IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| ROBERT GREENE, JAMES IREY, and SECOND AMENDMENT FOUNDATION, Plaintiffs, | ) | CIVIL ACTION NO. 1:24-cv-00021 |
| | ) | JUDGE BISSOON |
| v. | ) | *(Electronically Filed)* |
| MERRICK B. GARLAND, Attorney General of the United States, STEVEN M. DETTELBACH, Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives, CHRISTOPHER WRAY, Director of the Federal Bureau of Investigation, and UNITED STATES OF AMERICA, Defendants. | ) | |

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM AND LACK OF SUBJECT MATTER JURISDICTION**

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## ARGUMENT

### I. Plaintiffs Misstate the Legal Standard for Rule 12(b)(6) Motions to Dismiss

Plaintiffs misstate the legal standard for Rule 12(b)(6) motions to dismiss by relying on a looser standard that the Supreme Court rejected long ago. Plaintiffs argue that "[u]nless it is a 'certainty' that no relief could be granted under any set of facts which could be proven, the motion to dismiss on the basis of failure to state a claim, must be denied." Pls.' Br. in Opp'n to Mot. to Dismiss 4, ECF No. 39 ("Opp'n") (quoting *Evancho v. Fisher*, 423 F.3d 347, 351 (3d Cir. 2005)). Plaintiffs rely on a case decided before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which derives ultimately from the Supreme Court's statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). But in *Twombly*, the Supreme Court expressly rejected *Conley*'s "no set of facts" language. 550 U.S. at 563. Under the current standard, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

### II. Second Amendment Foundation (SAF) Lacks Standing

SAF lacks associational standing because "the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Specifically, fact-specific inquiries are needed to determine which SAF members are "similarly situated" to Plaintiffs Robert Greene and James Irey, and thus would benefit from the injunctive and declaratory relief sought by Plaintiffs. Defs.' Mem. in Supp. of Mot. to Dismiss First Am. Compl. 9-11, ECF No. 33 ("Mem."); First Am. Compl., Prayer for Relief, ECF No. 7 ("FAC").

Plaintiffs' assertion that similarly situated members are "easily ascertainable," Opp'n 5, is belied by considering the criteria needed to ascertain them. Plaintiffs acknowledge that whether members are "similarly situated" depends on whether they are otherwise prohibited by law from possessing firearms (which turns on citizenship history, criminal history, mental health history, military history, substance abuse history, and domestic violence history, *see*, *e.g.*, 18 U.S.C. § 922(g)); whether their actual or intended marijuana use complies with Pennsylvania law;[1] and whether they wish to possess and use firearms and ammunition. Opp'n 5.

In addition, Plaintiffs allege that Greene, Irey, and the "similarly situated" members want to use firearms for self-defense or other lawful purposes, and "are responsible, law-abiding peaceable citizens" with no history of violence. FAC ¶¶ 96-99. Thus, according to Plaintiffs' own Amended Complaint, an SAF member who was legally entitled to possess firearms, but had a history of violent conduct or intended to use firearms to commit future crimes, would not be "similarly situated" to Greene or Irey. There is nothing easy about determining which of SAF's hundreds of thousands of members are "similarly situated" to Greene or Irey.

Plaintiffs argue that SAF has standing because members Greene and Irey plead a basis for standing, and "[a]n organization only needs *one* injured member to have standing." Opp'n 6. This argument conflates the first element of associational standing, that the association's "members would otherwise have standing to sue in their own right," *Hunt*, 432 U.S. at 343, with the third element, that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," *id.* The presence of one identified member with standing

[1] Pennsylvania imposes an intricate set of statutory and regulatory requirements on medical marijuana. *See* Medical Marijuana Act, 2016 Pa. Legis. Serv. 2016-16, *as amended*, 35 Pa. Stat. and Cons. §§ 10231.101-10231.2110; Medical Marijuana Regulations, https://www.pa.gov/en/agencies/health/programs/medical-marijuana/medical-marijuana-regulations.html (last visited Nov. 7, 2024)

establishes the first element. But the third element, that individual participation is not required, is distinct.

SAF also fails to allege direct organizational injury. Mem. 11. Plaintiffs point to a perfunctory statement that SAF has "expended and diverted resources" because of the challenged provisions. Opp'n 6 (citing Decl. of Alan Gottlieb ¶ 12, ECF No. 16-1). That is a mere "formulaic recitation of the elements" of organizational standing, which "will not do" to survive a motion to dismiss. *Twombly*, 550 U.S. at 555. Plaintiffs claim they could address this failure of pleading with a further "amended complaint," Opp'n 6, but they fail to indicate what additional relevant facts they could allege.[2]

## III. Plaintiffs Fail to State a Second Amendment Claim

The challenged provisions are constitutional because they are "consistent with the principles that underpin our regulatory tradition." *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024). They are analogous to historical laws disarming the intoxicated, Mem. 19-25, as well as historical laws disarming groups that the government determined would present a danger with firearms, *id.* at 25-31. Plaintiffs' contrary arguments are unpersuasive.

### A. Relevant History Is Not Limited to the Founding Era

Plaintiffs argue that "this Court should only consider historical, analogous laws from the Founding Era," Opp'n 19, and entirely disregard laws that are "too early or late in time," *id.* at 20. Plaintiffs are wrong. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), *New York State Rifle*

[2] Plaintiffs argue that Defendants' counsel did not adequately raise the issue of direct organizational injury during their meet and confer. Opp'n 5. Defendants' counsel advised that Defendants intended to challenge SAF's standing, and that Defendants' arguments would be similar to their arguments in their Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 19. That was sufficient to apprise Plaintiffs that Defendants maintained their position, clearly expressed in the preliminary injunction opposition brief, *id.* at 10, that SAF had not shown direct organizational injury.

*& Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and *Rahimi*, the Supreme Court considered a wide range of historical materials, including early English history, early colonial history, Founding Era history, and American history through the end of the 19th century. *See* Mem. 17.[3] As Justice Kavanaugh explained, "the Framers themselves intended that post-ratification history would shed light on the meaning of vague constitutional text," and the Supreme Court "has repeatedly employed post-ratification history to determine the meaning of vague constitutional text." *Rahimi*, 144 S. Ct. at 1917-18 (Kavanaugh, J., concurring).

In arguing that this Court should disregard history outside the Founding Era, Plaintiffs rely on a ruling that the Supreme Court vacated in light of *Rahimi*, *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 134 (3d Cir. 2024), *cert. granted, judgment vacated*, No. 24-93, 2024 WL 4486348 (U.S. Oct. 15, 2024). Having been vacated, *Lara* is no longer good law. But even on its own terms, *Lara* did not demand entirely disregarding evidence outside the Founding Era. The court merely concluded that a law was unconstitutional when it could not identify any laws in the 18th century that the court believed supported the law's constitutionality. *Id.* at 133. But here, the relevant historical traditions extend before, during, and after the Founding Era. Mem. 19-31. Tellingly, as Plaintiffs do not dispute, even when *Lara* was good law, district courts in this circuit continued to rely on history outside the Founding Era in Second Amendment cases. *Id.* at 19 n.11.

[3] In *Bruen*, the Supreme Court did more than "mention[]" historical materials from outside the Founding Era because the parties "raised" those materials "in [their] briefing." Opp'n 18 & n.12. In both *Heller* and *Bruen*, the Court spent dozens of pages analyzing historical materials from outside the Founding Era, *see Heller*, 554 U.S. at 592-94, 606-19; *Bruen*, 597 U.S. at 40-49, 51-70, which would have made no sense if those materials were, as Plaintiffs contend, "too early or late in time" to be relevant to the constitutional analysis, Opp'n 20. While the Supreme Court's historical analysis in *Rahimi* was briefer, the Court discussed English statues enacted in 1328, 1662, and 1689, how the surety system evolved from ancient English law and continued through an 1836 Massachusetts statute, and cases from 1843 and 1849. *See Rahimi*, 144 S. Ct. at 1901. Plaintiffs are thus incorrect to suggest that the Court limited its analysis to "laws enacted around the time of the ratification of the Second Amendment in 1791." Opp'n 9 n.4.

**B. The Challenged Provisions Are Analogous to Laws Disarming the Intoxicated**

The challenged provisions "fit[] comfortably within" the historical "tradition," *Rahimi*, 144 S. Ct. at 1896-97, of restricting possession and use of firearms on the basis of intoxication. Mem. 19-25. Plaintiffs fail to address that many courts have correctly upheld the challenged provisions based on the analogy to historical intoxication laws. Mem. 23 & n.14.

Plaintiffs argue that neither the "why" nor the "how" of historical intoxication laws matches the challenged provisions closely enough, but they are wrong on both counts. As to the "why," Plaintiffs acknowledge that the reasons behind the historical intoxication laws and the challenged provisions are "at first blush, seemingly [] aligned," Opp'n 19, because both sets of laws protect against the danger of misuse of firearms by intoxicated persons. Yet Plaintiffs argue that the motivations are mismatched because the challenged provisions do not prohibit those who use drugs pursuant to a doctor's prescription from possessing firearms. *Id.* at 20. To state the obvious, there is a difference between unlawful drug use and lawful prescription drug use, and Congress concluded that those who regularly become intoxicated through criminal drug use present a danger with firearms that is different and greater from that of those who take medicine. *See United States v. Endsley*, No. 3:21-cr-00058, 2023 WL 6476389, at *5 (D. Alaska Oct. 5, 2023) ("[T]he very real risk to public safety posed by the combination of unlawful drug use and firearms was evidently a primary motivation behind Congress's enactment of § 922(g)(3)."). The "why" of historical intoxication laws and the challenged provisions match closely.[4]

[4] Plaintiffs also cite an article that (as of this filing) was unpublished and forthcoming (but mischaracterized by Plaintiffs as already having been published), to argue that marijuana users do not pose a danger with firearms because the data purportedly do not show a statistically significant relationship between state laws that decriminalize marijuana and firearms deaths. Opp'n 16. Even if the Court assumes that the author's analysis is correct, the most likely explanation for a lack of increase of firearms deaths caused by those who use marijuana in compliance with state law but in violation of federal law is that the challenged provisions prohibit those individuals from possessing or receiving firearms.

Plaintiffs argue that the "how" of the challenged provisions is too different from the historical intoxication laws because the historical laws restricted firearms rights while a person was intoxicated, and the challenged provisions apply beyond just the period of intoxication. Opp'n 20-21. Yet courts have recognized that the challenged provisions are similar to historical intoxication laws in that they impose a *temporary* restriction on firearms rights that applies while a person is an unlawful drug user or addict. Mem. 23 & n.13.

Plaintiffs argue that the prohibition is not really temporary, but they mischaracterize the challenged provisions by arguing that a person is automatically prohibited from possessing or receiving firearms if they have used drugs within the past year. Opp'n 13-14, 27. The challenged provisions apply to a person who "*is* an unlawful user of or addicted to any controlled substance," 18 U.S.C. §§ 922(d)(3), (g)(3) (emphasis added), and ATF interprets those statutes to mean "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. The Third Circuit holds that "to be an unlawful user, one needed to have engaged in regular use over a period of time proximate to or contemporaneous with the possession of the firearm." *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004).[5] As a practical matter, a person who possesses firearms while being an unlawful drug user almost certainly will possess firearms while intoxicated, unless he disposes of his firearms before every instance of drug use and then reacquires them after sobering up.

[5] ATF's regulation states that "[a]n inference of current use may be drawn from evidence of" a drug conviction within the past year or multiple drug arrests with the most recent within the past year, 27 C.F.R. § 478.11, but such an inference would be permissive. Courts and juries can consider all relevant facts when determining if a person is an unlawful drug user. The facts may demonstrate that even where a person has a drug conviction or repeat arrests within the past year, that person has ceased his unlawful drug use and is no longer an unlawful drug user.

Because the durational distinction between the historical intoxication laws and the challenged provisions is modest, Plaintiffs are left to argue incorrectly that the Second Amendment prohibits legislatures from going beyond historical regulations in any respect. Specifically, Plaintiffs mischaracterize *Rahimi* in stating that it "declare[s]" that "even if a law regulates arms-bearing for a permissible reason (*i.e.* 'why'), it is unconstitutional 'if it does so to an extent beyond what was done at the founding.'" Opp'n 21 (quoting *Rahimi*, 144 S. Ct. at 1898). *Rahimi* explained that a law "*may* not be compatible with the [Second Amendment] right if it [regulates arms-bearing] to an extent beyond what was done at the founding," but the Court clarified in the next two sentences: "And when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.' The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Rahimi*, 144 S. Ct. at 1898 (emphasis added) (quoting *Bruen*, 597 U.S. at 30). In *Rahimi*, the Court found 18 U.S.C. § 922(g)(8) analogous to surety laws even though § 922(g)(8) went further by banning firearms possession, while the surety laws required posting bond to bear firearms. *See Rahimi*, 144 S. Ct. at 1939 (Thomas, J. dissenting). Although the lone dissenting Justice thought that this distinction was fatal to the constitutionality of § 922(g)(8), the majority emphasized that while the law was "by no means identical to" historical laws, "it does not need to be." *Id.* at 1901 (majority opinion). The same is true here.

### C. The Challenged Provisions Are Analogous to Historical Laws Disarming Groups Deemed Dangerous with Firearms

The historical tradition of disarming categories of people who would be dangerous with firearms also justifies the challenged provisions. Mem. 25-31. Plaintiffs assert that Defendants argue for a "'dangerous test' that has yet to have been adopted by any court." Opp'n 22. To the contrary, many courts have upheld § 922(g)(3) on the basis that it "is 'relevantly similar' to

historical regulations aimed at preventing potentially dangerous persons from possessing and using firearms." *United States v. Clements*, No. 5:23-cr-1389-MIS, 2024 WL 129071, at *5 (D.N.M. Jan. 11, 2024) (quoting *Bruen*, 597 U.S. at 29); *see also* Mem. 31 n.21 (citing nine similar cases). Plaintiffs simply ignore this case law.

Plaintiffs state incorrectly that *Rahimi* rejected the argument that modern firearms laws can be upheld based on the analogy to historical laws disarming groups on the basis of dangerousness. Although *Rahimi* rejected the argument that the Second Amendment is categorically inapplicable to those who are not "responsible," 144 S. Ct. at 1903, the Court also stated that it "do[es] 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," *id.* at 1901. Section 922(g)(3) is such a law.

Plaintiffs assert that allowing legislatures to disarm groups that would present a danger with firearms "is directly contrary to everything our Founders stood for and what they sought to protect against in enshrining our rights in the Constitution," Opp'n 22, but they cannot dispute the history of laws disarming many disparate groups that the government believed presented a danger with firearms, including in colonial and state laws from the Founding Era. Mem. 25-28. Plaintiffs also argue that historical laws disarming dangerous groups should be disregarded because they purportedly address the "concern about preventing insurrection and armed rebellion." Opp'n 23. But history shows that governments disarmed groups who were deemed dangerous for a wide variety of reasons. *Rahimi* instructs that courts can divine "the principles that underpin our regulatory tradition" by "[t]ak[ing] together" different strands of historical laws. 144 S. Ct. at 1898, 1901. Taken together, these laws establish the principle that governments can disarm groups deemed dangerous with firearms. But even if a closer connection in the reason for dangerousness

were required, that connection is provided by the laws targeting the intoxicated and mentally ill, Mem. 19-25, 27-28, who were disarmed based on concerns about impaired judgment and lack of self-control.

### D. The Appropriations Restriction Concerning Medical Marijuana Has Not Removed Marijuana from the Controlled Substances Act (CSA) Schedules

Plaintiffs argue that a targeted restriction on appropriations to the Department of Justice (DOJ) has legalized medical marijuana and removed marijuana from the CSA's schedules of controlled substances. Opp'n 24-26. That is incorrect. The provision temporarily restricts DOJ from spending appropriated funds to prevent states from implementing medical marijuana laws, but it does not change the fact that marijuana is a Schedule I drug and that possession of marijuana violates federal law. The appropriations restriction, commonly known as the Rohrabacher-Farr Amendment, states: "None of the funds made available under this Act to the Department of Justice may be used, with respect to any of [a list of states and territories with medical marijuana laws, including Pennsylvania] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Pub. L. No. 118-42, 138 Stat. 25, 174, § 531 (Mar. 9, 2024). It is a temporary restriction on DOJ spending that applies only for the duration of an appropriations act. Although Congress has included it in every DOJ appropriations act since 2014, it is up to Congress to decide whether to include it in future appropriations acts.

More important, the Rohrabacher-Farr Amendment does not legalize marijuana or show that Congress "does not consider [medical marijuana users] to be breaking the law," as Plaintiffs wrongly suggest. Opp'n 25. The provision "does not provide immunity from prosecution for federal marijuana offenses. . . . Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes . . . is committing a federal crime." *United States*

*v. McIntosh*, 833 F.3d 1163, 1179 n.5 (9th Cir. 2016). Therefore, "it 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*, 36 F.4th 496, 498 (3d Cir. 2022); *see also Fried v. Garland*, 640 F. Supp. 3d 1252, 1260 (N.D. Fla. 2022) (rejecting argument that medical marijuana use is "akin to lawful conduct" because "[r]egardless of whether Plaintiffs are prosecuted (or whether Congress allocates funds for their prosecution), possession of marijuana remains a federal crime").

Plaintiffs' argument that the Rohrabacher-Farr Amendment amended the CSA "by removing, *in toto*, marijuana from the schedules," Opp'n 26, is baseless. The CSA and current DEA regulations explicitly list "marihuana" as a schedule I drug, 21 U.S.C. § 812, sch. I(c)(10); 21 C.F.R. § 1308.11(d)(23), so Plaintiffs must be arguing that the Rohrabacher-Farr Amendment impliedly repealed marijuana's statutory scheduling. But the "doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). This appropriations provision does not "legalize" medical marijuana but temporarily restricts DOJ spending on some, but not all, marijuana-related prosecutions. Plaintiffs note that ATF has acknowledged that Congress effectively repealed the firearms relief provision of 18 U.S.C. § 925(c) by eliminating funding, Opp'n 25, but that is because the elimination of funding deprived § 925(c) of any practical effect. Here, numerous legal consequences attach to marijuana's scheduling, including restrictions on research, *see*, *e.g.*, 21 U.S.C. § 823(c), and the inability of marijuana businesses to take certain tax deductions, 26 U.S.C. § 280E.

**E. The Challenged Provisions Address an Unprecedented Societal Concern**

Plaintiffs argue that the challenged provisions "address[] a general societal issue that has persisted since the 18th century," and are unconstitutional because they do so in a way that is different from Founding Era laws. Opp'n 15-16. Plaintiffs are wrong for two reasons. *First*, the

challenged provisions address an unprecedented societal concern: the unlawful use of controlled substances. Through much of the 19th century there was no need for firearm prohibitions addressing drugs other than alcohol because such substances were not widely used as intoxicants in the United States until the late 19th and early 20th centuries. *See* David F. Musto, *Drugs in America: A Documentary History* 188-192 (2002); Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DePaul L. Rev. 483, 487 (1997) ("[N]arcotics addiction was a negligible phenomenon in the eighteenth and nineteenth centuries."). Only in 1877 did Nevada become the first state to require a prescription for the purchase of any drug (in that case, opium). Elizabeth Kelly Gray, *Habit Forming: Drug Addiction in America, 1776-1914* 25 (2023). Because of this history, "[i]llegal drug trafficking," in particular, "is a largely modern crime." *United States v. Alaniz*, 69 F.4th 1124, 1129 (9th Cir. 2023) (upholding under *Bruen* sentencing enhancement for possessing dangerous weapon during drug offense). Marijuana is no exception. Although hemp was cultivated for agricultural purposes during the Founding Era, there are essentially "no accounts or reports" of "cannabis being used as an intoxicant during the period when the plant was widely cultivated as an agricultural commodity." John Rublowsky, *The Stoned Age: A History of Drugs in America* 98 (1974). Even by the 1930s, Americans lacked "any lengthy or broad experience" with marijuana, Musto, *supra*, at 192, and prohibitions did not emerge until the early 20th century.[6]

*Second*, even if the Court concludes that the challenged provisions address a concern that existed in the Founding Era, they are still constitutional if they are "consistent with the principles that underpin our regulatory tradition." *Rahimi*, 144 S. Ct. at 1898. *Rahimi* upheld 18 U.S.C.

[6] *See* U.S. Treasury Dep't, *State Laws Relating to the Control of Narcotic Drugs and the Treatment of Drug Addiction* 1-9 (1931) (describing development of state-level laws); 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, 985 (1970); *id.* at 1010 (noting Utah passed first state prohibition on cannabis sale or possession in 1915).

§ 922(g)(8), which addressed domestic violence. Domestic violence undoubtedly existed at the Founding, and § 922(g)(8) addressed domestic violence in meaningfully different ways from historic surety bond and going arms laws. Yet the Court held that even though § 922(g)(8) was "by no means identical to these founding era regimes," it was "relevantly similar" to those historical laws, which was sufficient to demonstrate its constitutionality. *Id.* at 1901. The challenged provisions likewise are sufficiently similar to historical laws. *See supra*, pp. 5-9.

**F. *Rahimi* Supports Defendants' Arguments**

Plaintiffs mischaracterize *Rahimi* in calling it a "death knell" that "could not be worse for the Government in relation to the challenged laws." Opp'n 26. As Defendants have explained, *Rahimi* buttresses Defendants' arguments, most importantly by rejecting the argument that a modern firearms law cannot be constitutional if it goes beyond historical laws, because our law is not "trapped in amber," and "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Rahimi*, 144 S. Ct. at 1897-98; *see also* Mem. 13-14, 17-18, 23, 24, 31 (explaining various ways that *Rahimi* supports the constitutionality of the challenged provisions).

*Rahimi* did not declare, as Plaintiffs wrongly argue, that burdens on firearms rights are constitutional only if a person has been found to pose a credible threat to others' physical safety. Opp'n 27. Rather, *Rahimi* stated that 18 U.S.C. § 922(g)(8)(C)(i), the provision under review in *Rahimi*, "presumes, like the surety laws before it, that the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others." 144 S. Ct. at 1902. In describing that provision, *Rahimi* did not hold that a specific finding of danger to others was always required to sustain a firearms law. To the contrary, the Court clarified that it was not rejecting categorical firearms restrictions. *Id.* at 1901 ("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").

**G. This Court Should Not Follow the Fifth Circuit's Outlier *Connelly* Decision**

Plaintiffs entirely ignore the 48 cases cited by Defendants that rejected challenges to § 922(g)(3) or § 922(d)(3), Mem. 12 n.8,[7] and instead ask this Court to follow an outlier against the vast weight of authority, *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024). *See* Opp'n 28-30. Defendants have explained why *Connelly*'s reasoning is flawed. Mem. 34-35. Its most fundamental error is concluding that because historical intoxication laws applied to those currently "under the influence," modern legislatures "at most" hold authority to disarm the currently intoxicated. 117 F.4th at 282. But *Rahimi* explained that modern legislatures can enact laws that go further than historical laws, and that the Fifth Circuit in *Rahimi* "err[ed]" by "read[ing] *Bruen* to require a 'historical twin' rather than a 'historical analogue.'" *Rahimi*, 144 S. Ct. at 1901-02 (quoting *Bruen*, 597 U.S. at 30). In *Connelly*, the Fifth Circuit reprised that error.

*Connelly* also erred in rejecting the analogy to the historical tradition of disarming the mentally ill, *see* Mem. 27-28, reasoning that even though "[t]he Founders purportedly institutionalized 'lunatics' and stripped them of firearms," that would only support disarming a person "[w]hile intoxicated." 117 F.4th at 276-77. This argument ignores that in the Founding Era, leading legal sources defined a "lunatic" as "one that hath lucid intervals; sometimes enjoying his senses, and sometimes not." 1 William Blackstone, *Commentaries on the Laws of England* 294 (1765). Thus, disarming regular unlawful drug users (who, like the mentally ill who were disarmed

[7] Defendants did more than stringcite these cases. Defendants explained throughout their opening brief how the reasoning of these cases demonstrated the constitutionality of the challenged provisions. *See* Mem. 23, 27-28, 31, 32-34 & nn.13, 14, 21.

in the Founding Era, may be able to exercise self-control at some times but not other times), is analogous to historical tradition of disarming the mentally ill.

**H. Plaintiffs Misstate the Legal Standard for Facial Challenges**

Plaintiffs argue incorrectly that "the overbreadth doctrine applies to all constitutionally protected rights and liberties," and that under this doctrine, a law is facially unconstitutional if it "sweep[s] unnecessarily broadly," even if it has many lawful applications. Opp'n 31, 32 (quoting *Zwickler v. Koota*, 389 U.S. 241, 250 (1967)). But the Supreme Court has clearly held that facial challenges outside the First Amendment do not work that way, generally or in the Second Amendment context. The Supreme Court "ha[s] not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In Second Amendment cases, the normal standard for facial challenges applies, under which the challenger must "establish that no set of circumstances exists under which the Act would be valid." *Rahimi*, 144 S. Ct. at 1898 (quoting *Salerno*, 481 U.S. at 745). "That means that to prevail" in defeating a facial Second Amendment challenge, "the Government need only demonstrate that [the challenged law] is constitutional in some of its applications." *Id.*[8]

Plaintiffs argue that "Section 922(g)(3)'s lawful application sweeps far too broadly." Opp'n 32. Defendants disagree, but even if that were correct, that would not justify a facial challenge, so long as the statute "is constitutional in some of its applications." *Rahimi*, 144 S. Ct. at 1898. Plaintiffs do not seriously dispute that it is constitutional to disarm someone while she is under the influence of drugs. *See* Opp'n 33 ("Plaintiffs are not arguing that laws preventing

[8] Plaintiffs cite cases, mainly from the 1960s, in which the Supreme Court discussed the overbreadth of statutes in adjudicating constitutional challenges. Opp'n 31 n.15. Although a statute's overbreadth may be relevant in determining whether it satisfies means-end scrutiny (which does not apply to Second Amendment claims), *Salerno* closed the door on the notion that the overbreadth doctrine is a constitutional doctrine of general application, and *Rahimi* specifically demonstrates that the doctrine is inapplicable in Second Amendment cases.

intoxicated individuals from possessing or using firearms while intoxicated may not survive constitutional scrutiny."). Therefore, their facial challenge fails on that basis alone.

Plaintiffs also argue that even if their facial challenge fails, the challenged provisions are unconstitutional as applied to medical marijuana users. Opp'n 33. But they have no response to *Fried v. Garland*, 640 F. Supp. 3d 1252, which persuasively rejected that very argument. *See* Mem. 32-34.

## IV. The Court Should Not Grant Leave to File a Second Amended Complaint

The Court should reject Plaintiffs' alternative request to grant them leave to file a Second Amended Complaint. Mem. 34. In "ordinary civil litigation," the Third Circuit follows "the settled rule [] that properly requesting leave to amend a complaint requires submitting a draft amended complaint." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 252-53 (3d Cir. 2007). A special rule applies "in civil rights cases," where "district courts must offer amendment—irrespective of whether it is requested—when dismissing a case for failure to state a claim unless doing so would be inequitable or futile." *Id.* at 251. Defendants are unaware of Third Circuit precedent addressing whether Second Amendment challenges are ordinary civil litigation or civil rights cases, but even if the rule for civil rights cases applies here, leave to amend should be denied as futile. Plaintiffs do not explain what factual allegations they could or would add in a Second Amended Complaint that could change the result. The problem with the Amended Complaint is not lack of detail. Rather, the Amended Complaint fails as a matter of law by challenging a constitutional statute. No amendment could fix that fundamental flaw.

## CONCLUSION

The Court should grant Defendants' Motion to Dismiss. The Court should dismiss SAF's claims for lack of subject-matter jurisdiction and should dismiss all Plaintiffs' claims for failure to state a claim. The Court should not grant Plaintiffs leave to file a Second Amended Complaint.

Dated: November 12, 2024

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

On November 12, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Western District of Pennsylvania, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ *Jeremy S.B. Newman*
JEREMY S.B. NEWMAN
Trial Attorney