

**NO. 22-13893**

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

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VERA COOPER,  
NICOLE HANSELL,  
NEILL FRANKLIN,

*Plaintiffs–Appellants,*

v.

ATTORNEY GENERAL OF THE UNITED STATES,  
UNITED STATES OF AMERICA,  
DIRECTOR OF BUREAU OF ALCOHOL, TOBACCO,  
FIREARMS AND EXPLOSIVES,

*Defendants – Appellees.*

\_\_\_\_\_/

On Appeal from the United States District Court  
for the Northern District of Florida  
Case No. 4:22-cv-00164-AW-MAF

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**APPELLANTS’ SUPPLEMENTAL BRIEF**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Appellants, Vera Cooper, Nicole Hansell and Neill Franklin, through their undersigned counsel, pursuant to 11th Cir. R. 26.1-1, hereby certify that the following persons or entities have an interest in the outcome of this case:

Boynton, Brian – Trial Counsel for Defendants/Appellees; Principal Deputy Assistant Attorney General.

Butler, Steven – Counsel for Defendants/Appellees.

Caminez & Yeary, P.A. – Counsel for Plaintiff/Appellant Franklin.

Cooper, Vera – Plaintiff/Appellant.

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Firearms Policy Coalition – Amicus Curie.

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Winsor, Hon. Allen – United States District Judge.

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## ARGUMENT

### I. THE ORDER OF DISMISSAL SHOULD BE REVERSED.

Following the October 5, 2023 oral argument in this matter, the Court entered an order (Doc. 60-2) staying this case pending the United States Supreme Court's decision in *United States v. Rahimi*, Case No. 22-915. The Supreme Court issued its *Rahimi* opinion on June 21, 2024, and it revised that opinion on June 25, 2024. *See* 219 L. Ed. 2d 351 (2024). Amongst that opinion's core holdings is that "an individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 367. As argued below, the reasoning and conclusions in *Rahimi* support the Appellants' arguments for reversal of the Order of Dismissal (Doc. 29-21, "Order").

At the outset, it is important to note *Rahimi*'s focus on and repeated references to the nature of the facial challenge advanced in that case. The majority, as well as a concurring opinion, stressed that this is "the most difficult challenge to mount successfully." 219 L. Ed. 2d at 364 (internal citation omitted); *see also Id.* at 374 (Gorsuch, J., concurring). Accordingly, *Rahimi* had the burden of establishing that the challenged law was invalid in every possible circumstance. *Id.*

In contrast, the Appellants present the Court with an as-applied challenge to Sections 922(d)(3) and 922(g)(3) of the Federal Criminal Code, 27 C.F.R. § 478.11 and Form OMB No. 1140-0020 (collectively, the "Challenged Laws and

Regulations”). They only argue that the Challenged Laws and Regulations violate the Second Amendment to the United States Constitution as they are applied to those who use medical marijuana in compliance with their state laws. Doc. 29-12, ¶ 111, 114. The relief the Appellants seek is more narrow than even other pending as-applied challenges to laws relating to drug use and firearms. *See United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023) (petition granted, judgment vacated, and case remanded for further consideration in light of *Rahimi* on July 2, 2024) (challenging such laws as applied to a state and federally illegal user of marijuana). Instead, as the Supreme Court did in *Rahimi*, the Appellants seek only to “confirm what common sense suggests<sup>1</sup>” that there is no historical tradition or principle of disarming persons like the Appellants who have not committed serious or violent crimes and who have not shown themselves to be a threat to the safety of others.

**A. *Rahimi* establishes that the Appellants are amongst “the people” with Second Amendment rights.**

At the oral argument in this matter, the panel reasonably questioned which categories of persons fall within the Second Amendment’s protections pursuant to *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) and *District of Columbia v. Heller*, 554 U.S. 570 (2008). In those decisions, the Supreme Court stated that the Second Amendment aims to protect “the right of law-abiding,

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<sup>1</sup> 219 L. Ed. 2d at 367.

responsible citizens to use arms.” *Bruen*, 142 S. Ct. at 2131 *citing Heller*, 554 U.S. at 635. The panel questioned how and whether this language served to “filter” certain persons out of the Second Amendment’s orbit, and it expressed a hope that the *Rahimi* opinion would clarify this point.

*Rahimi* shows that the Appellants are amongst “the people” with Second Amendment rights. The Supreme Court proceeded directly to its historical inquiry in that matter, giving no consideration to whether *Rahimi* (who had indisputably committed serious and violent criminal offenses) was “law-abiding.” Further, near the end of the Court’s opinion, it noted:

Finally, in holding that Section 922(g)(8) is constitutional as applied to *Rahimi*, we reject the Government’s contention that *Rahimi* may be disarmed simply because he is 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...But those decisions did not define the term and said nothing about the status of citizens who were not “responsible.” The question was simply not presented.

*Rahimi*, 219 L. Ed. 2d at 369-370.

In his dissent, Justice Thomas added that “not a single Member of the Court adopt[ed] the Government’s theory” that only “responsible” and “law-abiding” persons possess Second Amendment rights. *Id.* at 416 (Thomas, J. dissenting); *see also Id.* at 377 (Gorsuch, J., concurring). Justice Thomas (who authored the *Bruen* majority opinion) added further that such language served only to “describe those

who were unable to publicly carry a firearm” pursuant to the challenged laws in *Bruen* and *Heller*. *Id.* at 416, n. 7.

The contrast between Rahimi and the Appellants further clarifies this point. The former was noted to have fired a gun at his romantic partner, was found by a court to have committed “family violence,” later violated a resulting restraining order, and subsequently engaged in repeated and seemingly random acts of violence involving firearms. *Id.* at 360-361. The latter simply ingest marijuana in reliance upon their state’s law, their doctor’s recommendation, and Congress’ express protection of such action. Doc. 29-12, ¶ 29, 32, and 80; *see also* Consolidated Appropriations Act 2024, Pub. L. No. 118-42, § 531 (“Rohrabacher-Farr Amendment”).<sup>2</sup> There is no reasonable argument (be it historical or logical) in which Rahimi is law abiding or responsible and the Appellants are not. Yet, the Supreme Court did not declare Rahimi to be wholly excluded from the Second Amendment’s protections.

Further, the Solicitor General of the United States effectively conceded in the *Rahimi* oral argument that the Appellants are not amongst any group of non “law-abiding persons” who are bereft of Second Amendment rights. She defined such

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<sup>2</sup> *See also United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) and *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022) (both concluding that the Rohrabacher-Farr Amendment at least currently precludes the Department of Justice from criminally prosecuting state-law compliant medical marijuana users). The Appellees do not contest these holdings. Doc. 29-33 at 16-17 (276-277 of Appendix).

persons as those who have “committed serious crimes defined by the felony-level punishment that can be attached” to them. Transcript of Oral Argument, *United States v. Rahimi* (22-915), 5-6. The Solicitor General later agreed that “misdemeanor or minor criminal conduct under state law” would not exclude a person from the Second Amendment’s protections. *Id.* at 8. It is undisputed in this matter that the Appellants have not committed a felony or felony equivalent offense. Doc. 27 at 18. Accordingly, the Appellees appear to now agree that the Appellants are “law-abiding” for Second Amendment purposes.<sup>3</sup>

Therefore, nothing in *Rahimi*, *Bruen*, or *Heller* can be read as filtering any of the Appellants out of the Second Amendment’s protections. They are each unquestionably “members of the political community.” *Heller*, 554 U.S. at 579; *see also United States v. Jimenez-Shilon*, 34 F.4th 1042, 1044 (11th Cir. 2022) (discussing who is part of “the people” or “the national community” pursuant to *Heller*). The only pertinent question before the Court is whether the Appellees have

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<sup>3</sup> The Appellees’ previous arguments to this effect have further eroded since the oral argument in this matter. Specifically, the Attorney General of the United States submitted a notice of proposed rulemaking that could lead marijuana to be reclassified from a schedule I to a schedule III drug. *See* Press Release, Office of Public Affairs, Department of Justice, Justice Department Submits Proposed Regulation to Reschedule Marijuana (May 16, 2024), <https://www.justice.gov/opa/pr/justice-department-submits-proposed-regulation-reschedule-marijuana>. The concession that such action would be appropriate, regardless of the ultimate outcome of this administrative process, provides strong support for the Appellants’ position in this matter.

met their burden of showing that there is a historical tradition of disarming persons who are relevantly similar to the Appellants.

**B. *Rahimi* establishes that the Appellees have not met their burden of showing that disarming state law-compliant medical marijuana users comports with the history and tradition of the Second Amendment.**

In *Rahimi*, the Supreme Court clarified the purpose and scope of the required historical inquiry in Second Amendment challenges. Seeking to avoid a “law trapped in amber,” the Supreme Court stated that the “appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 219 L. Ed. 2d at 363. The government bears the burden to “justify its regulation” in this manner. *Id.* In conducting this analysis, a court should evaluate whether such a regulation is “‘relevantly similar’ to laws that our tradition is understood to permit...” *Id.* “Why and how” a challenged law “burdens the right are central to this inquiry.” *Id.* Even when “arms-bearing” for certain persons and populations was historically regulated, a modern law may be unconstitutional if it “does so to an extent beyond what was done at the founding.” *Id.* at 364. Such historical laws need not be “dead ringer[s]” for or “twins” to modern regulations, though, so long as they are “analogous enough to pass constitutional muster.” *Id.*

Although *Rahimi* noted that there was no historical law that was identical to the one challenged in that case, the modern regulation “fit neatly within the tradition”

that applicable historical laws “represent.” *Id.* at 367. Specifically, both the modern and historical laws at issue in *Rahimi* “applie[d] to individuals found to threaten the physical safety of others” and “restrict[ed] gun use to mitigate demonstrated threats of physical violence.” *Id.* Further, those laws were narrowly tailored in that they did not “broadly restrict arms use by the public generally.” *Id.* The Supreme Court also deemed the Second Amendment burden those modern and historical laws imposed to be comparable, as they all applied “only once a court” found a person to present “a credible threat to the physical safety” of others. *Id.* at 368. It focused further on the temporary nature of the modern and historical disarmament, as it served only during the period of a restraining order. *Id.* Finally, the Court compared the potential punishments stemming from these laws, finding the modern “lesser restriction of temporary disarmament” permissible in comparison to the historical punishment of imprisonment. *Id.*

**1. There is no historical tradition of disarming persons who are relevantly similar to the Appellants.**

*Rahimi* makes clear that the Challenged Laws and Regulations violate the Second Amendment as applied to the Appellants. Unlike in *Rahimi*, there is no historical tradition or principle reflecting or suggesting that the anyone relevantly similar to the Appellants may be stripped of their right to bear arms. Appellants Vera Cooper and Nicole Hansell only participate in their state medical marijuana program because Congress has seen fit to protect such action through the Rohrabacher-Farr

Amendment. Doc. 29-12, ¶¶ 29, 32. Further, as pled, they are compliant with their state’s medical marijuana laws and regulations, placing them within the Rohrabacher-Farr Amendment’s protections. *Id.* Nothing about this is reasonably comparable to the outrageous displays of violence and repeated violations of legal orders at issue in *Rahimi*.

The “why” of the Challenged Laws and Regulations, as applied to the Appellants, fits no historical tradition because those laws do not seek to protect against any “demonstrated” threats or risks. *Rahimi*, 219 L. Ed. 2d at 367-368. The Appellants, as pled, have not engaged in any violence or “serious crimes.”<sup>4</sup> They have not been and, pursuant to the Rohrabacher-Farr Amendment, currently cannot be prosecuted for their state-law compliant medical marijuana use. The Appellees advance no argument that the Appellants are likely to intentionally harm anyone with a firearm. Instead, the Challenged Laws and Regulations disarm the Appellants due to the potential risk that their medical marijuana use might at some point lead to sensory or cognitive impairments. Doc. 35 at 20-21. Such possible side effects, the Appellees suggest, “may” cause the Appellants to “store firearms in an unsafe way” or to “otherwise handle firearms carelessly.” *Id.*

No historical law or tradition imposed this type of firearm prohibition based on such potential or perceived risks. As it relates to criminality, any historical fear

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<sup>4</sup> See Transcript of Oral Argument, *United States v. Rahimi* (22-915), 5-6.

that non-violent misdemeanants might later commit more serious crimes did not lead to their disarmament. Further, concerns regarding drunkenness or any other form of intoxication never cost a person their right to bear arms. *See* Doc. 35 at 25-28; Doc. 42 at 17-19. Instead, historical laws imposed what were effectively time, place, and manner restrictions relating to intoxication and gun possession. *Id.* As “common sense suggests,” historical laws disarmed persons during the discrete period in which the risk of firearm violence or misuse was present (i.e., when the person was intoxicated or during times/places of mass celebration/inebriation). *Id.* In short, there is no historical tradition of wholly disarming every person who violates a law or every person who ingests an intoxicating substance due to such hypothetical risks.

The Appellees may argue, as they have previously, that the Appellants’ medical marijuana use renders them analogous to the mentally ill. *See* Doc. 35 at 20-21. Such an assumed affliction, the Appellees contend, renders the Appellants unable to exercise sufficient “care, caution, and self-control” with firearms. *Id.* Therefore, no “demonstrated” risk is necessary to disarm them.

However, this does not comport with the Amended Complaint, history, or common sense. As pled, the Appellants both follow the medical marijuana laws and regulations of their state and rely on Congress’ protections in relation to their medical marijuana use. Doc. 29-12, ¶¶ 29, 32, and 80. The historical principle behind disarming persons considered mentally ill relates to their inability to reason or

comport their behavior with societal norms and rules. *See United States v. Alston*, 2023 U.S. Dist. LEXIS 128679, \*31-34 (E.D. N.C. July 18, 2023) *report and recommendation adopted*, 2023 U.S. Dist. LEXIS 190306 (E.D. N.C. Oct. 24, 2023) *stay granted*, 2024 U.S. App. Lexis 10624 (4th Cir. May 1, 2024) (providing a historical overview of laws regarding “lunatics” and the basis for such regulations). Far from showing an inability or unwillingness to follow the law, the Appellants decide their course of conduct based on their state and Congress’ mandates and protections. The Appellees may disagree with their ultimate decisions, but this is rational thought and behavior. There is no reasonable basis or principle upon which the Appellants could be lumped in with “lunatics” who could be involuntarily civilly committed or otherwise deprived of their constitutional rights.

The scope of the Challenged Laws and Regulations, as applied to the Appellants, is far from narrow. Instead, they serve to wholly disarm every medical marijuana program participant in the United States. This includes even some persons who do not use or ingest medical marijuana. *See Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016). As Congress continues to protect medical marijuana, such programs have spread across the country. *See Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2237 (2021) (Thomas, J., respecting the denial of certiorari). In this way, Congress has acted “presumably, with an awareness of the beneficial consequences” the Rohrabacher-Farr Amendment “will have for consumers who seek to obtain

medical marijuana.” *N.E. Patients Group v. United Cannabis Patients and Caregivers of Maine*, 45 F.4th 542 (1st Cir. 2022). Yet, the Challenged Laws and Regulations treat all such persons as equivalent to wholly illegal drugs users (including users of substances carrying felony-equivalent criminal consequences). This flouts not only any reasonable tradition, but also Congress’ actions in protecting and encouraging medical marijuana programs.

Once again, the Appellants do not contest the Challenged Laws and Regulations on their face. They do not challenge those provisions as applied to any person (including a medical marijuana patient) who is actively intoxicated. The Appellants do not challenge their application to those who use marijuana without the protection of a state medical marijuana system and the Rohrabacher-Farr Amendment. The rampant gun violence associated with the illegal drug market could provide reason to separate wholly illegal drug users and firearms fitting within the type of historical tradition found in *Rahimi*. See *United States v. Thompson*, 842 F.3d 1002, 1007 (7th Cir. 2016) (referring to guns as “tools of the drug trade...”) (internal citations omitted). Further, the Appellants also do not challenge those laws as they are applied to anyone who is addicted to any controlled substance.

Instead, the Appellants seeks only narrow, common-sense relief. Any risk of firearm misuse they pose can be mitigated by prohibiting the possession of a firearm while they are under the influence of marijuana. Instead, the Challenged Laws and

Regulations disarm the Appellants at all times (including in their own homes) on the basis that they have ingested marijuana in recent days or weeks. The Appellees need not show a historical “twin”<sup>5</sup> for these laws, but there is no historical “cousin”<sup>6</sup> or even distant relative for such sweeping disarmament.

In this way, the burden (“how”) that the Challenged Laws and Regulations place upon the Appellants also does not fit any historical tradition. The Appellees have not cited and cannot cite to a single historical regulation or the existence/suggestion of a historical tradition that would preclude (a) a non-violent misdemeanor or (b) someone who generally uses an intoxicating substance from ever possessing a firearm. Simply put, there is no principle of treating those who are sometimes intoxicated as if they are always intoxicated. If there were, then the core constitutional rights of any person who ever drinks alcohol, takes a prescription medication, or ingests certain over-the-counter medications sit on a razor’s edge. Yet, this is precisely the effect of the Challenged Laws and Regulations.

Although the Appellees may emphasize the “temporary” nature of the Second Amendment burdens the Challenged Laws and Regulations impose, those laws are not comparable to the law in *Rahimi* on that point. In that case, the period of disarmament ran while the person was actually “subject to a restraining order.”

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<sup>5</sup> *Rahimi*, 219 L. Ed. 2d at 364.

<sup>6</sup> *Rahimi*, 219 L. Ed. 2d at 394 (Barrett, J., concurring).

*Rahimi*, 219 L. Ed. 2d at 359. For *Rahimi* specifically, that period was “one to two years after his release from prison.” *Id.* at 368. The Appellees may argue the Appellants face a similarly temporary burden because they could regain their Second Amendment rights by simply ending their marijuana use.

However, even this “temporary” burden on the Appellants has no historical precedent. The Appellees have detailed the concerns many founders held regarding “drunkards” and the potential threats they posed. Doc. 35 at 23-25. Yet, they do not and cannot cite to any tradition of wholly disarming “drunkards” or any persons relevantly similar to them. Instead, the clear historical tradition in this area is to mitigate against firearm misuse by restricting their use or possession during periods in which a person is intoxicated or at some location or event expected to include heavy drinking. *Id.* at 25-28. Accordingly, even the temporary wholesale disarmament of the Appellants has no historical basis.

The historical laws and traditions relied upon in *Rahimi* make clear that the Appellants may not be constitutionally disarmed for their medical marijuana use. The Supreme Court noted that, even as the colonists sought to prevent certain gun regulations through the ratification of the Second Amendment and otherwise, “regulations targeting individuals who physically threatened others persisted.” *Rahimi*, 219 L. Ed. 2d at 365. Among those were surety laws, which “authorized magistrates to require individuals suspected of future misbehavior to post a bond.”

*Id.* at 365-366. Such misbehavior included “all forms of violence, including spousal abuse,” as well as those who went “armed offensively.” *Id.* at 366 (internal citations omitted). Further, affray laws served to prevent persons from “arming” themselves “to the Terror of the People.” *Id.* at 367 (internal citation omitted). “Taken together,” these regulations revealed a tradition of prohibiting those “found by a court to present a threat to others” from possessing firearms. *Id.*

No such tradition exists as it relates to the Appellants. As an initial matter, Congress’ treatment of medical marijuana is itself completely ahistorical. The Appellees cannot cite an example of the federal government ever before “simultaneously tolerat[ing] and forbid[ing]” the same activity at the same time. *Standing Akimbo*, 141 S. Ct. at 2236-2237. Therefore, it is difficult to see how there can be any tradition concerning persons relevantly similar to the Appellants. Further, as stated previously, no form of historical law wholly disarmed non-violent misdemeanants or “drunkards.” Even if the Appellants could be fairly compared to such persons, history does not reveal any concern for their handling of firearms when not intoxicated or at a place of frequent intoxication. Accordingly, *Rahimi* defeats the Appellees’ historical argument in support of the Challenged Laws and Regulations as applied to the Appellants.

For these reasons, pursuant to *Rahimi*, the Challenged Laws and Regulations violate the Second Amendment as applied to the Appellants. The Appellees have not

met their burden of showing that any class of persons relevantly similar to the Appellants was historically disarmed. They also have not shown any tradition or principle that would support this application of the Challenged Laws and Regulations. Accordingly, the Court should reverse the Order of Dismissal.

**2. *Rahimi* precludes any argument that the Appellants may be disarmed because they are not “responsible.”**

The Appellees have argued that historical laws served to disarm those who were deemed not “responsible” enough to wield their Second Amendment rights. Doc. 35 at 11-21. This included “drunkards,” as discussed previously. *Id.* at 23-25. The Appellants, they assert, would fall into such a class.

However, as previously cited, *Rahimi* clearly and firmly rejected this position. 219 L. Ed. 2d at 369-370. *Rahimi* stated further that it was unclear what “responsible” would mean or include in this context. *Id.* In this way, allowing the government to disarm anyone it deems irresponsible would be to hand it the type of “blank check” that *Bruen* affirmatively disallowed. 597 U.S. at 30.

The Appellees may attempt to re-assert this argument in a different package, however, pointing to the following language from *Rahimi*:

“While we do not suggest that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse, *see Heller*, 554 U.S., at 626...”

*Rahimi*, 219 L. Ed. 2d at 368.

This section cites to the language in *Heller* referring to the disarmament of “felons,” “the mentally ill,” and other firearm restrictions. 554 U.S. at 626. The Appellees may cite this language and recast their “responsibility” arguments against the Appellants as instead relating to their “special danger of misuse.”

However, this language does not save the Challenged Laws and Regulations, as applied to the Appellants. First, the Appellants would not fall within such categories of persons. They are not felons or felon equivalents. They are also not “mentally ill” or “lunatics,” as historically understood. Second, nothing about the Appellants, as pled, presents a special danger of misuse. The Amended Complaint does not state or include any reference to any current or past violent or serious criminal behavior. To the extent their marijuana use is currently a federal misdemeanor, they only take such actions with Congress’ protection and encouragement. This does not fit any historical understanding of dangerous or irrational behavior.

Further, as Justice Barrett appropriately cautioned, courts “must be careful” not to apply any historical principle “at such a high level of generality that it waters down” the Second Amendment right. *Rahimi*, 219 L. Ed. 2d at 395 (Barrett, J., concurring). Much like labeling them “irresponsible,” concluding that the Appellants’ use of medical marijuana renders them a “special danger” would risk painting many law-abiding members of the political community with the same broad

brush. It is unclear why those who drink alcohol, participate in state-sanctioned gambling activities, or take other action the federal government might disapprove of would not pose the same “special danger.” If a legislature can strip the core constitutional rights of any person who engages in a behavior it deems dangerous or unsavory (regardless of whether that action would subject a person to criminal punishment), then it is unclear whose Second Amendment rights could not be taken. As the Supreme Court did in *Rahimi*, the Court should steer clear of such murky constitutional waters relating to virtue or personal judgment and instead limit its inquiry to one of historical traditions and principles.

### CONCLUSION

Wherefore, the Appellants respectfully request that the Order of Dismissal be reversed and that this matter be remanded to the District Court for further proceedings consistent with this Court’s judgment.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

1. This document complies with the Court's February 14, 2024 order requiring supplemental briefing (Doc. 60-2) because it does not exceed twenty (20) pages in length.

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I HEREBY CERTIFY that on July 12, 2024, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ William D. Hall  
William D. Hall, Esquire

No. 22-13893

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

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VERA COOPER, et al.,

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES, et al.,

Defendants-Appellees.

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

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**SUPPLEMENTAL 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 the Certificate of Interested Persons and Corporate Disclosure Statement contained in plaintiffs-appellants' reply brief is complete and correct.

*s/ Steven H. Hazel*  
\_\_\_\_\_  
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## INTRODUCTION AND SUMMARY

The government respectfully submits this supplemental brief in response to the Court's February 14, 2024, order directing the parties to address the effect of the Supreme Court's decision in *United States v. Rabimi*, No. 22-915, 2024 WL 3074728 (U.S. June 21, 2024), on this case. In *Rabimi*, the Court rejected a Second Amendment challenge to 18 U.S.C. § 922(g)(8), the federal prohibition on the possession of firearms by individuals subject to certain domestic violence restraining orders. Although *Rabimi*'s holding is limited to the constitutionality of that prohibition, its reasoning supports the conclusion that 18 U.S.C. § 922(g)(3), which disarms "unlawful user[s]" of controlled substances, comports with the Second Amendment.

*Rabimi* rejected an unduly narrow approach to Second Amendment analysis. The Court explained that "some courts have misunderstood the methodology of our recent Second Amendment cases." *Rabimi*, 2024 WL 3074728, at \*6. Those cases, the Court observed, "were not meant to suggest a law trapped in amber." *Id.* Instead, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* In applying that analysis to uphold the challenged firearms prohibition, the Court emphasized that although the prohibition "is by no means identical" to historical laws, "it does not need to be." *Id.* at \*9. After issuing its decision in *Rabimi*, the Supreme Court vacated a Fifth Circuit decision concluding that Section 922(g)(3) violates the Second Amendment as applied to an unlawful user of marijuana and remanded for further

consideration in light of *Rabimi*. See *United States v. Daniels*, No. 23-376, 2024 WL 3259662 (U.S. July 2, 2024).

History shows that legislatures hold authority to disarm categories of persons whose possession of firearms would endanger themselves or others. *Rabimi* itself recognized that “[s]ince the founding, our nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.” 2024 WL 3074728, at \*5. The limited restriction at issue here, which applies only to individuals engaged in the regular and ongoing use of illegal drugs, “fits comfortably” within that tradition and the principles underpinning it. *Id.* Armed drug users endanger the public in multiple ways. And Section 922(g)(3) bears at least as close a resemblance to historical laws as the modern prohibition that *Rabimi* had “no trouble” upholding. *Id.* at \*10.

Plaintiffs’ contrary argument is premised on the rigid historical approach that *Rabimi* rejected. Plaintiffs assert that because historical legislatures chose to prohibit the possession of firearms by individuals who were currently intoxicated or who were addicted to drugs, modern legislatures are limited to disarming the same groups. *Rabimi* makes clear, however, that the Second Amendment does not restrict Congress to adopting only regulations that are “identical” to historical laws. 2024 WL 3074728, at \*6. And there is no historically-rooted “principle[]” that would allow legislatures to disarm individuals who are actively intoxicated or addicted to illegal drugs, but not those engaged in the regular and ongoing use of the same substances. *Id.*

## ARGUMENT

### A. *Rahimi* Clarifies the Analytical Framework Governing Second Amendment Challenges

In upholding the federal prohibition challenged in *United States v. Rahimi*, the Supreme Court explained that “some courts have misunderstood the methodology of our recent Second Amendment cases.” No. 22-915, 2024 WL 3074728, at \*6 (U.S. June 21, 2024). Those cases “were not meant to suggest a law trapped in amber” because the Second Amendment “permits more than just those regulations identical to ones that could be found in 1791.” *Id.* As Justice Barrett emphasized in concurrence, “a test that demands overly specific analogues” would involve “serious problems,” including “assum[ing] that founding-era legislatures maximally exercised their power to regulate” and “forc[ing] 21st-century regulations to follow late 18th-century policy choices.” *Id.* at \*30 (Barrett, J., concurring).

Instead, the Court held that “the appropriate analysis involves considering whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.” *Rahimi*, 2024 WL 3074728, at \*6 (emphasis added). Under this analysis, “if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.” *Id.* Thus, even “when a challenged regulation does not precisely match its historical precursors,” it

may still “pass constitutional muster” if it “comport[s] with the principles underlying the Second Amendment.” *Id.*

*Rabimi* recognized that this test affords legislatures significant leeway to enact firearms regulations. The Court observed that “[f]rom Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Rabimi*, 2024 WL 3074728, at \*5 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). Consistent with that understanding of the right, the Court noted that historical legislatures enacted a “rang[e]” of regulations, including prohibitions on “dangerous and unusual weapons,” “rules about firearm storage,” and “restrictions on gun use by drunken New Year’s Eve revelers.” *Id.* The Court further noted that its prior cases have recognized that “many” modern firearms regulations are “presumptively lawful.” *Id.* at \*10 (quoting *Heller*, 554 U.S. at 626, 627 n.26).

This analytical framework is illustrated by its application to the federal prohibition on firearm possession by individuals subject to domestic violence restraining orders. In sustaining that prohibition, the Supreme Court recognized that the government had “offer[ed] ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others.” *Rabimi*, 2024 WL 3074728, at \*7. That historical evidence included surety laws, which authorized magistrates to “require individuals suspected of future misbehavior to post a bond,” and “going armed” laws, which “provided a mechanism

for punishing those who had menaced others with firearms.” *Id.* at \*8-9. There are a number of differences between these historical laws and the challenged modern prohibition. For example, “[a]fter providing sureties, a person kept possession of all of his firearms,” and “[e]ven if he breached the peace,” the penalty “was that he and his sureties had to pay a sum of money,” rather than forfeit weapons or face imprisonment. *Id.* at \*41-42 (Thomas, J., dissenting). Likewise, going armed laws generally applied to “public” misconduct, not to the “conduct [the modern prohibition] seeks to prevent—interpersonal violence in the home.” *Id.* at \*44 (Thomas, J., dissenting).

The Court recognized that the challenged prohibition “is by no means identical to these founding era regimes,” but held that “it does not need to be.” *Rabimi*, 2024 WL 3074728, at \*9. Instead, the Court found it sufficient that the prohibition “is ‘relevantly similar’” to historical laws “in both why and how it burdens the Second Amendment right.” *Id.* (quoting *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 29 (2022)). With respect to the prohibition’s rationale, the Court explained that both the modern law and its historical antecedents regulate “individuals found to threaten the physical safety of another.” *Id.* at \*10. And with respect to the prohibition’s scope, the Court emphasized that “like surety bonds of limited duration,” the modern law “only prohibits firearm possession so long as the defendant ‘is’ subject to a restraining order,” and thus involves “temporary” disarmament. *Id.* (quoting 18 U.S.C. § 922(g)(8)). The Court further emphasized that

as with historical “going armed laws,” the modern prohibition’s penalties include “imprisonment.” *Id.* Based on these similarities, the Court had “no trouble” concluding that the challenged prohibition accords with “[o]ur tradition of firearm regulation.” *Id.*

Although *Rahimi* had no occasion to analyze the federal law disarming unlawful drug users, the Court took pains to avoid “suggest[ing] that the Second Amendment prohibits the enactment of laws banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse.” 2024 WL 3074728, at \*9. The Court noted, for example, that its prior cases have identified prohibitions “on the possession of firearms by ‘felons and the mentally ill’ as “presumptively lawful.” *Id.* at \*10 (quoting *Heller*, 554 U.S. at 626, 627 n.26).

**B. The Analytical Framework Articulated in *Rahimi* Confirms the Constitutionality of Section 922(g)(3)**

The federal restriction at issue here “is consistent with the principles that underpin our regulatory tradition.” *Rahimi*, 2024 WL 3074728, at \*6.

1. One principle that emerges from the historical record is that legislatures hold authority to disarm “categories of persons” that “present a special danger of misuse.” *Rahimi*, 2024 WL 3074728, at \*9. As the government has explained, an influential Second Amendment precursor contemplated the disarmament of individuals who posed a “real danger of public injury,” 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971); 19th-century sources recognized legislatures’

power to disarm individuals whose possession of arms would endanger the public; and American legislatures have been disarming such individuals for centuries. Gov't Br. 12-14, 25-30. In a similar vein, *Rabimi* described surety and going armed laws as reflecting a historical tradition allowing “the Government to disarm individuals who present a credible threat to the physical safety of others.” 2024 WL 3074728, at \*10. Thus, “legislatures have the power to prohibit dangerous people from possessing guns.” *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

That category includes armed drug users. “[D]rugs and guns” are a “dangerous combination.” *Rosemond v. United States*, 572 U.S. 65, 75 (2014) (quoting *Muscarello v. United States*, 524 U.S. 125, 132 (1998)). In recognition of that danger, the founders implemented various measures restricting access to firearms by those likely to become intoxicated. See Gov't Br. 26-28.<sup>1</sup> For example, *Rabimi* noted that Founding Era legislatures enacted “restrictions on gun use by drunken New Year’s Eve revelers.” 2024 WL 3074728, at \*5. In the nineteenth century, legislatures similarly prohibited the possession of firearms while intoxicated. See Gov't Br. 25-26, 25 n.6.<sup>2</sup> And when

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<sup>1</sup> Relevant historical laws include: Act XII of 1655, 1655 Va. Laws 401, 401-02 (restricting gun use at drinking events); Ch. 1501, 5 Colonial Laws of New York 244-46 (1894) (restricting gun use during the New Year’s holiday); 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 (restricting gun use in taverns); 1844 R.I. Pub. Laws 503-16, § 1 (excluding “common drunkards” from the militia).

<sup>2</sup> Relevant historical laws include: Kan. Sess. Laws 25, § 282 (1867) (“any person under the influence of intoxicating drink” may not “carr[y] on his person a

*Continued on next page.*

intoxicating substances other than alcohol proliferated around the turn of the twentieth century, legislatures adopted laws disarming those addicted to drugs. Gov’t Br. 29<sup>3</sup>; *see Rabimi*, 2024 WL 3074728, at \*22-24 (Kavanaugh, J., concurring) (observing that the Supreme Court has identified “post-ratification history as a proper tool to discern constitutional meaning” and citing dozens of examples).

The limited firearms restriction at issue here “fits comfortably within this tradition.” *Rabimi*, 2024 WL 3074728, at \*5. Section 922(g)(3) makes it a crime for a person to possess a firearm if he “is an unlawful user” of “any controlled substance.” The term “user” refers to someone who engages in “regular and ongoing use” of a controlled substance “during the same time period as the firearm possession.” *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003) (per curiam). Marijuana, the

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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[] . . . 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).

<sup>3</sup> Relevant historical authorities include: 1931 Pa. Laws 499, no. 158, § 8; 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.

drug at issue here, is a controlled substance. *See* 21 U.S.C. § 812(c), sched. I(c)(10). Simple possession of marijuana is a misdemeanor under federal law, and possession after a previous conviction for a drug offense is a felony.<sup>4</sup> *See id.* § 844(a).

Individuals who possess firearms while engaged in the regular use of illegal drugs endanger public safety in multiple ways. First, drug users may mishandle firearms—or use firearms to commit crimes—because of “drug-induced changes in physiological functions, cognitive ability, and mood.” *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The effects of marijuana intoxication, for instance, can include an altered “perception of time,” “decreased short-term memory,” and “impaired perception and motor skills.” Nat’l Acads. of Scis., Eng’g, & Med., *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* 53 (2017) (*Health Effects*). Second, illegal drug users may “commit crime in order to obtain money to buy drugs”—and thus pose a danger of using firearms to facilitate such crime. *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in

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<sup>4</sup> The Department of Justice recently issued a notice of proposed rulemaking regarding the scheduling of marijuana. *See Notice of Proposed Rulemaking: Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44,597 (May 21, 2024). The notice proposes to move marijuana from Schedule I to Schedule III but to retain its status as a controlled substance. *See* 18 U.S.C. § 922(g)(3) (regulating unlawful users of “any controlled substance”). As explained below, *see infra* pp. 13-14, and in our response brief, *see* Gov’t Br. 36-45, plaintiffs identify nothing in the Second Amendment’s text or history that would require a court to distinguish between the unlawful users of different controlled substances.

the judgment). Third, “violent crime may occur as part of the drug business or culture.” *Id.* For example, violence may result from “disputes and ripoffs among individuals involved in the illegal drug market.” Bureau of Justice Statistics, U.S. Dep’t of Justice, *Drug & Crime Data—Fact Sheet: Drug Related Crime* 3 (1994), <https://perma.cc/NWH7-PNY4>. Fourth, armed drug users endanger themselves. Most gun deaths in the United States result from suicide, not homicide. *See Bruen*, 597 U.S. at 85 (Breyer, J., dissenting). And drug users, including marijuana users, pose a higher risk of suicide than ordinary citizens. *See Health Effects* at 311-12.

Section 922(g)(3) thus bears at least as close a resemblance to historical laws as the modern prohibition that *Rahimi* upheld. Like its traditional counterparts, Section 922(g)(3) is designed to mitigate the “mischief” created when firearms and intoxicating substances coincide. *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886) (upholding a historical precursor to Section 922(g)(3)). The justification for Section 922(g)(3) is particularly strong given that unlike many historical laws, it does not extend to individuals who consume alcohol, a legal substance. Instead, Section 922(g)(3) applies only to individuals whose use of controlled substances involves “regular and ongoing” violations of federal law. *Edmonds*, 348 F.3d at 953. Those law violations support Congressional authority to disarm individuals subject to Section 922(g)(3). *Cf. United States v. Dubois*, 94 F.4th 1284, 1292 (11th Cir. 2024) (recognizing legislative authority to prohibit the possession of firearms by individuals who are not “law-abiding”).

As in *Rabimi*, the restriction at issue here is not “identical” to historical laws, “but it does not need to be.” 2024 WL 3074728, at \*9. In concluding that the challenged prohibition was “sufficiently similar” to historical precursors, *Rabimi* emphasized, among other things, that the restrictions were of “limited duration,” and that violators were subject to “imprisonment.” *Id.* at \*10. The same similarities are present here. Historical laws disarmed individuals for the duration of their intoxication or drug addiction. Section 922(g)(3) likewise creates a “temporary” firearms disqualification. *Id.* It applies “only so long as [a person] abuses drugs,” and permits a user to “regain his right to possess a firearm simply by ending his drug abuse.” *United States v. Yancey*, 621 F.3d 681, 686-87 (7th Cir. 2010) (per curiam). In addition, like Section 922(g)(3), many historical laws involved penalties including imprisonment. *See* Gov’t Br. 32. History thus “confirm[s] what common sense suggests”: regular users of illegal drugs are not entitled to possess deadly weapons in the face of Congress’s contrary judgment. *Rabimi*, 2024 WL 3074728, at \*9.

2. Plaintiffs’ argument is premised on the same analytical approach that *Rabimi* rejected.

Plaintiffs do not meaningfully contest legislatures’ authority to disarm dangerous categories of persons. Nor do plaintiffs dispute that historical legislatures exercised that authority by disarming individuals who were actively intoxicated. Instead, plaintiffs urge (Opening Br. 22, 43-45) that those who regularly use illegal drugs can only be disarmed if they are “currently intoxicated.” Under plaintiffs’

theory, the Second Amendment would strip Congress of power to disarm regular users of all controlled substances, including cocaine, fentanyl, and methamphetamines. *See* 21 U.S.C. § 812, sched. I-II (listing controlled substances). That approach is plainly unworkable and would cast doubt not only on the longstanding provision of federal law at issue here, but also on similar provisions adopted by over 30 States and territories. *See* Petition for a Writ of Certiorari at 11 & n.7, *United States v. Daniels*, No. 23-376, 2023 WL 6623655 (U.S. Oct. 5, 2023) (collecting citations).

*Rahimi* forecloses the argument that modern legislatures may regulate drug users only when they are actively intoxicated. As *Rahimi* emphasized, the Second Amendment “permits more than just those regulations” that are “identical” to their historical counterparts. 2024 WL 3074728, at \*6. In arguing otherwise, plaintiffs mistakenly “assume[]” that historical legislatures “maximally exercised their power to regulate.” *Id.* at \*30 (Barrett, J., concurring). The error in that assumption is especially apparent here, where Section 922(g)(3) responds to a societal problem—firearm possession by unlawful drug users—that was not present at the founding. *See* Gov’t Br. 33-34.

There is no plausible historical “principle[]” that would permit legislatures to disarm actively intoxicated individuals but not regular users of intoxicating substances. *Rahimi*, 2024 WL 3074728, at \*6. The danger posed by an armed drug user is not limited to the time while they are intoxicated. As explained above, illegal drug users

can use firearms to commit crimes that fund their drug habit, to engage in violence as part of the drug business or culture, and to commit suicide. *See supra* p. 9-10. Those risks justify disarming unlawful drug users even between periods of drug intoxication. In any event, Section 922(g)(3) addresses individuals who both regularly use illegal drugs and possess firearms, and who will thus predictably possess firearms while actively intoxicated. Plaintiffs do not claim that they would surrender their guns to others every time they become intoxicated and retrieve them only after regaining sobriety.

Plaintiffs' piecemeal consideration of historical laws is likewise incompatible with *Rabimi*. There, the Supreme Court did not identify a single historical law that was analogous to the challenged federal prohibition in all relevant respects. Instead, the Court recognized that when "[t]aken together," surety and going armed laws embody a historical principle that justifies the challenged prohibition. *Rabimi*, 2024 WL 3074728, at \*9. Here, likewise, Section 922(g)(3) is supported not only by laws disarming individuals who were activity intoxicated, but also by laws disarming tavern-goers, New Year's Eve revelers, and others who legislatures judged likely to become intoxicated. *See* Gov't Br. 24, 26-29. In combination, those historical laws confirm modern legislatures' authority to prohibit arms-bearing by those engaged in the regular use of illegal and intoxicating substances.

*Rabimi* also undermines plaintiffs' alternative argument (Opening Br. 34-37, 44-46) that the Second Amendment allows legislatures to disarm regular users of all

controlled substances except marijuana. Plaintiffs point to no historical “principle[]” that would require a court to distinguish one illegal, intoxicating substance from another. *Rabimi*, 2024 WL 3074728, at \*6. And like *Bruen*, *Rabimi* analyzed whether a modern law was “relevantly similar” to its historical counterparts by considering “why and how it burdens the Second Amendment right.” *Id.* at \*9 (quoting *Bruen*, 597 U.S. at 29). Plaintiffs have not identified any way in which the particular type of illegal drug at issue alters that analysis. *See* Gov’t Br. 36-44.

Plaintiffs derive no support for their position from *Rabimi*’s discussion of “citizens who [a]re not ‘responsible.’” 2024 WL 3074728, at \*11. In *Heller* and *Bruen*, the Court described the Second Amendment as protecting “responsible” citizens, *see, e.g., Heller*, 554 U.S. at 635; *Bruen*, 597 U.S. at 70, and the government has accordingly used the term “irresponsible” as a shorthand for those individuals whose possession of firearms would endanger themselves or others, *see, e.g.,* Gov’t Br. 12-21. In *Rabimi*, the Court noted that while its prior decisions “used the term ‘responsible’ to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right,” those decisions “said nothing about the status of citizens who were not ‘responsible’” because the government’s authority to disarm those citizens “was simply not presented.” 2024 WL 3074728, at \*11 (quoting *Heller*, 554 U.S. at 635; *Bruen*, 597 U.S. at 70). The Court made clear, however, that although it declined to adopt the term “irresponsible,” it did not “suggest that the Second Amendment prohibits the enactment of laws” disarming “categories of persons thought by a legislature to

present a special danger of misuse.” *Id.* at \*9. As explained above, historical tradition supports legislative authority to disarm such categories of persons, and plaintiffs have not argued otherwise.

### CONCLUSION

For the reasons given above and in the government’s other filings, the judgment of the district court should be affirmed.

Respectfully submitted,

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July 2024

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the page limit established by this Court's February 14, 2024, order because it contains 15 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). 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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I hereby certify that on July 12, 2024, 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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