No. 22-13893

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

VERA COOPER, et al.,

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Florida

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for defendants-appellees certify that, in addition to the persons listed on plaintiffs-appellants' Certificate of Interested Persons and Corporate Disclosure Statement, the following persons have an interest in the outcome of this appeal:

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs attack the constitutionality of a longstanding provision of the Gun Control Act. The federal government believes oral argument is therefore appropriate.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Dkt. No. 12, at 9. The district court entered final judgment on November 4, 2022. Dkt. No. 22. Plaintiffs filed a timely notice of appeal on November 16, 2023. Dkt. No. 23. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Federal law prohibits the possession of firearms by anyone who "is an unlawful user" of "any controlled substance." 18 U.S.C. § 922(g)(3). Plaintiffs' planned course of conduct brings them within the scope of that prohibition because they seek to possess firearms while engaging in the regular use of marijuana, which is a controlled substance under federal law. The issue presented is whether the district court correctly rejected plaintiffs' as-applied Second Amendment challenge to Section 922(g)(3).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Federal law has long restricted the shipment, transport, possession, and receipt of firearms by certain categories of individuals. One such disqualification, 18

U.S.C. § 922(g)(3), prohibits the possession of firearms by anyone who "is an unlawful user of or addicted to any controlled substance."

Congress adopted this disqualification to "keep firearms away from the persons [it] classified as potentially irresponsible and dangerous." *Barrett v. United States*, 423 U.S. 212, 218 (1976). Following a multi-year inquiry that included "field investigation and public hearings," S. Rep. No. 88-1340, at 1-2 (1964), Congress identified the "ready availability" of firearms to "narcotic addicts," "criminals," and "others whose possession of firearms is similarly contrary to the public interest" as "a matter of serious national concern," S. Rep. No. 90-1501, at 22 (1968). To address that concern, Congress barred the possession of firearms by various groups, including "unlawful user[s]" of certain drugs. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220-21 (codified at 18 U.S.C. § 922(g)(3)).

Under the governing regulations, an "[u]nlawful user" is someone who "is a current user" of a controlled substance, meaning that "the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct." 27 C.F.R. § 478.11. As this Court has explained, an "unlawful user" is therefore an individual whose drug use is "regular and ongoing . . . during the same time period as the firearm possession." *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003) (per curiam). Section 922(g)(3) thus does not restrict arms-bearing by someone who has "end[ed] his drug abuse." *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010) (per curiam).

2.a. The Controlled Substances Act establishes a comprehensive federal system for regulating drugs that are subject to abuse. *See* 21 U.S.C. § 801 *et seq*. Such drugs are classified as controlled substances and assigned to schedules "based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body." *Gonzales v. Raich*, 545 U.S. 1, 13-14 (2005) (citing 21 U.S.C. §§ 811, 812). The Act authorizes the Attorney General to alter a drug's schedule or remove it from the list of controlled substances if appropriate in light of statutory criteria. *See* 21 U.S.C. § 811, 812(b).

One of the drugs the Act designates as a controlled substance is marijuana. Because Congress determined that marijuana "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and has "a lack of accepted safety," it assigned marijuana to Schedule I, the most restricted schedule. 21 U.S.C. § 812(b)(1); *see id.* at § 812(b)(1), sched. I(c)(10). Possession of marijuana is thus a federal crime punishable by up to a year in prison, with escalating penalties for subsequent convictions. *See id.* at § 844(a). The sole lawful use of marijuana is for certain research purposes, an exception that is not relevant here. *See Raich*, 545 U.S. at 14.

Although Congress has repeatedly declined to alter marijuana's classification as a controlled substance, in recent years it has included in appropriations bills a provision known as the Rohrabacher-Farr Amendment. The Amendment specifies that "[n]one of the Funds made available under this Act to the Department of Justice

may be used, with respect to [jurisdictions with medical marijuana laws] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022). The Amendment does not alter marijuana's status as a controlled substance, the possession of which is "still clearly illegal." *Shulman v. Kaplan*, 58 F.4th 404, 411 (9th Cir. 2023).

The Executive Branch has likewise denied requests to alter marijuana's classification. *See, e.g.*, *Denial of Petition to Initiate Proceedings to Reschedule Marijuana*, 81 Fed. Reg. 53,688 (Aug. 12, 2016) (denial of rescheduling petition); *Krumm v. DEA*, 739 F. App'x 655 (D.C. Cir. 2018) (same); *see Raich*, 545 U.S. at 15 & n.23 (additional examples). The Executive Branch is, however, considering whether to change its approach, and in October 2022, the President directed "the Secretary of Health and Human Services and the Attorney General to initiate the administrative process to review expeditiously how marijuana is scheduled under federal law." White House, *Statement from President Biden on Marijuana Reform* (Oct. 6, 2022), https://perma.cc/6L6N-FAS6. That review is ongoing.

b. After the initial passage of the Rohrabacher-Farr Amendment, Florida revised its constitution to reflect that "medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law." Fla. Const. art. X, § 29(a)(1). The revision makes clear, however, that "[n]othing in this section requires the violation of federal law or

purports to give immunity under federal law." *Id.* § 29(c)(5). Indeed, Florida warns medical marijuana program participants that federal law continues to classify marijuana "as a Schedule I controlled substance." Fla. Stat. § 381.986(4)(a)(8)(a).

The same statute that implements Florida's medical marijuana program also recognizes that marijuana can impair skills relevant to the safe handling of firearms. In particular, the statute cautions that marijuana can impede "coordination, motor skills, and cognition." Fla. Stat. § 381.986(4)(a)(8)(e). Participants in Florida's medical marijuana program must therefore sign a consent form, *see id.* § 381.986(4)(a)(8), acknowledging that marijuana "can affect . . . the ability to think, judge and reason" and can produce side effects such as "dizziness, anxiety, confusion, . . . impaired motor skills, paranoia, [and] psychotic symptoms," Dkt. No. 14-1, at 2-3 (Florida Board of Medicine, Medical Marijuana Consent Form). Florida accordingly makes it a crime to drive a motor vehicle while under the influence of marijuana. *See* Fla. Stat. § 316.193(1); *id.* at § 381.986(14)(g) (explaining that participation in the medical marijuana program "does not exempt a person from prosecution for a criminal offense related to impairment or intoxication resulting from the medical use of marijuana").

B. Factual Background and Prior Proceedings

1. Plaintiffs are Florida residents who seek to possess firearms while regularly using marijuana. Plaintiffs Vera Cooper and Nicole Hansell are current participants in Florida's medical marijuana program who acknowledge that their status as "unlawful

user[s]" of a controlled substance prevents them from purchasing firearms. Dkt. No. 12, at 11-12 (Am. Compl. ¶¶ 29-34). Plaintiff Neill Franklin currently possesses a firearm and claims that she refrains from participating in Florida's medical marijuana program to avoid violating Section 922(g)(3). *See id.* at 13 (Am. Compl. ¶¶ 35-37).

Plaintiffs request declaratory and injunctive relief directing that they be permitted to possess firearms even if they regularly use marijuana. *See* Dkt. No. 12, at 45 (Am. Compl.). Plaintiffs acknowledge that Section 922(g)(3) and related statutory and regulatory provisions preclude that result, *see id.* at 4-5, but assert that those provisions are unconstitutional as applied to them.

2. The district court granted the government's motion to dismiss. As an initial matter, the court recognized that in *District of Columbia v. Heller*, the Supreme Court described the class of individuals to whom the Second Amendment right extends as "law-abiding, responsible citizens." Dkt. No. 21, at 9 (District court op.) (quoting 554 U.S. 570, 635 (2008)). The district court also observed that in *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court approved certain licensing regimes because they ensure "that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" Dkt. No. 21, at 10 (quoting 142 S. Ct. 2111, 2138 n.9 (2022)). Given these precedents, the court found it "difficult to dismiss" the proposition that plaintiffs, like others whose conduct removes them from the class of law-abiding and responsible citizens, fall outside the Second Amendment's scope. *Id.*

The district court did not definitively resolve that issue, however, because it determined that "laws precluding medical marijuana users from possessing firearms [are] 'consistent with this Nation's historical tradition.'" Dkt. No. 21, at 11 (quoting *Bruen*, 142 S. Ct. at 2126). The court explained that under the test articulated in *Bruen*, a modern law survives Second Amendment scrutiny so long as it is "relevantly similar" to a historical "analogue." *Id.* at 11 (quoting 142 S. Ct. at 2132). Applying that test, the district court identified multiple historical analogues confirming that Section 922(g)(3) is constitutional. The court reasoned, for example, that Section 922(g)(3) is "comparable" to various historical laws "restricting gun possession of the intoxicated." *Id.* at 17. The court also analogized Section 922(g)(3) to historical "[l]aws keeping guns from the mentally ill" because both "marijuana users" and the "mentally ill" can "be dangerous when armed." *Id.* at 18 (citing *Yancey*, 621 F.3d at 683). And the court similarly understood Section 922(g)(3), which applies to individuals who regularly possess and use illegal drugs, as consistent with the historical tradition authorizing legislatures to "disarm[] those engaged in criminal conduct." *Id.* at 12-13.

In rejecting plaintiffs' attempts to distinguish these analogues, the district court emphasized that "[r]equiring an analogue with the specificity [p]laintiffs demand would arguably prevent the government from restricting *any* illegal drug users from possessing guns." Dkt. No. 21, at 14. And although plaintiffs sought to differentiate marijuana from other drugs by suggesting that the Rohrabacher-Farr Amendment

establishes that marijuana users "are not really engaged in criminal conduct," the court explained that the Amendment "does not make marijuana users law-abiding citizens." *Id.* at 13. To the contrary, the court recognized that "Congress considered marijuana possession serious business." *Id.* at 15 (citing 21 U.S.C. 844(a) (imposing prison sentences of up to a year for simple marijuana possession). The court accordingly held that Section 922(g)(3) is "consistent with the history and tradition of this Nation['s] firearm regulation." *Id.* at 19.

C. Standard of Review

The Court reviews the district court's grant of a motion to dismiss de novo. *See Chance v. Cook*, 50 F.4th 48, 51 (11th Cir. 2022).

SUMMARY OF ARGUMENT

For more than 50 years, federal law has prohibited the possession of firearms by any "unlawful user" of controlled substances. 18 U.S.C. § 922(g)(3). Plaintiffs admit that their planned course of conduct brings them within the scope of this prohibition because they seek to possess firearms while regularly using marijuana, a controlled substance. Plaintiffs argue, however, that the federal law prohibiting the concurrent use of drugs and firearms is unconstitutional.

As the district court recognized, Section 922(g)(3) is consistent with the Second Amendment. The Supreme Court has repeatedly described the class of individuals to which the Second Amendment right extends as "law-abiding, responsible citizens," *see, e.g., District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *New York State Rifle &*

Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2156 (2022), and this Court has implemented that principle by approving various laws disarming groups outside that class. Here, likewise, Section 922(g)(3) applies to those who remove themselves from the class of law-abiding, responsible citizens when they unlawfully consume controlled substances known to impair the skills needed to safely handle firearms. The commonsense proposition that regular users of illegal drugs are not law-abiding, responsible citizens is reflected in courts' overwhelming rejection of Second Amendment challenges to Section 922(g)(3), both before and after *Bruen*.

This "Nation's historical tradition of firearm regulation" confirms that legislatures have authority to prohibit the possession of firearms by regular users of controlled substances. *Bruen*, 142 S. Ct. at 2126. Although drugs like marijuana, cocaine, and fentanyl were not in common use at the founding, contemporaries recognized that alcohol renders users unable to safely bear arms and perceived those who regularly became intoxicated as threatening the social and political order. Legislatures accordingly adopted a variety of measures calculated to mitigate the risks created by the combination of alcohol and firearms. As illegal drugs proliferated around the turn of the twentieth century, numerous jurisdictions enacted additional regulations, including laws disarming those addicted to drugs. In recent times, "many states" have likewise "restricted the right of habitual drug abusers or alcoholics to possess or carry firearms." *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010)

(per curiam). Section 922(g)(3) thus reflects a tradition stretching from the founding to the present.

Plaintiffs concede that historical tradition permits legislatures to disarm those under the influence of intoxicants and those addicted to drugs. In nonetheless contending that legislatures cannot disarm regular users of controlled substances, plaintiffs rely on a misguided approach to historical analysis that the Supreme Court rejected in *Bruen*. The question under *Bruen* is not whether Section 922(g)(3) mirrors a "historical *twin*" but whether it is "relevantly similar" to a "historical *analogue*." 142 S. Ct. at 2132-33. Viewed from that perspective, the historical record is replete with evidence demonstrating that legislatures may prohibit arms-bearing by regular users of intoxicating substances, especially when those substances are illegal. Although plaintiffs seek to use marijuana, their arguments on this score are not limited to marijuana and would instead cast doubt on Congress's ability to disarm unlawful users of any controlled substance, including cocaine, fentanyl, or methamphetamines.

Endeavoring to escape the breadth of their theory, plaintiffs advance several grounds upon which they purport to distinguish unlawful users of marijuana from unlawful users of other controlled substances. But although plaintiffs note that the Rohrabacher-Farr Amendment may limit the prosecution of certain marijuana possession offenses, the Amendment leaves undisturbed Congress's judgment that marijuana is a controlled substance the users of which cannot responsibly possess firearms. And although plaintiffs insist that the Second Amendment forbids Congress

from disarming groups it has not prioritized for prosecution, historical legislatures often adopted similar approaches. No more successful is plaintiffs' attempt to contest marijuana's intoxicating effects: plaintiffs failed to raise this argument in district court, and in any event they identify no proper basis for disregarding legislative determinations that marijuana impairs users' ability to safely bear arms.

ARGUMENT

The District Court Correctly Rejected Plaintiffs' Constitutional Challenge

In a recent decision, this Court interpreted the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n v. Bruen* as establishing a two-step test for resolving Second Amendment challenges. *See National Rifle Ass'n v. Bondi*, No. 21-12314, 2023 WL 2484818, at *3 (11th Cir. Mar. 9, 2023) (citing 142 S. Ct. 2111, 2126-27 (2022)). At step one, the challenger must show that they fall within "the plain text of the Amendment, as informed by the historical tradition." *Id.* If the challenger clears that hurdle, step two dictates that the challenged law be upheld so long as it accords with a "historical analogue." *Id.* "[H]istorical sources" therefore "bear on both inquiries." *Id.* Plaintiffs' Second Amendment challenge to Section 922(g)(3) fails at each step.

A. Unlawful Users of Controlled Substances Fall Outside the Class of Law-Abiding, Responsible Citizens to Whom the Supreme Court has Determined the Second Amendment Right Extends

The Supreme Court has described the Second Amendment right as belonging to "law-abiding, responsible citizens," *District of Columbia v. Heller*, 554 U.S. 570, 635

(2008), and plaintiffs do not contest that understanding of the right's scope. As the courts of appeals have consistently recognized, unlawful users of controlled substances cannot be classified as law-abiding, responsible citizens.

1. The Constitution protects "the right to keep and bear Arms," U.S. Const. amend. II, but "[l]ike most rights, the right secured by the Second Amendment is not unlimited," *Heller*, 554 U.S. at 626. Because the Second Amendment "codif[ied] a pre-existing right," *id.* at 603, courts discern that right's limits by "examin[ing] a variety and legal and other sources" from our Nation's history, *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1044 (11th Cir. 2022) (quoting *Heller*, 554 U.S. at 605). As this Court has explained, the "particular history" of the right "to keep and bear Arms" shows that the right "extended (and thus extends) to some categories of individuals, but not others." *Jimenez-Shilon*, 34 F.4th at 1044.

In surveying the right's history, the Supreme Court has repeatedly described the class of individuals to which the right extends as "law-abiding, responsible citizens." *See, e.g.*, *Heller*, 554 U.S. at 635; *Bruen*, 142 S. Ct. at 2156. Consistent with that understanding of the right's scope, the Court in *Heller* warned that "nothing in [its] opinion should be taken to cast doubt" on "longstanding prohibitions on the possession of firearms," including regulations disarming "felons and the mentally ill." 554 U.S. at 626. *Heller* listed these regulations "only as examples" and left the identification of additional categories of lawful regulations "to future evaluation." *Id.* at 627 n.26, 635. A plurality of the Court "repeat[ed]" *Heller*'s "assurances" in

McDonald v. City of Chicago, 561 U.S. 742, 786 (2010), and in *Bruen*, six Justices reiterated those assurances yet again.[1]

The same historical sources the Supreme Court invoked in identifying an individual right to bear arms also reflect that the right is limited to "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635. For example, *Heller* described as a "highly influential" "Second Amendment precursor[]," *id.* at 603-04, a proposal by delegates to Pennsylvania's constitutional convention stating that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals," 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971). As the D.C. Circuit has observed, this proposal "indicates that criminals, in addition to those who posed a 'real danger' (such as the mentally ill, perhaps) were proper subjects of disarmament." *Medina v. Whitaker*, 913 F.3d 152, 158-159 (D.C. Cir. 2019). And although the proposal did not prevail at the

[1] *See Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring) (reiterating that "longstanding prohibitions on the possession of firearms by felons" are constitutional under *Heller* and *McDonald* (quoting *Heller*, 554 U.S. at 626)); *id.* at 2157 (Alito, J., concurring) (explaining that *Bruen* did not "disturb[] anything that [the Court] said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns" (citation omitted)); *id.* at 2189 (Breyer, J., joined by Sotomayor and Kagan, JJ., dissenting) (agreeing that "the Court's opinion" should be understood as "cast[ing] no doubt on [the] aspect of *Heller*'s holding" permitting felons and the mentally ill to be prohibited from possessing firearms); *see also New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1540-41 (2020) (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting) (recognizing that "history support[s] the constitutionality of some laws limiting the right to possess a firearm," including laws "prohibiting possession by felons and other dangerous individuals").

Pennsylvania convention, it was vindicated four years later through the adoption of the Bill of Rights, eight provisions of which—including the Second Amendment—echoed a set of amendments first proposed by the Pennsylvania delegates. 2 Schwartz at 628. "[I]nfluential" proponents of the Second Amendment thus understood the "pre-existing right" the Amendment codified as permitting legislatures to disarm individuals who either demonstrated disrespect for the law or who threatened public safety. *Heller*, 554 U.S. at 603-04.

This Court has accordingly recognized that the Supreme Court's description of the right as limited to "*law-abiding* and *qualified* individuals[] . . . is not dicta" and has approved a variety of regulations disarming individuals outside that class. *United States v. Rozier*, 598 F.3d 768, 771 & n.6 (11th Cir. 2010). In *Rozier*, for example, the Court concluded that "statutes disqualifying felons from possessing a firearm under any and all circumstances do not offend the Second Amendment." *Id.* at 771. In *Jimenez-Shilon*, the Court similarly noted, in the course of addressing a different Second Amendment question, that "those suffering from mental illness[] . . . may be prohibited from possessing firearms without offending the Second Amendment." 34 F.4th at 1046. And in *United States v. White*, the Court explained that while the federal law disarming domestic-violence misdemeanants is absent from "*Heller*'s list," it "warrants inclusion" because it regulates "dangerous" individuals. 593 F.3d 1199, 1205-06 (11th Cir. 2010) (citation omitted). What these cases have in common is that

in each, the Court endorsed regulations disqualifying individuals who are not law-abiding, responsible, or both.

2. Section 922(g)(3) does not restrict arms-bearing by law-abiding, responsible citizens. Two features of the statute compel that conclusion. First, the term "unlawful user" refers to an individual engaged in "regular and ongoing" law violations. *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003) (per curiam). Second, those law violations involve the use of "controlled substances" known to impair the skills needed to safely handle firearms, *see, e.g.*, Fla. Stat. § 381.986(4)(a)(8)(a), (4)(a)(8)(e) (recognizing that marijuana can impede "coordination, motor skills, and cognition"). Thus, Section 922(g)(3) disarms individuals who are neither law-abiding nor responsible with respect to firearms.

Although this Court has not yet squarely addressed a Second Amendment challenge to Section 922(g)(3), other courts of appeals have consistently recognized that the prohibition is analogous to the restrictions "on the possession of firearms by felons and the mentally ill" endorsed by the Supreme Court and this Court. *Heller*, 554 U.S. at 626. The Fifth Circuit has explained that "like felons," regular drug users "pose a risk to society" and may therefore be constitutionally disarmed. *United States v. Patterson*, 431 F.3d 832, 835-36 (5th Cir. 2005); *see United States v. May*, 538 F. App'x 465, 466 (5th Cir. 2013) (unpublished) (reiterating that disarming "unlawful users of controlled substances" is consistent with the Second Amendment). The Ninth Circuit has similarly held that "like career criminals and the mentally ill," regular drug users

"more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances." *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011). And the Eighth Circuit has likewise concluded that Section 922(g)(3) "has the same historical pedigree as other portions of § 922(g)," including the provisions disarming felons and the mentally ill that this Court has approved. *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010).

The Supreme Court's decision in *Bruen* reinforces the conclusion that Section 922(g)(3) is constitutional. Although *Bruen* invalidated New York's "may issue" licensing regime, it approved "shall-issue" regimes that "require applicants to undergo a background check."[2] 142 S. Ct. at 2138 n.9; *see id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring) ("[S]hall-issue licensing regimes are constitutionally permissible[] . . . ."). Those background checks often preclude the public carriage of firearms by individuals with felony convictions, adjudications of mental illness or commitments to mental institutions, and recent drug use.[3] Because these types of

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[2] A "shall issue" regime is one in which "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements." *Bruen*, 142 S. Ct. at 2123. By contrast, a "may issue" regime vests "authorities [with] discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria." *Id.* at 2124.

[3] *See, e.g.*, Colo. Rev. Stat. § 18-12-203(1)(f) (permit unavailable to any "unlawful user of . . . a[ny] controlled substance"); Miss. Code. § 45-9-101(2)(e) (license unavailable to those who "chronically or habitually abuse controlled substances"); N.C. Gen. Stat. § 14-415.12(b)(5) (permit unavailable to any "unlawful user of . . . marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other

Continued on next page.

prerequisites are "designed to ensure only that those bearing arms in [a] jurisdiction are, in fact, 'law-abiding, responsible citizens,'" the Supreme Court indicated that they generally pass constitutional muster. 142 S. Ct. at 2138 n.9 (majority op.) (quoting *Heller*, 554 U.S. at 635). *Bruen* therefore reflects that unlawful drug users, like those convicted of felonies or suffering from mental illnesses, are not law-abiding, responsible citizens constitutionally entitled to possess firearms.

Courts have thus overwhelmingly rejected Second Amendment challenges to Section 922(g)(3), both before and after *Bruen*. No court of appeals has ever sustained such a challenge, and at least a half dozen circuits have denied them. *See, e.g.*, *United States v. Carter*, 750 F.3d 462, 466-68 (4th Cir. 2014); *United States v. Yancey*, 621 F.3d 681, 683-87 (7th Cir. 2010); *United States v. Richard*, 350 F. App'x 252, 260 (10th Cir. 2009); *Patterson*, 431 F.3d at 835-36; *Dugan*, 657 F.3d at 999; *Seay*, 620 F.3d at 925. Although some court of appeals opinions apply the means-ends test *Bruen* eschewed, several others—including the Fifth, Eighth, and Ninth Circuit opinions cited above—rest on the analogy between Section 922(g)(3) and the "longstanding prohibitions" *Heller* endorsed, 554 U.S. at 626, and on which six Justices in *Bruen* took pains not to cast doubt, *see, e.g.*, 142 S. Ct. at 2162 (Kavanaugh, J., joined by Roberts, C.J., concurring).

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controlled substance"); 18 Pa. Stat. and Cons. Stat. § 6109(e)(1)(vi) (license unavailable to any "unlawful user of marijuana or a stimulant, depressant or narcotic drug"); Va. Code. § 18.2-308.09(8) (permit unavailable to any "unlawful user or distributor of, marijuana, synthetic cannabinoids, or any controlled substance").

In keeping with these authorities, to the government's knowledge 12 of 13 district courts to confront challenges to Section 922(g)(3) after *Bruen* have rejected them.[4] The lone outlier proceeded primarily not by distinguishing Section 922(g)(3) from the longstanding prohibition disqualifying felons but by questioning the constitutionality of that prohibition as well, *see United States v. Harrison*, No. CR-22-00328-PRW, 2023 WL1771138, at *9-17 (W.D. Okla. Feb. 3, 2023)—an incorrect result which no other federal court has embraced and which flatly contradicts this Court's precedent, *see Rozier*, 598 F.3d at 771; *United States v. Posey*, No. 2:22-CR-83 JD, 2023 WL 1869095, at *9 n.9 (N.D. Ind. Feb. 9, 2023) (observing that *Harrison* represents a "dramatic departure from existing precedent"). Indeed, since *Bruen* more than a hundred district courts have repudiated challenges to the felon-dispossession provision. *See Range v. Att'y Gen.*, 53 F.4th 262, 268 n.6 (3d Cir. 2022) (collecting

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[4] In addition to the district court decision at issue here, those decisions are: *United States v. Black*, No. 22-133-01, 2023 WL 122920, at *2-4 (W.D. La. Jan. 6, 2023); *United States v. Beverly*, No. 2:21-cr-36, slip op. at 1-4 (N.D. W. Va. Jan. 3, 2023); *United States v. Connelly*, No. EP-22-cr-229(2)-KC, 2022 WL 17829158, at *1-4 (W.D. Tex. Dec. 21, 2022); *United States v. Daniels*, No. 1:22-cr-58-LG-RHWR-1, 2022 WL 2654232, at *2-5 (S.D. Miss. July 8, 2022); *United States v. Kelley*, No. 5:22-cr-395, slip op. at 1-11 (W.D. Okla. Jan. 13, 2023); *United States v. Lewis*, No. CR-22-368-F, 2023 WL 187582, at *1-5 (W.D. Okla. Jan. 13, 2023); *United States v. Posey*, No. 2:22-CR-83 JD, 2023 WL 1869095, at *2-6 (N.D. Ind. Feb. 9, 2023); *United States v. Randall*, No. 4:22-CR-99, slip op. at 2-6 (S.D. Iowa Feb. 14, 2023); *United States v. Sanchez*, No. W-21-CR-00213-ADA, 2022 WL 17815116, at *2-4 (W.D. Tex. Dec. 19, 2022); *United States v. Seiwert*, No. 20-CR-443, 2022 WL 4534605, *1-3 (N.D. Ill. Sept. 28, 2022); *United States v. Stennerson*, CR-22-139-BLG-SPW, 2023 WL 2214351, at *1-3 (D. Mont. Feb. 24, 2023); *United States v. Veasley*, No. 4:20-cr-209, slip op. at 2-4 (S.D. Iowa Sept. 22, 2022); *see also State v. Wilfong*, 881 S.E. 2d 426, 429 (W. Va. 2022).

dozens of examples), *vacated upon granting of reh'g en banc*, No. 21-2835, 2023 WL 118469 (Jan. 6, 2023).[5]

3. Plaintiffs do not dispute that the Second Amendment right belongs to "law-abiding, responsible citizens." Br. 2-3 (quoting *Bruen*, 142 S. Ct. at 2131). Plaintiffs also do not dispute that those convicted of felonies, disqualified based on mental illness, and convicted of misdemeanor crimes of domestic violence fall outside the Second Amendment's scope. *See* Br. 27, 31, 40. Plaintiffs nonetheless contend (at 23-40) that unlike those groups, unlawful drug users qualify as law-abiding, responsible citizens entitled to possess deadly weapons.

But plaintiffs fail to refute the analogy between the prohibition on the possession of firearms by felons and the prohibition in Section 922(g)(3). Although plaintiffs emphasize (at 24) that simple drug possession is a misdemeanor under federal law, the district court correctly observed that Congress considers drug possession "serious business" punishable by up to a year in prison, Dkt. No. 21, at 252 (citing 21 U.S.C. § 844(a)). And as noted above, to implicate Section 922(g)(3)

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[5] A panel of the Fifth Circuit recently invalidated Section 922(g)(8), a provision restricting firearm possession by persons subject to qualifying protective orders. *See United States v. Rahimi*, 59 F.4th 163, *withdrawn and superseded by* No. 21-11001, 2023 WL 2317796 (5th Cir. Mar. 2, 2023). The government will seek further review. *See* U.S. Dep't of Justice, *Statement from Attorney General Merrick B. Garland Regarding United States v. Rahimi* (Feb. 2, 2023), https://perma.cc/764J-PNS7. In any event, even *Rahimi* recognized that some groups "have historically been stripped of their Second Amendment rights," and did not purport to resolve the historical basis for disarming groups other than those subject to Section 922(g)(8). 2023 WL 2317796, at *4.

plaintiffs must engage not just in an isolated instance of drug possession, but in drug use that is "regular and ongoing" at the time they possess firearms. *Edmonds*, 348 F.3d at 953; *see United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010) (per curiam) (emphasizing that under Section 922(g)(3), an individual can "regain his right to possess a firearm simply by ending his drug abuse"). Congress recognized the heightened significance of repeat violations by providing that individuals with a prior drug possession conviction may be imprisoned for over a year, *see* 21 U.S.C. § 844(a), making such repeat offenses felonies, *see* 18 U.S.C. § 3156(a)(3) (defining a felony as "an offense punishable by a maximum term of imprisonment of more than one year").

Plaintiffs also fail to refute the analogy between Section 922(g)(3) and prohibitions disarming individuals with mental illnesses. Handling firearms safely requires care, caution, and self-control. Those characteristics are compromised by the use of controlled substances. Marijuana, for example, "can affect . . . the ability to think, judge and reason" and can produce "dizziness, anxiety, confusion, . . . impaired motor skills, paranoia, [and] psychotic symptoms." Dkt. No. 14-1, at 2-3 (Florida Board of Medicine, Medical Marijuana Consent Form). These effects may cause unlawful drug users to store firearms in unsafe ways, allow others to access their firearms, or otherwise handle firearms carelessly. It is therefore "beyond dispute that illegal drug users," like those with mental illnesses, "are likely . . . to experience altered

or impaired mental states that affect their judgment and that can lead to irrational or unpredictable behavior." *Wilson v. Lynch*, 835 F.3d 1083, 1094 (9th Cir. 2016).

Section 922(g)(3) is thus comparable both to laws disarming those who commit serious crimes and to laws disarming those who cannot be trusted to handle firearms safely. In combining these rationales, Section 922(g)(3) parallels the "prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence" upheld by this Court. *White*, 593 F.3d at 1205-06. Both prohibitions disarm individuals who commit serious misdemeanors subject to substantial punishment. And both provisions disqualify those who Congress deemed "potentially irresponsible and dangerous," *Barrett v. United States*, 423 U.S. 212, 218 (1976)—because of a demonstrated propensity for violence, in the case of domestic violence misdemeanants, and because of impaired judgment and self-control, in the case of unlawful drug users. It follows that Section 922(g)(3) is analogous to each of the prohibitions this Court has previously concluded pass constitutional muster and that unlawful users of controlled substances are not law-abiding, responsible citizens to whom the Second Amendment right extends.

B. Historical Analogues Confirm Legislatures' Authority to Disarm Unlawful Users of Controlled Substances

This "Nation's historical tradition of firearm regulation" reflects that the Second Amendment does not strip legislatures of their authority to prohibit regular users of illegal drugs from possessing firearms. *Bruen*, 142 S. Ct. at 2126. Indeed,

plaintiffs acknowledge that "those currently under the influence of intoxicants," drug "addicts," and "alcoholics" were all subject to "historical disarmament." Br. 43-45. These undisputed historical analogues confirm that the modern prohibition on firearm possession by unlawful users of controlled substances is consistent with the Second Amendment.

1. The founders recognized that intoxicating substances render users unable to responsibly bear arms.

Central to Founding Era political theory was the link between rights and reason. The leading legal commentator of the era, William Blackstone, described the "rights of every Englishman" as "founded on nature and reason." 1 William Blackstone, *Commentaries on the Laws of England* 123 (1765). And John Locke, whose thinking "permeated the 18th-century political scene in America," *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (quotation marks omitted), likewise explained that the rights of "children," "lunatics," and "idiots" could be limited because those groups had not achieved a "state of reason," John Locke, *Two Treatises of Government* 324-28 (Peter Laslett ed., Cambridge 1960).

Consistent with these principles, Founding Era legislatures restricted the rights of various groups deemed lacking in reason. As Locke's reference to children suggests, those under the age of majority were regarded as having insufficient "judgment" to partake in political rights, Nat'l Archives, *Letter from John Adams to James Sullivan, 26 May 1776*, https://perma.cc/M5KR-JKLL, a category which included the

rights to vote, serve on juries, and bear arms, *see* Akhil Reed Amar, *The Bill of Rights* 48 (1998); *see also Bondi*, 2023 WL 2484818, at *7-12 (cataloging numerous historical state laws restricting access to firearms based on age and upholding a law under *Bruen* that imposed an age-based qualification on purchasing firearms). And as *Heller*'s approval of prohibitions "on the possession of firearms by . . . the mentally ill" likewise reflects, 554 U.S. at 626, at the founding "those afflicted with mental diseases were generally treated as though they had been stripped of all . . . their rights and privileges," Albert Deutsch, *The Mentally Ill in America: A History of their Care and Treatment from Colonial Times* 41 (1949). Indeed, "in eighteenth-century America, justices of the peace were authorized to 'lock up' 'lunatics' who were 'dangerous to be permitted to go abroad.'" *Yancey*, 621 F.3d at 685 (quoting Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1377 (2009), in turn quoting Henry Care, *English Liberties, or the Free-Born Subject's Inheritance* 329 (6th ed. 1774)).

The Second Amendment's ratifiers understood that just as immaturity and mental illness deprive individuals of reason, so do intoxicating substances. Benjamin Franklin, for example, expressed the widespread view that excessive alcohol use left the user "destitute of Reason." Nat'l Archives, *Silence Dogood, No. 12, 10 Sept. 1722*, https://perma.cc/8TVL-PJEG. Benjamin Rush, a signer of the Declaration of Independence and a prominent physician, similarly equated drunkenness with a "temporary fit of madness." Benjamin Rush, *An Inquiry into the Effects of Ardent Spirits*

on the Mind and Body 6 (Richardson 1812); *see also* Carl Erik Fisher, *Urge: Our History of Addiction* 47 (Penguin 2022) (noting that "eighteenth-century writers" understood "habitual drinking" as a form of "insanity"). And Thomas Jefferson placed "drunkards" in the same category as "infants," "maniacs" and others who "cannot take care of themselves." Nat'l Archives, *Letter from Thomas Jefferson to Samuel Smith, 3 May 1823*, https://permia.cc/2CJB-N7RS (Jefferson Letter).

As Thomas Jefferson's reference to "drunkards" reflects, those who regularly became intoxicated were viewed as particularly irresponsible. The writings of influential Founding Era figures are replete with condemnations of "drunkards." *See, e.g.*, Nat'l Archives, *Letter from John Adams to William Willis, 21 Feb. 1819*, https://perma.cc/AG9Z-Z8CP (Adams Letter). And those individuals were subject not just to criticism, but to community-imposed constraints. In Massachusetts, for instance, "lists of problem drunkards were in circulation and tavernkeepers were required to refuse service to those 'habitual tipplers.'" Christine Sismondo, *America Walks Into a Bar: A Spirited History of Taverns and Saloons, Speakeasies and Grog Shops* 17 (Oxford 2014); *see* Edward Field, *The Colonial Tavern* 19 (Preston and Rounds 1897) (reproducing a representative tavern bond requiring that the tavern keeper refuse to "entertain" anyone identified by "the magistrates of the county as . . . given to tippling").

Regularly intoxicated individuals were also perceived as threats to the social and political order. John Adams warned that "[a] drunkard is the most selfish being in the

universe" and has "no sense of duty" or "sympathy of Affection" with "his neighbour." Adams Letter. Likewise, Benjamin Rush predicted that an increase in "intemperate and corrupted voters" would put "the republic . . . in danger." Rush, *supra*, at 24. James Madison similarly recognized that "the corrupting influence of spiritous liquors" was "inconsistent with the purity of moral and republican principles." Nat'l Archives, *Defeated for Election to Virginia House of Delegates, [24 April] 1777*, https://perma.cc/K28R-8A5E.

2. Historical legislatures accordingly adopted a variety of measures calculated to separate firearms and alcohol.

It is common ground (*see* Br. 43-44) that historical tradition permits legislatures to prohibit the possession of a firearm while intoxicated. During the nineteenth century, for example, numerous states—including Kansas, Mississippi, Missouri, and Wisconsin—imposed criminal penalties on intoxicated individuals who possessed, used, or received firearms or pistols.[6] As an influential Missouri Supreme Court

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[6] *See* Kan. Sess. Laws 25, § 282 (1867) ("any person under the influence of intoxicating drink" may not "carr[y] on his person a pistol . . . or other deadly weapon"); 1878 Miss. Laws 175-76 § 2 (making it unlawful to sell pistols and certain other weapons to a "person intoxicated"); Mo. Rev. Stat. § 1274 (1879) (prohibiting carrying "any kind of firearms" "when intoxicated or under the influence of intoxicating drink"); 1883 Wis. Sess. Laws 290, Offenses Against Lives and Persons of Individuals, ch. 329 § 3 ("It shall be unlawful for any person in a state of intoxication, to go armed with any pistol or revolver."); *see also* 1909 Id. Sess. Laws 6, no. 62, § 1 (making it a crime for "any person" to "have or carry" any "pistol, revolver, gun or any other deadly or dangerous weapon" when "intoxicated, or under the influence of intoxicating drinks"); 1890 Okla. Sess. Laws 495, art. 47, § 4 (officers may not "carry[]

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decision explained, these laws comport with the right to bear arms because they mitigate the "mischief" that may result "from an intoxicated person going abroad with fire-arms." *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886). *Heller* described such nineteenth century laws as a "critical tool of constitutional interpretation," 554 U.S. at 605; *see also Bondi*, 2023 WL 2484818, at *5 (holding that Reconstruction Era sources are "probative . . . on the scope of the Second Amendment right"), and plaintiffs thus appropriately concede (at 39, 43-45) that such laws form part of the relevant historical tradition, *see Bruen*, 142 S. Ct. at 2130 n.6 (confirming that "the principle of party presentation" applies in Second Amendment cases).

Other historical laws regulated individuals deemed likely to become intoxicated while bearing arms. As early as 1655, Virginia prohibited "shoot[ing] any gunns at drinkeing [events]," regardless of whether attendees actually became intoxicated. Act XII of 1655, 1655 Va. Laws 401, 401-02. A 1771 New York law likewise barred firing guns during the New Year's holiday, a restriction that "was aimed at preventing the 'great Damages . . . frequently done on [those days] by persons . . . being often intoxicated with Liquor.'" *Heller*, 554 U.S. at 632 (first two alterations in original) (quoting Ch. 1501, 5 Colonial Laws of New York 244-46 (1894)). In a similar vein, a 1731 Rhode Island law forbade the firing of "any gun or pistol" in any tavern at night,

. . . arms while under the influence of intoxicating drinks"); 1899 S.C. Acts 97, No. 67, § 1 (forbidding "boisterous conduct" while "under the influence of intoxicating liquors," including "discharg[ing] any gun" near a public road).

a time and place where people were at a heightened risk of drinking to excess. An Act for preventing Mischief being done in the town of Newport, or in any other Town in this Government, 1731 R.I. Sess. Laws, pp. 240-41. None of these laws focus on intoxicated individuals alone; instead, they limit the use of firearms by broader groups legislatures viewed as likely to become intoxicated.

That legislatures held significant authority to restrict the combination of firearms and alcohol is further illustrated by historical militia laws. As the Second Amendment's text indicates, the framers recognized that armed members of the militia must be "well-regulated," U.S. Const. amend. II, a term that at the time connoted "discipline," *Heller*, 554 U.S. at 597, and "self-control," Michael Waldman, *The Second Amendment: A Biography* 61 (Simon & Schuster 2014). For that reason, at least one state excluded "common drunkards" from the militia, *see* 1844 R.I. Pub. Laws 503-16, § 1, and many others forbade the sale of "any Strong Liquor" near locations where militias mustered and trained.[7] These laws further confirm that the founders understood the risks created when alcohol and firearms coincide and did not

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[7] *See* An Act for Regulating the Militia of the Province of Maryland (1756), in 2 Arthur Vollmer, U.S. Selective Serv. Sys., *Military Obligation: The American Tradition* pt. 5, Maryland at 93 (1947); An Act for Establishing a Militia in this Government (1756), in 2 *Military Obligation*, *supra*, pt. 3, Delaware at 13; An Act for better settling and regulating the Militia of this Colony of New-Jersey, for the repelling of Invasions, and Suppressing Insurrections and Rebellions (1746) (§§ 3, 23), in 2 *Military Obligation*, *supra*, pt. 8, New Jersey at 25; An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania (1780) (§ XLV and § XLVIII(12th)), in 2 *Military Obligation*, *supra*, pt. 11, Pennsylvania at 97, 100.

intend the Second Amendment to cabin legislatures' substantial latitude to address the problem of intoxicated individuals possessing firearms.

3. As the use of drugs other than alcohol became widespread in America, legislatures began to criminalize the use and possession of those drugs. Such criminal prohibitions were often followed by firearms regulations. Those regulations reflected both legislatures' authority to keep firearms out of the hands of irresponsible individuals and their additional authority, repeatedly recognized by the Supreme Court, to regulate arms-bearing by those who are not "law-abiding." *See, e.g.*, *Bruen*, 142 S. Ct. at 2122; *Heller*, 554 U.S. at 625; *see also Range*, 53 F.4th at 271-81 (collecting examples of historical laws disarming individuals whose conduct demonstrated "disrespect for the rule of law").

The historical laws canvassed above primarily address arms-bearing by users of alcohol, a substance that—with certain exceptions such as Prohibition—has generally been legal throughout American history. Drugs other than alcohol were not widely used as intoxicants in the United States until the late nineteenth and early twentieth centuries. *See* David F. Musto, *Drugs in America: A Documentary History* 188-192 (NYU 2002). Prohibitions on narcotic and marijuana use accordingly did not emerge until around the 1880s and the early twentieth century, respectively. *See* Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 996 (1970); *id.* at

1010 (noting that Utah passed the first state prohibition on cannabis sale or possession in 1915).[8]

As illegal substances proliferated, so too did associated firearms regulations. Particularly relevant here are statutes prohibiting arms-bearing by those addicted to drugs. For example, a 1931 Pennsylvania statute established that "[n]o person shall deliver a firearm . . . to one who he has reasonable cause to believe . . . is a drug addict." 1931 Pa. Laws 499, no. 158, § 8. Following Pennsylvania's lead, jurisdictions across the country—including the District of Columbia, Alabama, California, South Dakota, and Washington—passed laws barring the sale of firearms or pistols to "drug addict[s]." *See* 47 Stat. 652, § 7 (1932); 1936 Ala. Laws 52, no. 82, § 8; *In re Rogers*, 66 P.2d 1237, 1238 (Cal. Dist. Ct. App. 1937); 1935 S.D. Sess. Laws 356, ch. 208, § 8; 1935 Wash. Sess. Laws 601, ch. 172, § 8.

In a testament to the strength of this historical tradition, prohibitions on firearms possession by unlawful drug users remain prevalent today. Along with the nationwide federal prohibition at issue in this case, the laws of at least twenty-six states and the District of Columbia "have restricted the right of habitual drug abusers

[8] Although plaintiffs assert in their statement of the case that marijuana was sometimes "prescribed as a medication" from "the Seventeenth Century through the early-to-mid Twentieth Century," they do not develop any argument based on that assertion. Br. 7. That is unsurprising, as scholars observe that even in the 1930s, Americans lacked "any lengthy or broad experience" with marijuana. Musto, *supra*, at 192. Founding and Reconstruction Era legislatures thus had no occasion to consider whether to criminalize marijuana or disarm its users.

or alcoholics to possess or carry firearms." *Yancey*, 621 F.3d at 684 (collecting examples). Section 922(g)(3) thus stands in stark contrast to the "outlier[]" laws the Supreme Court invalidated in *Bruen* and *Heller*. *Bruen*, 142 S. Ct. at 2156; *see id.* at 2161 (Kavanaugh, J., joined by Roberts, C.J., concurring) (emphasizing the "unusual" nature and "outlier" status of the New York law in *Bruen*); *Heller*, 554 U.S. at 629 (noting that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban"). Unlike those exceptional laws, Section 922(g)(3) reflects a historical tradition that stretches from the founding to the present, and it therefore comports with the Second Amendment.

4. Plaintiffs concede (at 43-45) that historical tradition permits legislatures to disarm those "currently under the influence of intoxicants" and those "addicted to" drugs. Plaintiffs nonetheless contend (at 42) that the Second Amendment's ratifiers would not have allowed legislatures to disarm individuals engaged in regular and ongoing drug use.

a. If adopted, plaintiffs' contention would carry wide-ranging consequences. Although plaintiffs seek to use marijuana, their arguments on this score are not limited to marijuana and could therefore cast doubt on legislatures' authority to disarm unlawful users of any controlled substance, including substances such as cocaine, fentanyl, and methamphetamines. *See* 21 U.S.C. § 812, sched. I-II (identifying these and other drugs as controlled substances). Nothing in Second Amendment doctrine or history justifies that extraordinary result.

To the contrary, plaintiffs' contention reflects a misguided analytical approach that *Bruen* rejected. In directing that courts consider "this Nation's historical tradition of firearm regulation," *Bruen* warned that history does not impose "a regulatory straightjacket." 142 S. Ct. at 2132-33. Thus, the question is not, as plaintiffs seem to suggest, whether a modern law mirrors a "historical *twin*." *Id.* Rather, the question is whether the modern law is "relevantly similar" to a "historical *analogue*." *Id.* That "analogical inquiry" involves a review of "two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.*

Those metrics establish that Section 922(g)(3) is "relevantly similar" to the historical laws canvassed above, including laws making it a crime to possess firearms while intoxicated and disarming those addicted to drugs. With respect to the "why" metric, both Section 922(g)(3) and historical laws mitigate the "mischief" threatened when intoxicated individuals "go[] abroad with fire-arms." *Shelby*, 2 S.W. at 469; *cf. Bondi*, 2023 WL 2484818, at *12 (finding the "why" metric satisfied where a modern law and its historical predecessors imposed similar restrictions with the similar purpose of "enhanc[ing] public safety"). And with respect to the "how" metric, both Section 922(g)(3) and historical laws disarm individuals who currently or recurringly use drugs that impair their ability to possess firearms responsibly.

b. Both laws disarming currently intoxicated individuals and laws disarming those addicted to drugs provide "historical analogue[s]" confirming Section 922(g)(3)'s constitutionality. *Bruen*, 142 S. Ct. at 2133.

First, plaintiffs fail to reconcile their cramped view of Congress's authority with historical laws making it a crime to possess firearms while intoxicated. Plaintiffs do not suggest they will surrender their firearms every time they use marijuana. Plaintiffs will accordingly possess firearms while intoxicated and thus fall within the class of individuals subject to disarmament under these historical laws. And although plaintiffs imply (at 39) that individuals in that class were permitted to retrieve their firearms the second they became sober, many were subject to substantial prison sentences during which they would have been forbidden from possessing firearms. *See, e.g.*, 1883 Mo. Laws 76 (authorizing up to six months imprisonment for those who possessed firearms while intoxicated); 1883 Wis. Sess. Laws 290, ch. 329, § 3 (similar). Both Section 922(g)(3) and this category of historical laws thus disarm similar groups for similar lengths of time.

In nonetheless attempting to distinguish these laws, plaintiffs disregard the historical tradition vesting legislatures with additional authority to restrict arms-bearing by those engaged in criminal conduct. As noted above, *see supra* pp. 28-29, historical laws making it a crime to possess firearms while intoxicated generally regulated users of alcohol, a legal substance. The modern prohibition at issue here, by contrast, is limited to "unlawful user[s]" of controlled substances. 18 U.S.C. § 922(g)(3). Section 922(g)(3) is thus even less restrictive than historical intoxication regulations because it only affects individuals engaged in unlawful activity.

Second, plaintiffs are no more successful in their attempt to differentiate Section 922(g)(3) from historical laws prohibiting the possession of firearms by those addicted to drugs, which plaintiffs concede (at 43-45) form part of the relevant tradition. Although plaintiffs assert that regular drug users are not comparable to those addicted to drugs because the latter individuals cannot "control" their drug use, Br. 41-42, that assertion has no bearing on either of the two "metrics" *Bruen* identified, 142 S. Ct. at 2133. To start, the modern and historical prohibitions are "comparably justified," *id.*: The rationale for disarming regular drug users—that their frequent intoxication makes their possession of firearms incompatible with public safety—applies regardless of whether an individual's drug use is volitional or attributable to addiction. And the modern and historical prohibitions also involve "comparable burden[s]," *id.*: Both preclude arms-bearing until an individual "end[s] his drug abuse," *Yancey*, 621 F.3d at 686. If even these close parallels are not enough to satisfy plaintiffs, then it is difficult to imagine any historical law other than a "*twin*" that would do so. *Bruen*, 142 S. Ct. at 2133; *see also Bondi*, 2023 WL 2484818, at *9 (emphasizing that historical analogues need not be "precisely the same" as their modern antecedents).

c. The importance of looking for "historical *analogues*," as the Supreme Court has directed, rather than "historical *twins*," is confirmed by the "unprecedented social concerns and dramatic technological changes" separating 1791 from the present. *Bruen*, 142 S. Ct. at 2132-33. At the founding, narcotics were far less common than

they are today, *see* Musto, *supra*, at 188-92, "social norms" largely restrained "intemperance," Mark Edward Lender & James Kirby Martin, *Drinking in America: A History* 15 (1987), and the cumbersome nature of eighteenth-century firearms mitigated the risk created by intoxicated individuals, *see* Randolph Roth, *Why Guns Are and Aren't the Problem*, *in* Jennifer Tucker, et al., *A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 117 (2019). Today, by contrast, potent narcotics have proliferated, *see, e.g.*, *United States v. McClellan*, 44 F.4th 200, 217 (4th Cir. 2022) (Wilkinson, J., dissenting) (observing that in 2021, "drug overdoses killed 108,000 Americans, the highest number in our nation's history"), Congress has identified arms-bearing by drug users as "a matter of serious national concern," S. Rep. No. 90-1501, at 22, and "advances made in firearm technology" have multiplied "the amount of carnage a single person can inflict in a short period," *Bondi*, 2023 WL 2484818, at *13. Under these changed circumstances, plaintiffs' rigid approach both disregards *Bruen*'s warning against converting history into a "straightjacket" and makes little practical sense. 142 S. Ct. at 2133.

Although plaintiffs' position is not entirely clear, they at points seem to assert that the Supreme court in *Bruen* imposed a more stringent test. Specifically, they suggest that Section 922(g)(3) must be "distinctly similar" rather than "relevantly similar" to historical laws. *Compare* Br. 28 n.10 (noting that "it appears possible" that *Bruen* imposes a "distinctly similar" standard in some cases, but stating that the Court need not "resolve that question in this matter"), *with* Br. 37-38 (asserting that "the

question before the Court is whether" unlawful drug users "are distinctly similar to any group that has historically be[en] disarmed"). But as *Bruen* itself makes clear, and as this Court recently confirmed, the Supreme Court has set out a single legal test, rooted in "analogical reasoning," that turns on whether a modern law is "relevantly similar" to "historical analogue[s]." 142 S. Ct. at 2131-33; *see Bondi*, 2023 WL 2484818, at *6-7 (interpreting *Bruen* as establishing one test that is satisfied when a modern law is "relevantly similar" to "historical analogue[s]") (quoting 142 S. Ct. at 2133). In any event, either test would be satisfied by the close parallels between Section 922(g)(3) and the historical laws discussed above.

d. The extent of plaintiffs' misunderstanding of applicable law is exemplified by their assertion (at 40-41, 45) that an ATF regulation defines as unlawful drug users even those who engage in isolated or long-ago instances of drug use. That assertion does nothing to advance plaintiffs' as-applied challenge because plaintiffs fail to allege that their drug use would be isolated or distant-in-time from their firearm possession. This Court's precedent requires that an "unlawful user" engage in "regular and ongoing use of a controlled substance," *Edmonds*, 348 F.3d at 953, and the operative complaint accordingly reflects that plaintiffs engage (or plan to engage, in the case of plaintiff Franklin) in "regular and ongoing" use of marijuana, *id.*; *see, e.g.*, Dkt. No. 12, at 11-13 (Am. Compl. ¶¶ 29, 32, 36) (Cooper "takes and has taken medical marijuana"; Hansell "uses medical marijuana to successfully treat" a chronic medical condition; Franklin likewise has a medical condition for which he would like to use

marijuana). There is thus no cause to consider the outer bounds of the statute or the regulation.

Regardless, plaintiffs are wrong to suggest (at 41) that the cited regulation indicates that a failed drug test "within the past year" conclusively establishes a defendant's status as an unlawful drug user. 27 C.F.R. § 478.11. To the contrary, the regulation makes clear that although a failed test may support "[a]n inference of current use," such an inference can be rebutted by evidence showing that the defendant is no longer "actively engaged" in the unlawful use of controlled substances. *Id.*

C. That Plaintiffs Are Unlawful Users of Marijuana, Rather Than Another Controlled Substance, Does Not Alter the Second Amendment Analysis

Throughout their brief, plaintiffs suggest that the question whether Section 922(g)(3) may constitutionally be applied to them turns on the fact that they use (or wish to use) marijuana, rather than another drug. But plaintiffs identify nothing in the text or history of the Second Amendment, this Court's precedent, or any other source to support their contention that Congress may constitutionally disarm unlawful users of drugs like heroin or cocaine but cannot disarm unlawful users of marijuana.

1. Plaintiffs' reliance on the Rohrabacher-Farr Amendment is unavailing.

a. As explained above, Section 922(g)(3) embodies a legislative judgment that unlawful users of controlled substances cannot be trusted with lethal weapons. In enacting Section 922(g)(3), Congress identified an increase in "gun murders," "armed

robberies," and "firearms assaults," and attributed part of that increase to "narcotic addicts[] . . . and others whose possession of firearms is similarly contrary to the public interest." S. Rep. 90-1501, at 22. Unlawful drug users are thus among the "potentially irresponsible and dangerous" individuals Congress sought to disarm. *Barrett*, 423 U.S. at 218.

Congress determined that marijuana users in particular are unable to responsibly possess firearms. The prohibition as originally enacted singled out marijuana, the only drug identified by name in the statute, as of particular concern. *See* 82 Stat. at 1220-21 (prohibiting the receipt of firearms by any individual "who is an unlawful user of . . . marihuana or any depressant or stimulant drug . . . or narcotic drug"). And when Congress revised the prohibition, it barred firearm possession by unlawful users of "any controlled substance" as "defined in section 102 of the Controlled Substances Act," which includes marijuana. Firearm Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452 (1986) (codified at 18 U.S.C. § 922(g)(3)).

Despite repeated opportunities to alter marijuana's status, Congress has not wavered from its determination that marijuana is a Schedule I substance the users of which cannot safely bear arms. Since 2015 Congress has, however, included in a series of appropriations riders a provision known as the Rohrabacher-Farr Amendment. The Amendment specifies that funds appropriated to the Department of Justice may not be used "to prevent any [states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

See, e.g., Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 531, 136 Stat. 4459, 4561 (2022).

As important as what the Rohrabacher-Farr Amendment does is what it does not do. The Amendment leaves undisturbed marijuana's status as a Schedule I controlled substance, the users of which are disqualified from bearing arms under Section 922(g)(3). The Amendment also leaves undisturbed 21 U.S.C. § 844(a), the provision making it a federal crime to possess marijuana. Thus, the use of marijuana is "still clearly illegal under federal law," *Shulman v. Kaplan*, 58 F.4th 404, 411 (9th Cir. 2023), as is the possession of firearms by individuals engaged in "regular and ongoing" marijuana use, *Edmonds*, 348 F.3d at 953.

Many of plaintiffs' arguments rely on an expansive understanding of the Rohrabacher-Farr Amendment that has no basis in the Amendment's text. For example, plaintiffs suggest (at 36) that the Amendment reflects a legislative determination that armed marijuana users pose a "less serious" threat to public safety than armed users of other drugs. But whether to prosecute regular users of marijuana and whether to prevent them from bearing arms represent distinct policy questions, and no one could read the Amendment as addressing the latter question. Plaintiffs also err in asserting, as the district court put it, that "they are not really engaged in criminal conduct." Dkt. No. 21, at 13; *see, e.g.*, Br. 37 (claiming that the Amendment "effectively encourage[s]" marijuana use). "[I]t is beyond dispute that the use and possession of marijuana—even where sanctioned by a State—remains a violation of

federal law." *United States v. Cannon*, No. 22-1569, 2022 WL 2063436, at *1 (3d Cir. June 8, 2022). And to the extent plaintiffs suggest that the Amendment removes them from the category of "unlawful user[s]" covered by Section 922(g)(3), that contention is wrong but would serve, in any event, only to support a statutory claim, not the constitutional claim plaintiffs advance here.

b. Rather than accept the Rohrabacher-Farr Amendment's limits, plaintiffs urge (at 34-37) that the Second Amendment converts Congress's time-limited decision about how to allocate certain Department of Justice resources into a far-reaching judgment that marijuana users can be trusted with firearms. That argument fails on many fronts: It is inconsistent with the Supreme Court's understanding of the Second Amendment right as extending to law-abiding and responsible citizens; divorced from *Bruen* and historical tradition; and unworkable in practice.

As an initial matter, the Rohrabacher-Farr Amendment does not transform plaintiffs into "law-abiding, responsible citizens" to whom the right to bear arms extends. *Bruen*, 142 S. Ct. at 2156. Plaintiffs concede that marijuana possession remains "illegal[]," Br. 8 n.2, and their planned course of conduct thus entails repeated violations of federal law. An individual who violates the decades-old federal prohibition on drug possession, yet avoids punishment as a result of a time-limited change in enforcement resources, is not therefore law-abiding. That is especially true here, where plaintiffs have been warned that marijuana remains "a Schedule I controlled substance" under federal law. Fla. Stat. § 381.986(4)(a)(8)(a). And of

course, the Amendment does nothing to diminish marijuana's intoxicating effects, which continue to impair users' "coordination, motor skills, and cognition," *id.* § 381.986(4)(a)(8)(a), (4)(a)(8)(e), rendering them unable to responsibly possess firearms.

The Supreme Court's decision in *Bruen* confirms that plaintiffs' reliance on the Rohrabacher-Farr Amendment is misplaced. *Bruen* contemplates a comparison between a "modern firearm regulation" and the relevant "historical analogue[s]," with a particular focus on "how and why the regulations burden a law-abiding citizen's right to armed self-defense." 142 S. Ct. at 2132-33. The Rohrabacher-Farr Amendment plays no part in that comparison. It does not itself restrict armed self-defense and it does not indirectly affect Section 922(g)(3)'s scope because it preserves marijuana's status as a controlled substance. Indeed, the Amendment makes no difference to the "two metrics" *Bruen* identified: whether Section 922(g)(3) and historical laws are "comparably justified" and whether they "impose a comparable burden." *Id.* at 2133. Both before and after the Amendment, Section 922(g)(3)'s justification, which is to disarm "potentially irresponsible and dangerous" individuals, *Barrett*, 423 U.S. at 218, and its effect, which is to "separat[e] guns and drugs," *Yancey*, 621 F.3d at 687, remain the same.

Plaintiffs' arguments are also incompatible with historical tradition. Under plaintiffs' theory, historical legislatures would not have been permitted to prohibit the possession of firearms by any group without also subjecting that group to criminal

prosecution. In practice, however, legislatures often disarmed groups deemed irresponsible or untrustworthy regardless of whether those groups encountered criminal sanctions. For instance, plaintiffs do not dispute (at 39-40) that legislatures could disarm those affected by mental illness and do not suggest that those individuals were prosecuted as a result of their illness. There can likewise be no dispute as to legislatures' authority to bar children from possessing firearms, even though they obviously are not subject to punishment because of their age. *See, e.g.*, *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009) (upholding, based on a historical analysis, the federal prohibition on handgun possession by individuals under the age of 18); *Bondi*, 2023 WL 2484818, at *6-13 (cataloging historical laws restricting access to firearms by 18-to-20-year-olds). And as detailed above, many historical legislatures prohibited firearm possession by individuals "under the influence of intoxicating drink" without making alcohol itself illegal. *Shelby*, 2 S.W. at 469; *see supra* p. 25-28 (additional examples). As these examples attest, plaintiffs err in asserting that the Second Amendment compels Congress to disarm only those groups it subjects to criminal prosecution.

Conflating those distinct policy choices would produce serious practical consequences and ignore the nature of an appropriations rider. Plaintiffs' theory would imbue nuanced changes in drug policy like the Rohrabacher-Farr Amendment with consequences far beyond Congress's intent. Their theory also threatens to tie the Second Amendment's scope to resource-allocation decisions that may fluctuate from

year to year, administration to administration, and even from one prosecutor's office to another. That shifting and unpredictable approach to Second Amendment analysis disserves the interests of regulated individuals and law enforcement officers alike and finds no support in Supreme Court precedent or historical tradition.

2. Plaintiffs' remaining arguments provide no basis for disregarding Congress's judgment that marijuana users cannot safely possess firearms.

Plaintiffs' suggestion (at 46) that marijuana is not an intoxicating substance fails on multiple grounds. For one thing, plaintiffs forfeited this assertion by electing not to meaningfully dispute marijuana's impairing effects in district court. *See, e.g.*, Dkt. No. 15, at 28 (acknowledging that marijuana's "side effects" include "dizziness, anxiety, memory loss, depression, [and] impaired judgment"). Indeed, even plaintiffs' opening brief concedes (at 43-45) that "currently" intoxicated marijuana users and those "addicted to marijuana" can be disarmed, a concession that would make little sense unless marijuana impairs users' faculties.

In any event, plaintiffs fail to grapple with federal and Florida laws embodying legislative determinations that marijuana is an intoxicating substance. The Florida statute with which plaintiffs claim to comply indicates that marijuana can impede "coordination, motor skills, and cognition," Fla. Stat. § 381.986(4)(a)(8)(a), (4)(a)(8)(e), and the "standardized informed consent form," *id.* § 381.986(4)(a)(8), that Florida has adopted similarly recognizes that marijuana can disrupt "the ability to think, judge and reason," Dkt. No. 14-1, at 2-3. Consistent with that recognition, Florida makes it a

crime to drive a motor vehicle while under the influence of marijuana. *See* Fla. Stat. § 316.193(1); *id.* § 381.986(14)(g) (noting that participation in the medical marijuana program "does not exempt a person from prosecution for a criminal offense related to impairment or intoxication resulting from the medical use of marijuana"). And again, Congress has determined, based on the same objective criteria it applies to other drugs, *see* 21 U.S.C. § 812(b), that marijuana qualifies as a Schedule I controlled substance, *see id.* § 812(b)(1), sched. I(c)(10). Nowhere do plaintiffs engage with these legislative determinations or explain why they are insufficient to establish marijuana's impairing effects.

Plaintiffs likewise err (at 44-45) in accusing the district court of assuming that they are "addicted to marijuana." The district court used the term "habitual user" not to imply addiction, *see* Dkt. No. 21, at 18, as plaintiffs insist, but as a shorthand for someone whose regular use of illegal drugs makes them an "unlawful user" within the meaning of Section 922(g)(3), *see Habitual*, Merriam-Webster, https://perma.cc/9F4U-BBL (defining "habitual" as "regularly or repeatedly doing or practicing something or acting in some manner"). That understanding of a habitual user pervades the case law, including authorities the district court discussed. *See, e.g.*, *Yancey*, 961 F.3d at 682 (referring to a defendant who "regularly ingest[ed] controlled substances," but who the Court did not identify as a drug addict, as a "habitual drug user[]").

Plaintiffs fare no better in urging (at 45-46) that their asserted status as "state law-compliant medical marijuana users" entitles them to disregard Section 922(g)(3).

To the extent plaintiffs suggest that Florida can override Congress's judgment that marijuana users cannot safely possess firearms, they are mistaken. As the Florida law on which plaintiffs rely recognizes, a state medical marijuana program cannot and does not countermand federal law. *See* Fla. Const. art. X, § 29(c)(5) (confirming that nothing in the amendment establishing the medical marijuana program "requires the violation of federal law or purports to give immunity under federal law"). To the extent plaintiffs suggest that compliance with state rules might show that they can be trusted with firearms, they are likewise mistaken. If following state rules could excuse federal violations, those state rules would have the practical effect of nullifying federal law. Plaintiffs identify no authorities supporting such an end-run around the Supremacy Clause, and the government has found none. *See Kordash v. United States*, 51 F.4th 1289, 1293 (11th Cir. 2022) (explaining that the "Supremacy Clause enshrines the basic principle that federal law supersedes state law whenever they conflict").

Regardless, Florida has made clear that it does not endorse plaintiffs' planned course of conduct. To carry a firearm in public in Florida, an individual must generally hold a concealed-carry permit. *See* Fla. Stat. § 790.01(1); *see id.* § 790.053(1) (barring open carry of most weapons, including firearms). Those permits are unavailable, however, to those who are "prohibited from purchasing or possessing a firearm by . . . federal law," including Section 922(g)(3). Fla. Stat. § 790.06(2)(n). Florida has thus signaled its disapproval of plaintiffs' plan to both regularly use

marijuana and to carry firearms in public. *See* Dkt. No. 12, at 11-13 (Am. Compl. ¶¶ 30, 33).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,363 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

s/ Steven H. Hazel
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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system, except for the following, who will be served via mail at the following addresses:

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ADDENDUM

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18 U.S.C. § 922

§ 922. Unlawful acts

. . . .

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile--

. . .

> (3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

. . . .

(g) It shall be unlawful for any person—

. . .

> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

. . . .

21 U.S.C. § 844

§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000.

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21 C.F.R. § 478.11

§ 478.11. Meaning of terms

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this subpart. Words in the plural form shall include the singular, and vice versa, and words importing the masculine gender shall include the feminine. The terms "includes" and "including" do not exclude other things not enumerated which are in the same general class or are otherwise within the scope thereof.

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Unlawful user of or addicted to any controlled substance. A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. 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 that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use 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, e.g., a conviction for use or possession of a controlled substance within the past year; multiple arrests for such offenses within the past 5 years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, nonjudicial punishment, or an administrative discharge based on drug use or drug rehabilitation failure.

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