IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 25-1229

UNITED STATES OF AMERICA,
Appellant,
v.
DAVID WORSTER; ALEXZANDRIA CARL,
Defendants-Appellees.

No. 25-1398
UNITED STATES OF AMERICA,
Appellant
v.
ALEXZANDRIA CARL,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND IN SUPPORT OF APPELLEES DAVID WORSTER AND ALEXZANDRIA CARL

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Disclosure Statement

Amicus curiae, the American Civil Liberties Union of Rhode Island (RI-ACLU), is a nonprofit entity operating under §501(c)(4) of the Internal Revenue Code. RI-ACLU is not a subsidiary or affiliate of any publicly owned corporations and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to RI ACLU's participation.

Interest of the Amicus Curiae

RI-ACLU, with over 5,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. RI-ACLU, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution.

For decades, the ACLU has been in the forefront of advocacy challenging the criminalization of marijuana possession and the gross racial disparity in arrests and incarceration of racial minorities for violation of marijuana laws. See, e.g., "A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform," issued by the ACLU in 2020.[1] RI-ACLU has long legislatively supported, ultimately successfully, the legalization in Rhode Island of medical marijuana, the legalization

[1] Available at https://www.aclu.org/publications/tale-two-countries-racially-targeted-arrests-era-marijuana-reform.

of recreational marijuana possession and expungement of past criminal convictions, and the availability of marijuana dispensaries. Cooperating counsel for RI-ACLU have also litigated numerous cases challenging police interference with gun ownership. See, e.g., Caniglia v. Strom, 593 U.S. 194 (2021); Richer v. Parmelee, 189 F.Supp.3d 334 (D.R.I. 2016).

RI-ACLU files this brief in support of the Appellees David Worster and Alexzandria Carl with respect to Counts Four and Five of the Indictment, respectively, alleging violation of 18 U.S.C. §922(g)(3), that the District Court dismissed.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Only amicus, its members or counsel contributed money that was intended to fund preparing or submitting this brief. Fed.R.App.P. (29)(c)(5). All parties have consented to the filing of this brief.

Procedural History

On September 1, 2021, the government filed a criminal complaint in the District Court. Neither the Complaint nor the Affidavit filed in support of the Complaint say anything about the Appellees' use of marijuana. On November 3, 2021, the government filed a six-count Indictment in the District Court. This brief

addresses only Counts Four and Five against Worster and Carl, respectively, which are identical except for the Defendant's name:

COUNT FOUR

(Marijuana User in Possession of Firearm and Ammunition)

> On or about August 31, 2021, in the District of Rhode Island, Defendant DAVID WORSTER, knowing that he was an unlawful user of a controlled substance as defined in 21 U.S.C. § 802, did knowingly possess a firearm and ammunition, specifically (1) one Henry Arms Repeating Arms Company AR-7 .22 caliber rifle (serial number US168714B), (2) 335 rounds of "C" .22 caliber ammunition, (3) 21 rounds of "Tulammo" .223 caliber ammunition, (4) 14 rounds of "Sig" 9mm ammunition, (5) 11 rounds of assorted 9mm ammunition (stamped "Sig," "Barnes" and "Blazer"), (6) 7 rounds of assorted .22 caliber ammunition (stamped "Rem" and "F"), (7) 2 rounds of "Blazer" 9mm ammunition, (8) 15 rounds of "C" .22 caliber ammunition, (9) 15 rounds of assorted .22 caliber ammunition (stamped "C," "F," and "Rem"), and (10) 30 rounds of "Tulammo" .223 caliber ammunition,
>
> In violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2).

Count Three alleges that Worster was a felon in possession of a firearm and ammunition. Counts Six and Seven allege Carl obtained a firearm through false statements. On October 3, 2024, Worster moved to dismiss Counts Three and Four of the Indictment on the grounds that they violated the Second Amendment. On November 4, 2024, Carl moved to dismiss Counts Five, Six, and Seven on the grounds they violated the Second Amendment. On February 5, 2025, the District Court issued a Memorandum and Order granting the motion as to Counts Four and

Five (as well as Six, and Seven), but denying it as to Count Three.[2] The government filed notices of appeal.

Summary of the Argument

The government's application of §922(g)(3) to the Appellees violates the Second Amendment because it would disarm them and all other users of marijuana regardless of whether their use renders their possession of firearms dangerous. The Supreme Court's decisions in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) ("Bruen"), and United States v. Rahimi, 602 U.S. 680 (2024) ("Rahimi"), demonstrate that this Court should consider analogous statutes from the Founding era which disarmed users of alcohol and the mentally ill only if their individual condition rendered their possession of firearms dangerous. In contrast, the government relies on numerous statutes passed after 1868.

Six other circuit courts have considered the issue since Bruen and all six have agreed that §922(g)(3) is unconstitutional if applied *per se* to bar firearm possession by a marijuana user. Rather, four have required the government specifically to allege or show that the individual defendant's marijuana use rendered his or her possession of a firearm dangerous. The government has not alleged, or even hinted, that it

[2] The government moved for reconsideration with respect to the dismissal of Counts Six and Seven against Carl which the District Court denied. The government has appealed the dismissal of those Counts. This brief does not address that aspect of the appeal.

intends to make any such showing regarding Appellees. One circuit has required that the government show that the defendant is or will be dangerous in some other respect. One has held that the defendant must have the opportunity to show he is not dangerous. The Supreme Court has already rejected the government's reliance on so-called surety laws as grounds for a general disarmament. The government's reliance on vagrancy statutes here is unprecedented and unfounded.

Argument

THE SECOND AMENDMENT PROTECTS APPELLEES' RIGHT TO POSSESS FIREARMS WHILE USERS OF MARIJUANA

The Appellees have a constitutional right to possess firearms and ammunition while users of marijuana. The first step of the analysis under Bruen is whether the Second Amendment's "plain text protects an individual's conduct." Id. at 17. If so, then the next step is whether the government can meet its burden of showing a "historical tradition of firearms regulation" that would allow it to bar the Appellees from possessing firearms and ammunition while being a marijuana user. Id.

The Appellees' possession of this firearm and ammunition is conduct protected by the Second Amendment, which says: "…the right of the people to keep and bear arms shall not be infringed." In United States v. Connelly, 117 F.4th 269, 274, (5th Cir. 2024), the defendant was arrested when she told police she occasionally used marijuana as a sleep aid, and a search of her home found a firearm that belonged to her. She was charged with violating §922(g)(3). The district court held the statute,

as applied to Connelly, violated the Second Amendment and the government appealed. The Fifth Circuit considered "[t]he threshold question of whether the Second Amendment applied to [Connelly]." It held: "Marijuana user or not, [Connelly] is a member of our political community and thus has a presumptive right to bear arms. By infringing on that right, §922(g)(3) contradicts the Second Amendment's plain text." Id. at 274.[3] Accordingly, the government bears the burden of showing a relevant historical tradition of firearms regulation that supports its position.

As a first step of that part of the analysis, this Court must consider what history is relevant to determining the historical tradition upon which Bruen says the analysis must be based. Bruen, at 26. The Bruen Court discussed what historical period could be important to the issue of public carry:

> The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. It is one thing for courts to "reac[h] back to the 14th Century" for English practices that "prevailed up to the 'period immediately before and after the framing of the Constitution.'" [citation omitted]. It is quite another to rely on an "ancient" practice that had become "obsolete in England at the time of the adoption of Constitution" and never "was acted upon or accepted in the Colonies." [citation omitted].

Id. at 34-35.

[3] All the circuit courts agree on this point. See, e.g., United States v. Harrison, No. 23-6028, 2025 WL 2452293 at *11 (10th Cir. Aug. 26, 2025)

The Court continued: "Similarly, we must guard against giving postenactment history more weight than it can bear." Id. at 35. "[W]e recognize that 'where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.'" [citation omitted]. Id. at 36. "Thus, 'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'" (emphasis original) [citation omitted]. Id. "As we recognized in Heller itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" [citation omitted]. Id.

The Court concludes this part of its analysis by "acknowledg[ing] there is an ongoing scholarly debate on whether courts should rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope…" Id. at 37. The Court determined it did not need to decide the issue because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." Id. at 38. Thus, the most relevant history was from 1791 to 1868.

The majority of subsequent federal court decisions concur. See, e.g., Wolford v. Lopez, 116 F.4th 959, 980 (9th Cir. 2024) ("We thus agree with the Second Circuit

that, at least when considering the 'sensitive place' doctrine, we look to the right to bear arms *both* at the time of the ratification of the Second Amendment in 1791 *and* at the time of the Second Amendment in 1868.") (emphasis original); Lara v. Commissioner Pennsylvania State Police, 91 F.4th 122, 129 (3rd Cir. 2024), vacated on other grounds sub. nom, Paris v. Lara, 145 S.Ct. 369 (2024) ("The question is 'whether historical precedent from before, during and even after the founding evinces a comparable tradition of regulation.'" [citations omitted].); Antonyuk v. Chiurmento, 89 F.4th 271, 304-05 (2nd Cir. 2023), vacated on other grounds sub. nom., Antonyuk v. James, 144 S.Ct. 2709 (2024) ("Because the [Concealed Carry Improvement Act] is a state law, the prevailing understanding of the right to bear arms in 1868 and 1791 are both focal points of our analysis."[4]); Bevis v. City of Napierville, 85 F.4th 1175, 1199 (7th Cir. 2023). Accordingly, firearms regulations from the late nineteenth century and later do not justify §922(g)(3).

Last year, the Supreme Court revisited the scope of Second Amendment rights in Rahimi. In that case, the issue was whether Rahimi could be disarmed because he was "dangerous." Rahimi physically abused his girlfriend, C.M., who was also the mother of his child, shot at her as she attempted to flee, and then threatened to shoot her if she reported the incident. C.M. went to Texas state court and obtained a

[4] This statement indicates that for a federal statute, such as §922(g)(3), the relevant historical tradition is that which prevailed in 1791.

restraining order that found Rahimi had committed "family violence," that this violence was likely to occur again, and that Rahimi posed a credible threat to C.M. and their child. The order barred Rahimi from threatening or contacting C.M. and her family for two years and suspended Rahimi's gun license for two years.

Rahimi subsequently violated the restraining order and committed other crimes, including shooting at other people. Pursuant to a warrant, police searched his apartment and found a pistol, a rifle, ammunition, and a copy of the restraining order. He was prosecuted for violating 18 U.S.C. §922(g)(8), which prohibits a person from possessing a firearm while subject to a domestic violence restraining order. The district court denied Rahimi's challenge that the statute violated his Second Amendment rights, but the Fifth Circuit reversed. The Supreme Court granted the government's petition for writ of certiorari.

The Supreme Court summarized the holding of Bruen and said:

> The appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.. A court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances. Discerning and developing the law in this way is a commonplace task for any lawyer or judge.

Id. at 1898 (citations omitted, cleaned up). The Court reviewed the history of firearms regulations first in England and then in the United States at the time of the founding to see whether there were analogous regulations to keep firearms out of the

hands of persons who had been found dangerous. It determined there was a historical tradition of such regulations, including surety laws and laws prohibiting persons from going armed to "terrify" other people. Notably, though, it specifically rejected the government's argument that Rahimi could be disarmed simply because he was not "responsible."

> "Responsible" is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In Heller and Bruen we used the term "responsible" to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. [citations omitted]. But those decisions do not define the term and said nothing about the status of citizens who were not "responsible." The question was simply not presented.

Id. at 1903. The Court reversed and remanded. Id. Accordingly, to justify its prosecution under §922(g)(3), the government must show "relevantly similar" laws during the relevant period that barred people from possessing firearms. Here, the government cannot do so.

Since Bruen and Rahimi were decided, the Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuit Courts of Appeals agree that §922(g)(3) violates the Second Amendment to the extent it would prevent a person from possessing firearms merely because he or she is a user of marijuana. United States v. Harrison, 2025 WL 2452293 at *26; Florida Comm'er of Agriculture v. Attorney General of the United States,148 F.4th 1307 (11th Cir. 2025); United States v. VanOchten, No. 23-1901, 2025 WL 2268042 at * 6-7 (6th Cir. Aug. 8, 2025); United States v. Perez, 145 F.4th

800, 807-08 (8th Cir. 2025) ("[W]e have already held that without more, neither drug use generally nor marijuana use specifically automatically extinguishes an individual's Second Amendment right."); United States v. Harris, 144 F.4th 154 (3rd Cir. 2025); United States v. Cooper, 127 F.4th 1092, 1098-99 (8th Cir. 2025); United States v. Daniels, 124 F.4th 967, 978-79 (5th Cir. 2025) (citing Connelly, supra, 117 F.4th at 282).

In Cooper, the Eighth Circuit rejected a facial challenge to §922(g)(3) but considered an "as-applied" challenge. The defendant was tried on stipulated facts and convicted under §922(g)(3) because he used marijuana 3-4 times a week while possessing a handgun. On appeal, the Eighth Circuit first considered whether historical statutes disarming the mentally ill were analogous to §922(g)(3). The court said: "The 'behavioral effects' of mental illness and drug use can 'overlap,' but only the subset of the mentally ill who were dangerous faced confinement and the loss of arms." 27 F.4th at 1095 (cleaned up). The court said that disarmament of drug users and addicts "must be limited to those who pose a danger to others." Id. (cleaned up). The court highlighted the difference between a person whose use of PCP induces violence and a frail and elderly grandmother who uses marijuana for a medical condition. Id.

The Eighth Circuit also rejected an argument that so-called "Terror of the People" laws, which prohibited carrying arms to terrify people, were an analogue.

The court said violation of these laws required more than "mere possession" of a weapon. Id. Rather, "an essential element was terrorizing behavior…accompanying the possession." [citation omitted]. Id. The court concluded this part of its analysis:

> These two analogues also frame the relevant questions for resolving Cooper's as-applied challenge. Did using marijuana make Cooper act like someone who is "both mentally ill and dangerous"? Did he "induce terror," or "pose a credible threat to the physical safety of others" with a firearm? [citation omitted]. Unless one of the answers is yes—or the government identifies a new analogue we missed—prosecuting him under §922(g)(3) would be "[in]consistent with this Nation's historical tradition of firearm regulation."

Id. at 1096 (cleaned up).

Finally, the Eighth Circuit considered whether intoxication laws were a potential analogue. However:

> Intoxication has been prevalent throughout our nation's history, but "earlier generations addressed that societal problem by restricting when and how firearms could be used, not by taking them away." Only later, in the mid-20th Century, did attention turn to the potential danger posed by mixing guns and drugs. These analogues make clear that "disarming *all* drug users," regardless of the individual danger they pose, is not comparable to anything from around the time of the Founding.

Id. at 1097 (cleaned up; emphasis original). The court remanded the case to the district court for further proceedings. Id. at 1098.

In Connelly, the Fifth Circuit held that historical laws disarming "lunatics" were not analogous to §922(g)(3) to the extent it disarms all users of marijuana: "Repeat marijuana users, like repeat alcohol users, are of sound mind upon regaining sobriety, whereas those adjudged severely mentally ill often require extensive

treatment and follow up examinations before they can be said to be of sound mind again." 117 F.4th at 276-77. Moreover, here, the government cites only three historical statutes—from Florida, Kansas, and North Carolina—disarming the mentally ill and they all date between 1881 and 1899, outside the relevant time period. (Government's Brief, p. 20, n.6).

The Fifth Circuit also rejected the government's argument that §922(g)(3) was analogous to historical statutes that disarmed certain groups deemed to be dangerous, such as Catholics or those who refused to take an oath of allegiance during the Revolutionary War. Id. at 277-79. It said: "Marijuana users are not a class of political traitors, as English loyalists were deemed to be. Nor are they like Catholics and other religious dissenters who were seen as potential insurrectionists." Id. at 278.

Lastly, the Fifth Circuit considered the argument that historical intoxication laws supported §922(g)(3). It said those laws were "primarily concerned with (1) misuse of weapons while intoxicated and (2) disciplining state militias." Id. at 280. It rejected the government's argument that regular marijuana use necessarily meant a person was under the influence when in physical possession of a firearm or when arrested. Id. at 282. "The history and tradition before us support, at most, a ban on carrying firearms while an individual is *presently* under the influence. By regulating [Connelly] based on habitual or occasional drug use, §922(g)(3) imposes a far greater burden on her Second Amendment rights than our history and tradition of

firearms regulation can support." Id. (emphasis original) It affirmed the dismissal of the charges as to the defendant's as-applied challenge. Id.

In Florida Comm'er of Agriculture, Florida users of medical marijuana filed suit seeking injunctive and declaratory relief that §922(g)(3) violated the Second Amendment to the extent it barred them from possessing firearms. The district court granted the government's motion to dismiss on the merits. On appeal, the Eleventh Circuit rejected the government's argument that historical statutes disarming felons were an analogue. The court pointed out that the complaint alleged that plaintiffs were committing a misdemeanor, not a felony, and the government had not identified any historical tradition of disarming misdemeanants.[5] 148 F.4th at 1318-19. Amicus would note, moreover, there is a companion federal statute that disarms felons, §922(g)(1). Interpreting §922(g)(3) to include a history of felonious conduct would render that statute superfluous.

The Eleventh Circuit also rejected the government's argument that statutes disarming the mentally ill were analogues because nothing in the complaint set forth any information that the plaintiffs could be considered dangerous "solely due to their marijuana use." Id. at 1319-20. Further, there was nothing in the complaint to support an argument that the plaintiffs were a "credible threat to the physical safety

[5] In Rhode Island, use of both medical and recreational marijuana is legal, R.I.Gen.L. §§21-28.6-1, et seq. and 21-28.11-1, et seq., respectively.

of others." Id. at 1320, quoting Rahimi, 602 U.S. at 700. The court concluded that the plaintiffs plausibly alleged that §922(g)(3) violated the Second Amendment as applied to them. Id. at 1321.

The Third Circuit's analysis in Harris differs somewhat from that of the Fifth, Eighth, and Eleventh Circuits, but ultimately it agrees that the mere fact of marijuana use is not sufficient under §922(g)(3) to disqualify a person from possessing a firearm: "In sum, §922(g)(3) temporarily and constitutionally restricts the gun rights of drug users only as long as they 'present a special danger of misusing firearms.'" Harris, 144 F.4th at 164, quoting, Pitsilides v. Barr, 128 F.4th 203, 211 (3rd Cir. 2025). The Third Circuit reversed the district court's denial of Harris' motion to dismiss the indictment. It remanded the case for a factfinding as to "how Harris' drug use affected his mental state and riskiness," including a variety of factors the district court should consider. Harris, 144 F.4th at 165.

Similarly, here, the government does not allege or argue that the Appellees were under the influence of marijuana at any time they were handling the firearm or even when they were arrested. The Indictment does not assert that the Appellees were likely risks of unsafe use of this firearm. The record at most indicates that they used marijuana and they also possessed a firearm. Nothing in the government's filings indicates it is prepared to prove anything more than that. The Second

Amendment does not permit the use of §922(g)(3) to disarm the Appellees based on those allegations.

In Harrison, the Tenth Circuit determined that §922(g)(3) addresses the dangers of mixing guns and intoxicants. 2025 WL 2452293 at *12. However, "when the Founders addressed the dangerous mixture of firearms and intoxicants, they seemed to disarm only intoxicated people." Id. at *13. It rejected the government's argument that laws disarming the mentally ill are relevant historical analogues. Id. at *15. "No matter what our historical tradition might reveal abut disarming the mentally ill, that principle is not broad enough to extend to non-intoxicated marijuana users under §922(g)(3)." Id.

However, the Tenth Circuit disagrees with the Fifth Circuit whether the relevant history permits the legislature to disarm people shown to prove a risk of future harm. Id. at *16. It finds historical statutes disarming Catholics and loyalists to be relevant in this regard, id. at *19, an argument the Fifth Circuit rejects. Connolly, 145 F.4th at 278-82. Ultimately, the court remanded for the district court to inquire "whether the government can justify its assertion that non-intoxicated marijuana users pose a risk of danger." Harrison, 2025 WL 2452293 at *25. This Amicus would point out that at the time those historical statutes were passed, Catholics and loyalists, as groups, were considered threats to overthrow the government. Nobody thinks marijuana users will join forces to attempt a coup.

Lastly, there is VanOchten, which presents a very different set of facts. There, sheriff's deputies responded to reports that a man was shooting a rifle in his backyard. Arriving at the defendant's home, they found him standing in his garage holding a Glock pistol. They learned he owned at least two Armalite rifles which he had been shooting in the direction of a propane tank in his backyard, aiming supposedly for a flock of birds. VanOchten was drunk and high on marijuana, which he said he used regularly. During a search of his home, the deputies found more firearms, ammunition, and three pipe bombs.

VanOchten subsequently was found guilty under state law for possessing a firearm while intoxicated and sentenced to probation. Under federal law, he was charged with possessing unregistered firearms (the pipe bombs). He pled guilty. The probation office's presentence report made a recommendation based on the assumption that he was also violating §922(g)(3) because he used marijuana while in possession of firearms. VanOchten argued this recommendation violated his Second Amendment rights. The district court agreed with the government and sentenced VanOchten to 52 months in prison. He appealed the sentence.

The Sixth Circuit initially rejected the government's argument that Congress "may categorically disarm classes of people it believes are dangerous." 2025 WL 2268042 at *5, citing United States v. Williams, 113 F.4th 637, 663 (6th Cir. 2024) (holding that Congress could use class-based legislation to disarm drug users

through §922(g)(3) because it judged them to be dangerous, so long as drug users have the opportunity to make an individualized showing that they are not actually dangerous). "For VanOchten, then, the government cannot strip him of his right to bear arms simply because he falls within a class of people Congress has deemed dangerous. Instead, he must have the opportunity to demonstrate he is not dangerous." Id. The Sixth Circuit analogized its decision to the historical statutes that a person could be disarmed if it was shown he was dangerous. Id. at *6. And the court said there was ample evidence that VanOchten was dangerous based on his actions the day he was arrested. Id. at *7. The Amicus would comment that the difference between the Sixth Circuit's decision and the historical statutes is the burden of proof. The Sixth Circuit places the burden on marijuana users to prove that they are not dangerous.

The Supreme Court has already rejected the government's reliance on one set of historical statutes, i.e., the surety laws, to eliminate Second Amendment rights based, in part, on the burden of proof. See, Bruen, 597 U.S. at 56, quoting, Mass.Rev.Stat., ch. 134, §16 (1836) ("[T]he surety statutes *presumed* that a person had a right to public carry that could be burdened only if another could make out a specific showing of a 'reasonable cause to fear an injury, or breach of the peace.'" (emphasis original)). In other words, the burden was on the prosecuting party to show the defendant was dangerous. Here, the government has made no allegation

that either Appellees' use of marijuana or their possession of a firearm gives "reasonable cause to fear an injury or breach of the peace."

The government argues that there are no historical statutes respecting marijuana use because there was no historical use of marijuana. While Amicus questions the accuracy of that argument,[6] it does not explain why statutes dealing with the use of firearms while intoxicated with alcohol are not a suitable analogue. As other circuit courts found, these statutes did not prohibit alcohol users from possessing firearms. They only prohibited use of firearms while intoxicated, i.e., when the substance rendered the person dangerous. See, United States v. Perez, 145 F.4th at 805. In that case the Eighth Circuit vacated the defendant's conviction under §922(g)(3). It commented:

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[6] To the contrary, "[i]n the U.S., cannabis was widely utilized as a patent medicine during the 19th and early 20th centuries, described in the *United States Pharmacopoeia* for the first time in 1850. Federal restriction of cannabis use and cannabis sale first occurred in 1937 with passage of the Marihuana Tax Act." Bridgeman, et al., "Medicinal Cannabis: History, Pharmacology, And Implications for the Acute Care Setting," P T. 2017 Mar;42(3):180 (footnotes omitted.) permalink: https://pmc.ncbi.nlm.nih.gov/articles/PMC5312634/ Accessed 8/14/25. See also declaration of Clayton Cramer, Appellee Worster's Supplemental Appendix.

Statutory restrictions upon and criminalization of marijuana surfaced first in 1937, with the Marihuana Tax Act, which also encompassed regulation of the industrial hemp market. See generally New Hampshire Hemp Council, Inc. v. Marshall, 203 F.3d 1 (1st Cir. 2000), cert. denied, 531 U.S. 828 (2000); Lundy v. Commonwealth, 511 S.W.3d 398 (Ky.Ct.App. 2017). ("Despite its industrial uses and value as an agricultural crop, hemp was ultimately criminalized under federal and state law.")

> First, the district court did not address whether marijuana *caused* Cordova Perez to act "mentally ill and dangerous," an inquiry slightly different from the court's finding that he acted violently or recklessly while using marijuana. Analogizing to the "mentally ill and dangerous," the proper question is whether Cordova Perez's marijuana use caused him to act in an outwardly erratic or aggressive manner that would, in context, be reasonably perceived as disturbing or dangerous to others.

Id. (cleaned up; emphasis original).The court continued:

> The government here did not provide enough evidence to show that marijuana use alone could reasonably be seen to make any user "an unacceptable risk of dangerousness" to others by merely possessing a firearm. Indeed, defining a class of drug users simply by the suggestion that they might sometimes be dangerous, without more, is insufficient for categorical disarmament.

Id. at *6 (cleaned up). But that is exactly what the government proposes to do to the Appellees.

For the first time, the government makes a variety of factual arguments about the alleged dangers of drug use, including marijuana, that it did not make below. (Government's Brief, pp. 33-38). The government's argument is essentially that marijuana use is *per se* dangerous to the public, especially when combined with firearm possession. However, many of the government's citations address drugs much more dangerous than marijuana, such as heroin, cocaine, methamphetamine, PCP, and fentanyl. The government relies on cases holding that the use of firearms in drug deals makes the deals more dangerous. But the Appellees are not charged with drug dealing. The government does not identify any study or report that says a

person in possession of a firearm is *per se* more dangerous if he is a user of marijuana. Regardless, that is an argument that may require expert testimony and should have been presented below.

Finally, the government's reliance on vagrancy statutes appears unprecedented as it cites no decisions doing so and Amicus has located none. It is worth noting that the Supreme Court declared vagrancy statutes unconstitutional in 1972. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or look suspicious to the police are to become future criminals is too precarious for a rule of law.").

The government argues that legislatures classified "common drunkards" as vagrants, that the "restraint" of habitual drunkards was a "well-established aspect of the State's power to protect 'public safety, health, and morals,'" and, because "habitual drunkards" were restrained, that means they could be disarmed. (Government's Brief, pp. 22-23, quoting Hamilton v. State, 152 U.S. 133, 136, (1894)). By our count, the government identifies only seven such historical statutes during the relevant period from before the Founding to 1868—Massachusetts (1699), New Hampshire (1718), Connecticut (1727), New Jersey (1799), Maine (1825), Rhode Island (1865), and Alabama (1871)—as compared to the thirty-seven states in the Union by 1868. (Government's Brief, pp. 22-23, nn. 9 and 10). Nineteen

percent of the possible jurisdictions hardly establish a historical tradition. See, Bruen, 597 U.S at 65-66, quoting Heller, 554 U.S 570, 632 (2008) ("[W]e will not 'stake our interpretation of the Second Amendment upon a single law in effect in a single [State] that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense.'").

Moreover, the government's reliance on those seven statutes is factually unfounded. It makes no showing that the Appellees are vagrants under any of them. For example, the oldest act, from Massachusetts in 1699, says counties may build "houses of correction" for the "keeping, correcting and setting to work" of "rogues, vagabonds, common beggars, and other leud, idle and disorderly persons…" It goes on to say that the county justices of the peace may "send and commit" to these houses:

> [A]ll rogues, vagabonds and idle persons going about in any town or county begging, or persons using any subtle craft, jugling or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending that they can tell destinies, fortunes, or discover where lost or stol'n goods may be found, common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common nightwalkers, pilferers, wanton and lascivious persons, either in speech or behavior, common railers or brawlers, such as neglect their callings, misspend what they earn, and do not provide for themselves or the support of their families; upon due conviction of any of the offences or disorders aforesaid.

(Id.).[7]

The act does not define "common drunkard," and a law professor has said that, under English common law, a conviction for drunkenness required more than intoxication: "'Mere drunkenness,'…'with no act beyond, is not indictable at the common law'…It is not the *drunkenness* but the *injury to other persons*, committed under the influence of alcohol that is relevant at law." Jerome Hall, "Drunkenness As a Criminal Offense," 32 J. Criminal L. & Criminology 297, 298 (1941-1942) (emphasis original). The same writer points out that in the United States, the terms "common drunkard" and "habitual drunkenness" often had different definitions, if defined. Apparently quoting an uncited statute, he says that a common drunkard in Rhode Island was a person who had been convicted of intoxication three times in six months or had been intoxicated three times in six weeks. Id. at 302. Conversely, in Massachusetts, a court had held, consistent with English common law, that a "common drunkard" was a person in the habit of getting drunk but also offending the public peace and order. Id. at 303. Regardless, the government has not alleged or even indicated it intends to prove Appellees' use of marijuana made them the

[7] Rhode Island's statute, passed in 1865, was similar: "Common drunkards, common night walkers, pilferers, lewd, wanton and lascivious persons, in speech or behavior, common railers and brawlers, persons who neglect all lawful business and habitually misspend their time by frequenting houses of ill-fame, gaming houses or tippling shops, and all persons who appear in the streets or in public in apparel usually worn exclusively by the opposite sex, shall be deemed disorderly persons."

equivalent of common drunkards. Historically, there were many people who used alcohol who were not common drunkards or vagrants. There are millions of marijuana users[8] who are not vagrants nor are they analogous to vagrants. Yet, the government would disarm all of them.

The government relies on cases that either do not apply or misapply the Bruen/Rahimi analysis or are based on very different facts. The government cites to this Court's decision in United States v. Tanco-Baez, 942 F.3d 7 (1st Cir. 2019), but wisely does not rely much on it because it was decided before Bruen and Rahimi. The Court did not engage in the kind of historical analysis dictated by the Supreme Court in those decisions. The case was also based on very different facts and procedural circumstances, especially whether the government had sufficiently corroborated admissions that one defendant, Cepeda, had allegedly made to police shortly after his arrest.

Regardless, the decision supports the Appellees' argument. The Court said that it had defined an "unlawful user" under §922(g)(3) as a person: (1) who used controlled substances regularly, (2) whose use took place over a long period of time, and (3) whose use was proximate to or contemporaneous with the person's possession of a firearm. Id. at 15. After disregarding the uncorroborated statements,

[8] "Percentage of U.S. adults that have used cannabis within the past yar in 2023, by state," https://www.statista.com/statistics/723822/cannabis-use-within-one-year-us-adults/ (last visited 09/21/25).

the Court found the corroborated evidence of Cepeda's drug use to be that he admitted to using marijuana on the day of his arrest. The Court held this was insufficient to sustain a conviction. Id. at 25. Here, Counts Four and Five allege nothing about the Appellees' history of drug use so they are insufficient to set forth a charge of violating §922(g)(3), even under this Court's precedent, nor does the government state it will prove more.

The government also relies on United States v. Posey, 655 F.Supp.3d 762 (N.D.Ind. 2023). The problem with Posey is that it relies on a Seventh Circuit decision, United States v. Yancey, 621 F.3d 681 (7th Cir. 2010) (per curiam), which predates both Bruen and Rahimi. (Obviously, Posey itself also predates Rahimi). Posey says this is appropriate because Yancey engages in the kind of historical analysis that Bruen mandates. 655 F.Supp. at 773.

But not so fast. The Seventh Circuit's historical analysis is not limited to the important period beginning at the time of the Second Amendment's ratification in 1791 to the ratification of the Fourteenth Amendment in 1868, as restricted by Bruen. To the contrary, the Yancey court appears to rely on many contemporary state statutes restricting "the right of habitual drug users or alcoholics to possess or carry firearms." 621 F.3d at 684 (listing statutes). Further, the Seventh Circuit says the historical statutes barring felons from possessing firearms are analogous to §922(g)(3). Id. at 684-85. However, the Supreme Court has made clear that statutes

barring felons from possession are longstanding, unlike §922(g)(3). See, Heller, 554 U.S. at 627 ("[N]othing in our opinion should be taken to cast doubt on long-standing prohibitions on possession of firearms by felons…"). Similarly, the Yancey court said §922(g)(3) was analogous to statutes barring possession of firearms by the mentally ill. Id. at 685-86. However, the court acknowledges that historically there were few such statutes because the mentally ill who were dangerous were locked up—so there was no need to bar other mentally ill persons from possession. Id. at 686.

Moreover, when Yancey was arrested, he was carrying a loaded pistol and .7 grams of marijuana. He confessed that he had been smoking marijuana daily for two years. He had twice been arrested for possession of marijuana during that period. Accordingly, Yancey may well have been under the influence of marijuana when he was arrested in possession of a firearm (although the decision does not say that). Finally, it appears Yancey made a facial challenge to §922(g)(3), not an as-applied challenge. These are important distinctions as there is nothing in the Indictment or Complaint alleging the Appellees are habitual drug users or that they were under the influence of marijuana at any time they had physical possession of the firearm.

CONCLUSION

The Court should affirm the District Court Memorandum and Order holding that Section 922(g)(3) violates the Second Amendment as applied to Appellees

David Worster and Alexzandria Carl on the allegations set forth in Counts Four and Five, respectively, of the Indictment.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the requirements of Rule 32(g)(1) because, excluding the parts of the brief exempted by Fed.R.App. P. 32(f), this brief contains 6421 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

/s/ Thomas W. Lyons

Attorney for Amicus Curiae American Civil Liberties Union of Rhode Island
Dated: October 8, 2025

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2025, a copy of the foregoing was filed and served electronically on all registered CM/ECF users through the Court's electronic filing system and served by email on attorneys for defendants. Parties may access this filing through the Court's CM/ECF system.

/s/ *Thomas W. Lyons*