibit firearms carriage by habitual drug users.<sup>11</sup> Notably, a majority of all States define the restricted drug user by referring to or using the language of section 922(g)(3).<sup>12</sup>

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<sup>10</sup> See Ala. Code § 13A-11-72(b); Cal. Penal Code § 29800(a)(1); D.C. Code § 22-4503(a)(4); 720 Ill. Comp. Stat. 5/24-3.1(a)(3); Kan. Stat. Ann. § 21-6301(a)(10); Me. Rev. Stat. tit. 15, § 393(1)(G); Md. Public Safety Code Ann. § 5-133(b)(7); Minn. Stat. § 624.713(10)(iii); Mo. Rev. Stat. § 571.070; Nev. Rev. Stat. Ann. § 202.360(1)(f); Ohio Rev. Code Ann. § 2923.13(A)(4); S.C. Code Ann. § 16-23-30(A)(1); Tenn. Code § 39-17-1307(f)(1)(C); Utah Code Ann. § 76-11-303(5); W. Va. Code § 61-7-7(a)(3).

<sup>11</sup> See Alaska Stat. § 18.65.705(5); Ariz. Rev. Stat. § 13-3112(E)(3); Ark. Code § 5-73-309(7); Colo. Rev. Stat. § 18-12-203(1)(f); Fla. Stat. § 790.06(2)(f); Ga. Code Ann. § 16-11-129(b)(2); Idaho Code § 18-3302(11)(e); Ind. Code §§ 35-47-1-7(5), 35-47-2-3; Ky. Rev. Stat. Ann. § 237.110(4)(a); La. Rev. Stat. § 40:1379.3(C)(12); Miss. Code Ann. § 45-9-101(2)(e); Mont. Code § 45-8-321(1)(a); Neb. Rev. Stat. § 69-2433(2); N.H. Rev. Stat. § 159:6; N.J. Stat. § 2C:58-3(c)(3); N.M. Stat. Ann. § 29-19-4(9); N.Y. Penal Law § 400.00.1(e); N.C. Gen. Stat. § 14-415.12(b)(5); N.D. Cent. Code §§ 62.1-04-03(1)(c)(8), (1)(f); 18 Pa. Cons. Stat. § 6109(e)(1)(vi); S.D. Codified Laws § 23-7-7.1(3); Tex. Gov't Code § 411.172(a)(6); Va. Code Ann. §§ 18.2-308.09(8); Wash. Rev. Code § 9.41.070(1)(a); Wyo. Stat. § 6-8-104(b)(iv).

<sup>12</sup> See Alaska Stat. § 18.65.705(5); Ariz. Rev. Stat. § 13-3112(E)(3); Ark. Code § 5-73-309(7); Colo. Rev. Stat. § 18-12-

Other States describe the group of prohibited drug users slightly differently. Some States, like Oklahoma, restrict the possession or carriage of firearms by those who have been convicted of certain drug offenses, such as the unlawful possession of controlled substances.<sup>13</sup> Still others, like Rhode Island, ban possession or carriage of firearms by those who are in treatment for drug use.<sup>14</sup>

Importantly, as in the federal system, these States impose merely a temporary restriction on the possession or carriage of firearms. In many States, as under section 922(g)(3), the disarmament lasts only so long as the person habitually uses the drug.<sup>15</sup>

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203(1)(f); Ga. Code Ann. § 16-11-129(b)(2); Ind. Code § 35-47-2-3; Kan. Stat. Ann. § 21-6301(a)(10); Ky. Rev. Stat. Ann. § 237.110(4)(a); La. Rev. Stat. § 40:1379.3(C)(12); Me. Rev. Stat. tit. 15, § 393(1)(G); Mont. Code § 45-8-321(1)(a); Neb. Rev. Stat. § 69-2433(2); Nev. Rev. Stat. Ann. § 202.360(1)(f); N.H. Rev. Stat. § 159:6; N.M. Stat. Ann. § 29-19-4(9); N.Y. Penal Law § 400.00.1(e); N.C. Gen. Stat. § 14-415.12(b)(5); N.D. Cent. Code §§ 62.1-04-03(1)(c)(8), (1)(f); Ohio Rev. Code Ann. § 2923.125(o); 18 Pa. Cons. Stat. § 6109(e)(1)(vi); S.D. Codified Laws § 23-7-7.1(3); Tenn. Code § 39-17-1307(f)(1)(C); Tex. Gov't Code § 411.172(a)(6); Va. Code Ann. § 18.2-308.09(8); Wash. Rev. Code § 9.41.070(1)(a); W. Va. Code § 61-7-7(a)(3); Wyo. Stat. § 6-8-104(b)(iv).

<sup>13</sup> See Del. Code Ann. tit. 11, § 1448(a)(3); 21 Okl. Stat. § 1272(f); Or. Rev. Stat. § 166.291(1)(L).

<sup>14</sup> See Haw. Rev. Stat. § 134-7(a); Mass. Gen. Laws ch. 140, § 121F(j)(ii)(D); R.I. Gen. Laws § 11-47-6.

<sup>15</sup> See, e.g., Ariz. Rev. Stat. § 13-3112(E)(3) (allowing issuance of concealed-carry permit if the applicant “is currently not a prohibited possessor under . . . federal law”); Colo. Rev. Stat. § 18-12-203(1)(f) (allowing issuance of concealed-carry permit if applicant is not “an unlawful user of or addicted to a controlled substance,” as determined by “federal law and regulations”);

Other States restrict possession or carriage for a specific, time-limited period, such as by imposing three- or five-year bans on carriage for certain drug users.<sup>16</sup> At least one State disarms drug users for the length of their substance use treatment.<sup>17</sup>

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Ohio Rev. Code Ann. § 2923.13(A)(4) (prohibiting the possession and carriage of a firearm while “the person has a drug dependency”); see also *State v. White*, 1997 Ohio App. LEXIS 1598, at \*8 (Ohio Ct. App. 1997) (the “limitation on the right to possess a firearm is only temporary” as the restriction is stated “in the [present] tense”); *State v. Wheatley*, 94 N.E.3d 579, 591 (Ohio Ct. App. 2018) (barred drug users “must currently use drugs or do so on a habitual basis” and “individuals who formerly abused drugs and have completely recovered from their addiction” are not barred); *People v. Washington*, 237 Cal. App. 2d 59, 68 (Cal. Dist. Ct. App. 1965) (defining “addicted” as an “emotional dependence on any narcotic in the sense that he experiences a compulsive need to continue its use, and an increased tolerance to the drugs’ effects”).

<sup>16</sup> See, e.g., Ark. Code § 5-73-309(7)(B) (presumption of chronic and habitual use if the applicant for concealed-carry license has been in drug abuse treatment or has been convicted for certain controlled substance offenses “within the three-year period immediately preceding the date on which the application is submitted”); Fla. Stat. § 790.06(2)(f) (presumption of chronic and habitual use if the applicant for a concealed-carry license has been convicted of certain intoxication offenses “within a 3-year period”); Ky. Rev. Stat. Ann. § 237.110(4)(d) (three-year bar on concealed-carry permit if committed for controlled substance abuse or convicted of controlled substance offense); La. Rev. Stat. § 40:1379.3(C)(7) (five-year bar on concealed-carry permit if committed for controlled substance abuse or convicted of controlled substance offense); Miss. Code Ann. § 45-9-101(2)(e) (presumption of chronic and habitual use if the applicant for concealed-carry license has been in drug abuse treatment or has been convicted for certain controlled substance offenses “within the three-year period”).

<sup>17</sup> See Mont. Code § 45-8-321(1)(f) (restricting issuance of

To be sure, the States impose restrictions through different administrative and regulatory means and by using slightly different metrics. For instance, many States bar firearm possession by habitual drug users through their criminal code, providing for criminal penalties when a prohibited drug user possesses a firearm.<sup>18</sup> Others use licensing and permitting schemes to restrict carriage.<sup>19</sup> In these States, state officials will not issue firearms permits and licenses to habitual drug users. But regardless of these

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concealed-carry permits while applicant “is under a court order of . . . treatment . . . or is otherwise under state supervision”).

<sup>18</sup> See Ala. Code § 13A-11-72(b); Cal. Penal Code § 29800(a); D.C. Code § 22-4503(a)(4); 720 Ill. Comp. Stat. 5/24-3.1(a)(3); Kan. Stat. Ann. § 21-6301(a)(10); Me. Rev. Stat. tit. 15, § 393(1)(G); Md. Public Safety Code Ann. § 5-133(b)(7); Minn. Stat. § 624.713(10)(iii); Mo. Rev. Stat. § 571.070; Nev. Rev. Stat. Ann. § 202.360(1)(f); Ohio Rev. Code Ann. § 2923.13(A)(4); R.I. Gen. Laws § 11-47-6; S.C. Code Ann. § 16-23-30(A)(1); Tenn. Code § 39-17-1307(f)(1)(C); Utah Code Ann. § 76-11-303(5); W. Va. Code § 61-7-7(a)(3).

<sup>19</sup> See Alaska Stat. § 18.65.705(5); Ariz. Rev. Stat. § 13-3112(E)(3); Ark. Code § 5-73-309(7); Colo. Rev. Stat. § 18-12-203(1)(f); Fla. Stat. § 790.06(2)(f); Ga. Code Ann. § 16-11-129(b)(2); Idaho Code § 18-3302(11)(e); 430 Ill. Comp. Stat. 65/8(d); Ind. Code §§ 35-47-1-7(5), 35-47-2-3; Ky. Rev. Stat. Ann. § 237.110(4)(d); La. Rev. Stat. § 40:1379.3(C)(12); Md. Public Safety Code Ann. § 5-306(a)(5); Miss. Code Ann. § 45-9-101(2)(e); Neb. Rev. Stat. § 69-2433(2); N.H. Rev. Stat. § 159:6; N.J. Stat. § 2C:58-3(c)(3); N.M. Stat. Ann. § 29-19-4(9); N.Y. Penal Law § 400.00.1(e); N.C. Gen. Stat. § 14-415.12(b)(5); N.D. Cent. Code §§ 62.1-04-03(1)(c)(8), (1)(f); Ohio Rev. Code Ann. § 2923.125(o); Or. Rev. Stat. § 166.291(1)(L); 18 Pa. Cons. Stat. § 6109(e)(1)(vi); S.D. Codified Laws § 23-7-7.1(3); Tex. Gov’t Code § 411.172(a)(6); Va. Code Ann. § 18.2-308.09(8); Wash. Rev. Code § 9.41.070(1)(a); Wyo. Stat. § 6-8-104(b)(iv).

variations, virtually all States and the District of Columbia have sought to address the recognized public-safety risk associated with the combination of firearms and drugs by prohibiting habitual drug users from possessing or carrying firearms regardless of whether they are under the influence at the time.

**II. The Fifth Circuit’s decision unduly restricts permissible regulatory responses to public safety risks like those addressed by section 922(g)(3).**

In addition to mirroring the approach taken by the majority of the States, section 922(g)(3)’s categorical restriction on firearm possession for habitual drug users is consistent with this country’s historical tradition of firearms regulation, as the United States explains. Pet. Br. [redacted]. [placeholder for additional description of United States argument]

In reaching the opposite conclusion, the Fifth Circuit applied principles that are contrary to this Court’s precedents. Namely, the lower court’s reasoning that, in order to qualify as an appropriate historical analogue, the burdens imposed by modern laws must be identical to those imposed by historical laws, is inconsistent with *Bruen* and *Rahimi*. It would also impair the States’ ability to respond to societal problems that are novel or have shifted meaningfully since the Founding and Reconstruction eras. Similarly, the lower court’s approach to the categorical nature of section 922(g)(3)’s restriction would, if adopted, unduly restrict legislatures from making appropriate and reasonable determinations about who is likely to misuse firearms. These

outcomes are not required by this Court's precedents or the Second Amendment and should be rejected.

**A. The Second Amendment allows legislatures to confront shifting societal problems with new regulatory solutions.**

As this Court has explained, while legislatures may not ban the possession of handguns by responsible, law-abiding individuals or impose similarly severe burdens on the Second Amendment right, they still possess “a variety of tools” to combat the problem of gun violence. *Heller*, 554 U.S. at 636; see also *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (Second Amendment “by no means eliminates” the States’ “ability to devise solutions to social problems that suit local needs and values”). One prominent application of that principle is this Court’s consistent recognition that the Second Amendment “permits more than just those regulations identical to ones that could be found in 1791.” *Rahimi*, 602 U.S. at 691-692; see also *Bruen*, 597 U.S. at 28 (Second Amendment “can, and must, apply to circumstances beyond those the Founders specifically anticipated.”).

In fact, *Bruen* accounts for this very scenario. When assessing whether the government has provided sufficient historical analogues to show that a challenged statute is consistent with historical tradition, the *Bruen* standard recognizes that while some historical analogies are “straightforward,” others are not “simple to draw.” 597 U.S. at 27. This is because “[t]he regulatory challenges posed by firearms today” are not the same as those that “preoccupied the Founders in 1791 or the Reconstruction generation in 1868.” *Ibid.* Yet the

Second Amendment must “apply to circumstances beyond those . . . anticipated” during the Founding and Reconstruction eras. *Id.* at 28. Accordingly, this Court anticipated a “more nuanced approach” to analogical reasoning in cases involving circumstances unanticipated by previous generations, such as “unprecedented societal concerns or dramatic technological changes.” *Id.* at 27.

The Court reiterated these precepts in *Rahimi*, where it underscored that the “appropriate analysis” involves applying “the principles that underpin our regulatory tradition” to “modern circumstances.” 602 U.S. at 692 (internal quotations omitted). Consistent with that articulation of the standard, the Court upheld the constitutionality of 18 U.S.C. § 922(g)(8) notwithstanding that it was “by no means identical to . . . founding era regimes.” *Id.* at 698. In doing so, this Court recognized that a contemporary statute responding to a serious public safety risk—disarming individuals subject to a domestic violence restraining order—was consistent with the historical tradition of disarming individuals who threaten harm to others to prevent the misuse of firearms. *Id.* at 690.

The Fifth Circuit here, however, disregarded this standard when it determined that section 922(g)(3) was constitutional only in certain applications—specifically, to the same extent that legislatures regulated the intersection of intoxicants and firearms at the time of the Founding. Indeed, in *Connelly*, the court reasoned that historical regulations prohibiting the carriage of firearms by intoxicated persons could justify modern regulations prohibiting the carriage of firearms by the actively intoxicated only. 117 F.4th at 282. In reaching this conclusion, the Fifth Circuit

failed to account for the reason why there were no laws identical to section 922(g)(3) in the Founding or Reconstruction eras: there was no public safety risk involving the combination of habitual drug use and firearms. On the contrary, that risk is an entirely contemporary problem, and one that legislatures began regulating shortly after the dangers attendant to the misuse of firearms by habitual drug users became apparent.

Indeed, at the Founding and during Reconstruction, Americans' relationship to drugs was vastly different than the relationship today. Even though the use of opiates was widespread by the early eighteenth century, this use was not illicit, nor was it associated with danger or violence.<sup>20</sup> Any American could obtain morphine or other opiates without a prescription.<sup>21</sup> Furthermore, there is no evidence that the typical opiate user presented a public safety risk, let alone one that was heightened when combined with firearms. On the contrary, habitual opiate users were usually women of means, who were introduced to the drug for severe or chronic pain.<sup>22</sup> And because these drugs were often "the only effective pain-killers available," any problems with overdosing or habitual use were not accompanied by regulation.<sup>23</sup> This, combined with the secrecy associated with habitual opiate use by this population, made it unlikely that

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<sup>20</sup> Elizabeth Kelly Gray, *Habit Forming: Drug Addiction in America, 1776-1914*, at 43 (2022) (hereinafter "Gray").

<sup>21</sup> *Id.* at 24.

<sup>22</sup> *Id.* at 21.

<sup>23</sup> *Id.* at 25.

early legislatures were even aware of the existence of a problem.<sup>24</sup>

It was only when the scale of the addiction problem increased and became apparent to doctors and pharmacists in the early twentieth century that legislatures started to act.<sup>25</sup> Congress first addressed drug addiction in 1909. See Smoking Opium Exclusion Act of 1909, Pub. L. No. 60-221, 35 Stat. 614. And drug addiction was only comprehensively legislated five years later when, in 1914, Congress passed the Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785, which had the effect of banning nonmedical uses of opiates and cocaine. Many States also began regulating the sale of cocaine and opiates around this time.<sup>26</sup> And it was not until these drugs became illegal that a dangerous drug trade developed

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<sup>24</sup> See *ibid.*

<sup>25</sup> Proceedings of the American Pharmaceutical Association at the Fiftieth Annual Meeting 567-568 (1902); Gray, *supra* note   , at 43; David T. Courtwright, *A Century of American Narcotic Policy*, in 2 *Treating Drug Problems: Commissioned Papers on Historical Institutional and Economic Contexts of Drug Treatment 2* (Gerstein & Harwood, eds. 1992), available at <https://bit.ly/4pmUh6y> (hereinafter “Courtwright”). Another reason for this regulation may have been because a nonopiate pain reliever, aspirin, became widely available at this time. Gray, *supra*, at 19. Plus, the medical community did not begin to acknowledge or focus on drug dependency until about 1830. *Id.* at 40.

<sup>26</sup> See George Fisher, *The Drug War at 100*, Stan. L. School Blogs (Dec. 19, 2014), <https://law.stanford.edu/2014/12/19/the-drug-war-at-100/>.

and, subsequently, was regulated through criminal laws and restrictions like section 922(g)(3).<sup>27</sup>

In short, there is good reason why the historical analogues identified by the United States are not identical to section 922(g)(3). And there is also good reason why this Court's precedents have recognized that legislatures may still regulate firearms consistent with the Second Amendment in these circumstances. Otherwise, the States and the federal government would be unable to address pressing public safety risks even if, as here, those risks are "unprecedented." *Bruen*, 597 U.S. at 27. Amici States thus urge the Court to reject this aspect of the Fifth Circuit's reasoning.

**B. The Second Amendment contemplates categorical restrictions that avoid the administrability problems associated with case-by-case determinations.**

The Fifth Circuit's reasoning hamstringing legislatures in another meaningful way: by calling into question the validity of categorical restrictions like the one at issue in this case. Indeed, the lower court reached its ultimate conclusion in part by rejecting the federal government's regulatory determination that the best way to protect the public is to prohibit all habitual drug users from possessing firearms. As the United States explains, Pet. Br. [REDACTED], this decision is inconsistent with historical tradition,

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<sup>27</sup> Courtwright, *supra* note [REDACTED], at 11-13 (discussing the advent of legal and diplomatic efforts to prevent illicit drug transactions in the 1920s and 1930s).

which includes myriad laws that made categorical determinations about who may possess firearms.<sup>28</sup>

Additionally, the Fifth Circuit’s standard—which would require courts to conduct an individualized analysis of dangerousness to determine if a defendant violated section 922(g)(3)—would create serious administrability and fairness problems. For one, it is unclear how courts would conduct such an individualized analysis. The Fifth Circuit’s standard, for example, requires the government to establish, on a person-by-person basis, “that a defendant’s frequent or recent drug use renders him presumptively dangerous,” or to show a “tight temporal nexus between an individual’s drug use and his possession of firearms.” *Daniels*, 124 F.4th at 976. The Third Circuit, which has likewise rejected a categorical approach to section 922(g)(3), similarly requires courts to evaluate several factors when determining whether a criminal defendant presents a “special danger” of misusing firearms, such as the “drug’s half-life,” the “length and recency of the defendant’s [drug] use,” and the effects of the drug, among other

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<sup>28</sup> See, e.g., *United States v. Jackson*, 110 F.4th 1120, 1128 (8th Cir. 2024) (early American legislatures determined that prohibiting possession of firearms by categories of people was appropriate when the legislature determined that the category as a whole presented a serious risk of danger if armed); *Kanter v. Barr*, 919 F.3d 437, 546 (7th Cir. 2019) (Barrett, J., dissenting) (in early America, legislatures routinely passed laws “regarding categorical exclusions from the enjoyment of the right to keep and bear arms”), *abrogated by Bruen*, 597 U.S. 1.

considerations from a “non-exhaustive list.” *Harris*, 144 F.4th at 164-65 (internal quotations omitted).

A multifactor test like these, if adopted by this Court, would require trial courts to create a kind of common law of dangerousness and would result in lengthy litigation over the application of that standard in each case. *Cf. Taylor v. United States*, 495 U.S. 575, 601 (1990) (discussing administrability problems involved in a sentencing court considering factual evidence when applying 18 U.S.C. § 924(e) sentencing enhancements). Indeed, such an approach would require courts to resolve a wide range of fact-intensive inquiries, such as how often a criminal defendant used illegal drugs, what particular drug or drugs the defendant used, the specific effects of each drug, how those effects contribute to the defendant’s dangerousness, as well as questions about the defendant’s past behavior, arrests, or convictions. See, e.g., *VanOchten*, 150 F.4th at 559; *Harris*, 144 F.4th at 164-65. These kinds of proceedings are exactly what led this Court to describe a proposed case-by-case approach to sentencing enhancements under the Armed Career Criminal Act as “utter[ly] impractica[l].” *Johnson v. United States*, 576 U.S. 591, 605 (2014).

Furthermore, this type of post-hoc inquiry into dangerousness would present substantial notice and fairness problems for drug users, who would have no way of knowing in advance whether their drug use would fall within the ambit of section 922(g)(3). *Cf. Greer v. United States*, 593 U.S. 503, 506 (2021) (“[I]ndividuals who are convicted felons ordinarily know that they are convicted felons.”). Allowing the

categorical disarmament of habitual drug users, by contrast, both recognizes the risks posed by habitual drug users and is readily administrable and fair. The lower courts have a well-developed body of law establishing the method for adjudicating cases under section 922(g)(3), and have settled on a consistent definition of who an “unlawful user” of a “controlled substance” is. See *United States v. McCowan*, 469 F.3d 386, 392 (5th Cir. 2006) (collecting cases); 27 C.F.R. § 478.11 (2024) (describing an unlawful user as someone who has “lost the power of self-control with reference to the use of [a] controlled substance”).

Because of this settled definition, the elements of the offense are predictable. For an individual to be convicted under section 922(g)(3), the government must prove beyond a reasonable doubt that: (1) the defendant used illegal drugs regularly or is addicted to those substances, (2) the use took place over a long period of time, and (3) the use was proximate or contemporaneous with his possession of a firearm. See *United States v. Tanco-Baez*, 942 F.3d 7, 15 (1st Cir. 2019); *Seiwert*, 152 F.4th at 873 (similar); *United States v. Burchard*, 580 F.3d 341, 350 (6th Cir. 2009) (to establish violation of section 922(g)(3), government must prove “that the defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm” (internal quotations omitted)). This clear legal test puts longtime drug users on notice that they cannot possess a firearm, and it also enables courts to apply the law consistently. Not only that, the standard is

democratically accountable. If the polity decides that users of certain controlled substances should be allowed to possess firearms, it can request that democratically elected representatives make that change.

For these reasons, section 922(g)(3) is much preferable to the multi-factor tests advanced by some circuit courts that assess individualized dangerousness correlated to the defendant's criminal history or drugs of choice.

### CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRIAN L. SCHWALB  
*Attorney General*  
*District of Columbia*

CAROLINE S. VAN ZILE  
*Solicitor General*

ASHWIN P. PHATAK  
*Principal Deputy*  
*Solicitor General*

PERRY CAO  
*Assistant Attorney*  
*General*

400 6th Street, NW,  
Suite 8100  
Washington, D.C. 20001

KWAME RAOUL  
*Attorney General*  
*State of Illinois*

JANE ELINOR NOTZ\*  
*Solicitor General*

SARAH A. HUNGER  
*Deputy Solicitor General*

MEGAN L. BROWN

BRIANNA YANG  
*Assistant Attorneys General*

115 South LaSalle Street

Chicago, IL 60603

(312) 814-5376

jane.notz@ilag.gov

\* *Counsel of Record*

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UNCLASSIFIED//LAW ENFORCEMENT SENSITIVE  
FBI Criminal Justice Information Services (CJIS) Division  
National Instant Criminal Background Check System (NICS) Section



**Information and Examples of the Application of Title 18, United States Code (U.S.C.),  
Section 922, Subsection (g)(3):**

**PERSONS WHO ARE UNLAWFUL USERS OF OR ADDICTED TO ANY  
CONTROLLED SUBSTANCE**

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Regulation Title 27, Code of Federal Regulations (C.F.R.), Section 478.11 specifically defines an unlawful user of or addicted to any controlled substance as “a person who has lost the power of self-control with reference to the use of a controlled substance; and any person who is a current user of a controlled substance in a manner other than prescribed by a licensed physician.” As defined by 21 U.S.C. § 802 and C.F.R. Part 1308; the term “controlled substance” means a drug or other substance, or immediate precursor included in the Controlled Substance Act (CSA) Scheduling. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate the individual is actively engaged in such conduct. An inference of current use or possession may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that *reasonably covers the present time*. The ATF has determined that the *present time* is represented by the time frame of within the past 12 months.

Below is a listing of different scenario examples relating to this prohibition. These are examples only, not a complete listing.

• **Drug Conviction within the Past Year**

A conviction for a controlled substance within the past year is disqualifying under the federal drug prohibition 922(g)(3), even if the drug arrest occurred outside of the 12-month time frame. The ATF Chief Counsel has interpreted ATF Regulation 27 C.F.R. § 478.11 for “a conviction for use or possession of a controlled substance within the past year” as a conviction within the past year, although the use or possession (or date of arrest) may not be within the past year.

**Note:** “Within the past year” is defined as being 365 days from the conviction date.

Example: a conviction date of 10/5/2018 is prohibiting through 10/4/2019. If the attempted purchase date is 10/5/2018, it would no longer be disqualifying under 922(g)(3).

Please note, in accordance with ATF Regulation 27 C.F.R. § 478.11, a conviction within the past year DOES NOT include probation before judgment, deferred prosecution, pretrial diversion, etc. Even though a guilty plea may be involved, this is not necessarily an admission of use of a controlled substance and may not by itself be used as an “inference of

current use or possession.” Since there is no adjudication of guilt, these may not be used to satisfy the conviction example. The arrests with such a disposition may be treated as if they had no disposition at all and if the arrest occurred within the past year, the incident report should be obtained to determine inference of current use or possession.

- **Admission of Use/\*Possession**

If there is evidence that an individual admits, within the past 12 months, to using or possessing a controlled substance, the federal drug prohibition 922(g)(3) would apply. Admission of use/possession of a controlled substance may often be found within the narrative of a criminal incident report. An admission of drug use/possession does not have to result in a drug arrest to be disqualifying.

Individuals admitting to illegal use/possession of a controlled substance are prohibited from the receipt/possession of a firearm for one year from the date of admission. It should be noted this must be a self-admission. If a second party states the controlled substance belongs to another subject, neither would be disqualified based solely on that statement.

*\*Possession of medical marijuana by an individual identified as a medical marijuana caregiver, grower, provider, etc. is not disqualifying under 922(g)(3). Use of the marijuana (or other controlled substance) must be established for the prohibition to exist. (Please refer to the sections titled Drug Card—Medical/Recreational Marijuana for more information.)*

- **Reduced to a Different Offense**

Instances where an individual is arrested for the possession of a controlled substance or Driving Under the Influence (DUI) within the past year, but convicted of a non-drug offense such as disorderly conduct, are recommended to be researched to determine if an inference of illegal use or possession can be established. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information regarding inference of use.)

- **Single Drug Arrest Within the Last Year with No Disposition**

Outreach to the courts and/or district attorney is recommended to determine if the charge has been disposed of and the record has not been updated yet. It is also recommended to review the incident report to determine if the individual, or the substance in his/her possession, was drug tested positive or if the individual admitted to the unlawful use or possession of a controlled substance. (Please refer to the sections titled Drug Conviction Within Past Year and Drug Testing for more information regarding these scenarios.)

- **Multiple Arrests within the Past Five Years with the Most Recent Occurring Within the Past Year**

This scenario establishes a pattern of use and is disqualifying under the federal drug prohibition 922(g)(3). Final dispositions are not necessary for this prohibition.

DUI offense(s) can be used to establish a pattern of use if it is proven that the DUI offense(s) was/were drug related.

A paraphernalia offense may be used with the multiple arrests scenario if the paraphernalia residue tested positive for a controlled substance.

**Note:** Final dispositions such as “dismissed,” “deferred,” etc., may be used in the multiple arrest application. Although these terms generally indicate a negotiation/compromise during litigation, the ATF counsel provided clarification in 2012 that the regulation calls for multiple arrests, not convictions, when determining a pattern of drug use. Dispositions of “not guilty” cannot be utilized or considered as a multiple arrest.

- **Dismissed Drug Charges**

Scenario—Drug offense or DUI offense showing “dismissed” on the criminal history record returned during a NICS check.

Unless dictated otherwise by state law, a dismissed charge is not considered a conviction and is not disqualifying when dealing with a *single* drug arrest occurring within the past year. The NICS user may rely on the information available to them during the NICS check; therefore, in this scenario, if no conviction has occurred, no additional research is needed to determine the offense is not disqualifying.

Scenario—External research of a recent charge results in both a “dismissed” finding and an inference of current use.

If, while researching a drug arrest within the past year, it is established that the charge was dismissed; however, inference of use is also determined, whether by an admission of drug use/possession, or a positive drug test finding—the federal drug prohibition 922(g)(3) is established due to the inference of use. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information regarding inference of use.)

Scenario—Multiple (two or more) drug arrests within the past five years, the most recent occurring in the past year.

As stated above in the Multiple Arrests with the Past Five Years/One Year Scenario, a disposition of “dismissed” may be used in the multiple arrest application.

- **Drug Paraphernalia**

Although misdemeanor possession of drug paraphernalia is not federally disqualifying, drug paraphernalia arrests/convictions may be disqualifying if the offense occurred within the past year AND an inference of use is determined by a positive drug test being conducted on the paraphernalia. A drug paraphernalia arrest within the past year can also be researched to determine if the incident report shows the individual admitted to the use or possession of a controlled substance at the time of the paraphernalia arrest. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information regarding inference of use.)

A drug paraphernalia arrest *outside* of the past year may be researched only if the individual

was currently on active probation or if the arrest occurred in the past five years. (Please refer to the sections regarding Active Probation and Multiple Arrests within the Past Five Years/One Year.)

- **Active Probation**

Charges showing active probation may be researched to determine if there are any conditions prohibiting firearm possession and to ascertain if the probation includes drug testing. If the probation includes drug testing, it is necessary to determine whether the subject has tested positive for a controlled substance within the last year to establish the federal drug prohibition 922(g)(3). This would apply on all active probations regardless of the charge. More information regarding drug testing is listed below.

- **Drug Testing**

Inference of drug use can be determined through positive drug testing within the past year. Positive drug testing consists of either field or chemical tests conducted on either the *subject* or the *material*. For example, establishing that a *subject* tested positive for illegal drug use through a blood test or urinalysis is disqualifying if the blood or urine was taken from the subject within the past year. Furthermore, determining that *material* taken from a subject within the past year tested positive as a controlled substance may also be disqualifying. For example, an incident report showing an officer obtained a baggie containing a “green leafy material” from the subject’s shirt pocket which tested positive as marijuana would be disqualifying under the federal drug prohibition 922(g)(3). The NICS Section does not rely on an officer’s opinion or the findings of a drug-detection dog to establish a material is a controlled substance.

It is recommended to obtain the type of controlled substance detected in order to determine if the substance is prohibiting. For example, the prohibition would not apply if a urinalysis shows a subject was found positive for use of Hydrocodone; however, the individual possessed a valid prescription for the Hydrocodone.

In the case of prescribed medication, identification (by the markings on the pills) by the Poison Control Center or a pharmacist may be used in lieu of a chemical test.

It should be noted that the 12-month disqualification time starts from the date the material, urine, or blood was taken from the subject, not the date the matter was tested or the date the results were returned.

Open drug arrests within the past year, paraphernalia arrests within the past year, and any active probation may be researched to determine if the “drug testing” disqualifying scenario applies.

- **DUI/Public Intoxication, Etc.**

In the majority of the states, DUI statutes include driving under the influence of drugs. When

researching recent DUI/Public Intoxication offenses, the statute of the offense may be referenced to determine if the offense could include controlled substances. A NICS User may wish to reference their internal resources, the NICS State Information Pages (available on the Law Enforcement Online), or contact the NICS Section's Legal Analysis Team (LAT) at <NICS\_LegalResearch@fbi.gov> to make these determinations.

Additional research is recommended to be conducted on the following scenarios to determine if the DUI involved controlled substances: DUIs *with no dispositions* occurring within the past **two** years only; DUI *convictions* within the past year; and any DUI/drug conviction with current active probation. For DUI-related arrests/convictions to meet the 922(g)(3) prohibition, it must be established that the controlled substance referenced in the documentation (ie: arrest report) is a scheduled controlled substance AND was illegally or unlawfully used or possessed. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information.)

- **DUI Charge Not Within the Past Year, Conviction Is Within the Past Year**

If there is a DUI charge occurring over 12 months ago, but the conviction is within the past year prior to the NICS check, this conviction is disqualifying under 922(g)(3) only if the record of conviction confirms the conviction is for DUI drugs only, and the drug involved is a scheduled controlled substance. An incident report may be used to determine if scheduled controlled substances were involved at the time of arrest. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information.) If the incident report provides no indication of drugs, it is not necessary to obtain the record of conviction, as the prohibition does not apply. The ATF Chief Counsel has interpreted ATF Regulation 27 C.F.R. § 478.11, for “a conviction of use or possession of a controlled substance within the past year” as a conviction within the past year, although the use or possession (or date of arrest) may not be within the past year.

**Note:** “Within the past year” is defined as being 365 days from the conviction date. Example: a conviction date of 5/31/2019 is prohibiting through 5/30/2020.

- **Prescription Drugs**

Prescription drugs (medications), which are scheduled controlled substances, as defined by 21 U.S.C. § 802, may qualify under the federal drug prohibition 922(g)(3) if used in a non-prescribed manner. This includes taking too much or more than what is recommended of an individual's own prescribed controlled substance, or taking a prescribed controlled substance without a prescription. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information.)

Additionally, some prescription drugs may also qualify under the federal drug prohibition 922(g)(3) even when used in a prescribed manner. Prescription drugs such as SUBOXONE®, buprenorphine, naloxone, and methadone are designated for the treatment of *opioid dependence* by suppressing withdrawal symptoms and cravings for opioids. It is reasonable to conclude a person who is prescribed one of these prescription drugs (or similar prescriptions)

has demonstrated a dependence/addiction to opioids, even when such person is seeking treatment to end that opioid addiction. The ATF provided the following summary: “There is, therefore, support for the argument that §922(g)(3) prohibits the receipt and possession of firearms and ammunition by persons who are addicted to controlled substance lawfully obtained by prescription or otherwise. Thus we conclude that a person who is using a controlled substance such as SUBOXONE® pursuant to prescription to treat addiction to controlled substances is a person “addicted to any controlled substance” and is subject to federal firearms disabilities pursuant to §922(g)(3).”

Prescription drugs that are scheduled controlled substances may also qualify for the federal drug prohibition 922(g)(3) if a person has obtained the drugs by unlawful means, such as forging a prescription, stealing a prescribed medication, or obtaining a prescription drug by fraud.

• **Drug Card—Medical/Recreational Marijuana**

Under federal law, the substance of marijuana is classified as a Schedule I controlled substance and identified as a federally prohibited substance with no approved medical use. Although state laws may permit the use/possession of marijuana for medical or recreational purposes, the use of marijuana remains prohibiting under federal law. Any marijuana user is prohibited from possessing or purchasing a firearm while using marijuana and for one year after last use. Information that a subject admits to using marijuana or that an individual is in possession of a medical marijuana *user* card is enough to establish an inference of current use for the federal drug prohibition 922(g)(3). The information may be obtained by an individual admitting they have a medical marijuana user card or by presenting a copy of the medical marijuana user card within the past year.

The following scenarios will be used to determine the disqualification period in regard to possession of a medical marijuana user card:

1. One year from the date of the medical marijuana user card’s expiration date; or
2. One year from the date of “admission” of possession of the medical marijuana user card, if no expiration date is available; or
3. One year from the date the medical marijuana user card is relinquished.

*Possession of medical marijuana by an individual identified as a medical marijuana caregiver, grower, provider, etc. is not disqualifying under 922(g)(3). Use of the marijuana (or other controlled substance) must be established for the prohibition to exist. Similarly, an individual may possess a medical marijuana handler’s card as a caregiver, grower, or provider for another party, but would not be disqualified, unless use was established. (Please refer to the sections titled Admission of Use/Possession and Drug Testing for more information.)*

- **Synthetic Drugs**

Per emergency orders of the Drug Enforcement Administration, dated 3/1/2011, and 10/21/2011, certain synthetic drugs, as amended in section 201 of the CSA, and their salts, isomers, and salts *or* isomers have been placed in Schedule I of the CSA and may qualify under the federal drug prohibition 922(g)(3). A NICS User may wish to reference their internal resources or contact the LAT at <NICS\_LegalResearch@fbi.gov> to determine if the particular synthetic drug involved is a Schedule I controlled substance. The most common product names to indicate potential Schedule I controlled substance involvement include, but are not limited to, “K2,” “Spice,” “CBD oil,” and “Bath Salts.”

- **Question of Who Actually Possessed the Drug**

If the individual is arrested (no conviction present) for possession of a controlled substance found in his/her vehicle or his/her home, and there are other people present at the time of the arrest, establishing who actually possessed or admitted to ownership of the controlled substance is needed for the 922(g)(3) prohibition to apply. Establishing that the substance is, in fact, a controlled substance is also needed for the prohibition (by subject’s admission or filed/chemical drug test). (Please refer to the sections titles Admission of Use/Possession and Drug Testing for more information.)

- **Materials to Make a Controlled Substance**

An arrest involving only the possession of materials to make a controlled substance would not qualify under this prohibition. A controlled substance must exist or the subject must have admitted to actually making a controlled substance (e.g., methamphetamine) rather than attempting to make. This does not eliminate the possibility of a state prohibition for these types of offenses.

- **Substances Not Included Under the Controlled Substance Act**

Per the ATF, alcohol, glue, and paint huffing/sniffing are not prohibited under the CSA.

- **Attempts and Conspiracies**

“Attempt” or “Conspiracy” to possess a drug or controlled substance generally does not qualify under the federal drug prohibition 922(g)(3), but may be disqualifying if an inference of current use or possession can be established through an admission to drug use/possession or through failed drug testing. (Please refer to the sections titles Admission of Use/Possession and Drug Testing for more information.)