University of Cincinnati Law Review

Volume 93 | Issue 1 Article 5

October 2024

Lawyers, Guns, and Marijuana: How N.Y. State Rifle and Pistol Ass'n v. Bruen is Shaping Federal Marijuana Law

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LAWYERS, GUNS, AND MARIJUANA: HOW *N.Y. STATE RIFLE AND PISTOL ASS'N V. BRUEN* IS SHAPING FEDERAL MARIJUANA LAW

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I. INTRODUCTION

In April 2022, Patrick Daniels was pulled over for driving without a license plate.[1] Two law enforcement officers searched his vehicle, found marijuana cigarette butts and firearms, and arrested him.[2] Like millions of Americans, Mr. Daniels owned guns and was a frequent user of marijuana.[3] But unlike most people similarly situated, Mr. Daniels was held criminally liable under federal statute 18 U.S.C. § 922(g)(3) and was sentenced to almost four years in prison.[4] The statutory prohibition on firearm possession for marijuana users, as established under 18 U.S.C. § 922(g)(3), has been recognized as constitutional for many years. Its constitutionality, however, was thrown into question in the summer of 2022.[5]

In 2022, the United States Supreme Court decided *N.Y. State Rifle and Pistol Ass'n v. Bruen* and fundamentally changed the framework for how courts determine the extent of Second Amendment rights within the context of a given regulation.[6] The Court determined that the new test should be one of "historical tradition," and the constitutionality of regulations should be grounded in whether there existed Founding-Era regulations that were relevantly or distinctly similar to the modern statute.[7] This reinvigorated Second Amendment test created a ripple effect and impacted numerous federal statutes. One area of law directly impacted by *Bruen* is federal marijuana law, specifically 18 U.S.C. §

* Citations Editor, 2024-2025, Associate Member 2023-2024, *University of Cincinnati Law Review*. I would like to thank Patrick Maney for his extensive thoughtful feedback and edits; and Stephen Cordle for many proofreads and much support.

1. United States v. Daniels, 77 F.4th 337, 340 (2023). On July 2, 2024, the Supreme Court vacated the Fifth Circuit's judgment in *Daniels* and remanded to the Fifth Circuit to consider in light of its recent decision, United States v. Rahimi*,* 144 S. Ct. 1889 (2024). United States v. Daniels, 2024 U.S. LEXIS 2910 at *1 (2024). As discussed later, the Supreme Court's decision in *Rahimi* does not alter the Fifth Circuit's analysis in *Daniels*.

2. *Daniels*, 77 F.4th at 340.

3. *Id.*

4. *Id.* at 341.

5. *See* United States v. Carter, 750 F.3d 462, 463 (4th Cir. 2014); N.Y. State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022).

6. *N.Y. State Rifle*, 597 U.S. 1.

7. *Id.* at 26, 28-29.

922(g)(3) (922(g)(3)).[8]

922(g)(3) creates criminal liability for people who possess firearms and also unlawfully use a controlled substance, including marijuana.[9] The constitutionality of 922(g)(3), as applied to marijuana users, is being questioned in light of the new requirements of the *Bruen* standard. The history of marijuana regulation in the context of *Bruen*'s historical tradition analysis creates complex and novel issues for the federal courts, especially in determining whether the statute remains constitutional as applied to marijuana users.

This Comment first examines the history of marijuana regulation in the United States, including modern conflicts created by state legalization efforts. This Comment then discusses the evolution of Second Amendment protections, beginning with the Supreme Court's landmark decision in *United States v. Heller* and culminating in its recent decision, *N.Y. State Rifle and Pistol Ass'n v. Bruen*.[10] Section II of this Comment examines a recent circuit split on the constitutionality of 922(g)(3) through analysis of *United States v. Daniels*, *United States v. Posey*, and *United States v. Lewis*.[11] Finally, Section III argues that all courts should adopt the Fifth Circuit's approach in *United States v. Daniels* as it is more consistent with current law, even in light of the Supreme Court's decision in *United States v. Rahimi*.[12] Section III further argues that the "law-abiding citizen" exception to the Second Amendment does not limit the rights of marijuana users, that marijuana users are not sufficiently dangerous to warrant Second Amendment restrictions, and that 18 U.S.C. 922(g)(3) as applied to marijuana users is inconsistent with policy objectives of firearms regulations.

II. BACKGROUND

The relationship between the federal government's regulation of marijuana possession and use and firearm possession has distinct and unique, although often politically charged, policy implications. However, the intersection of these two spheres of government policy creates constitutional challenges that question the extent of the federal government's regulatory authority. Part A of this Section outlines the historical and political narrative of marijuana regulation throughout the

8. 18 U.S.C. § 922(g)(3).

9. *Id.*; *see* 21 U.S.C. § 802(6); 21 U.S.C. § 812 (Schedule I (c)(10)).

10. *N.Y. State Rifle*, 597 U.S. at 8; District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

11. United States v. Daniels, 77 F.4th 337, 339 (5th Cir. 2023); United States v. Posey, 655 F. Supp. 3d 762, 765 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1236 (W.D. Okla. 2023). *Daniels* and *Posey* discuss 18 U.S.C. § 922(g)(3) as applied to marijuana users and *Lewis* applies the statute to substance users generally.

12. United States v. Rahimi, 144 S. Ct. 1889 (2024).

twentieth century up to the present day. Part A also introduces 922(g)(3), a federal statute that makes it a felony for an individual to be an unlawful user of marijuana while possessing a firearm.[13] Part B discusses the judicial interpretation of the Second Amendment, culminating in the Supreme Court's 2022 decision in *Bruen*. Further, Part B explores the implications of the *Bruen* decision, including development of the Second Amendment's protections and the resulting rigorous test to determine when federal firearms regulations comport with an individual's constitutional rights.[14] Finally, Part C introduces the different approaches taken by the Fifth Circuit and the district courts in the Seventh and Tenth Circuits regarding the constitutionality of 922(g)(3) in light of *Bruen*.[15]

A. The History and Policy of Marijuana Use and Regulation

Although scholarly debate exists over the extent of marijuana production and use during the early days of American history, cannabis extract, a marijuana product, was widely available in the late nineteenth century.[16] Cannabis extract was often prescribed by nineteenth century physicians for medicinal purposes, along with opium and other narcotics.[17] In 1906, Congress enacted the Pure Food Act, which prohibited the sale of misbranded or poisonous food and drugs.[18] In its definition of "drug," the Pure Food Act included cannabis alongside narcotics, including heroin, cocaine, and chloroform.[19]

After Congress passed the Pure Food Act, public anti-marijuana sentiment became more prevalent as the temperance movement gained traction.[20] Opium addiction gripped Americans, which translated to fear that marijuana abuse would produce similar outcomes.[21] Also, following the Mexican Revolution and the subsequent wave of Mexican immigration, anti-immigration sentiment invited false, prejudicial beliefs that Mexicans introduced marijuana to the United States.[22]

Then, during the 1920s, marijuana use regained popularity both

13. 18 U.S.C. § 922(g)(3).

14. *N.Y. State Rifle*, 597 U.S. at 24.

15. *Daniels*, 77 F.4th at 339; *Posey*, 655 F. Supp. 3d at 765; *Lewis*, 650 F. Supp. 3d at 1236.

16. Stephanie Geiger-Oneto & Robert Sprague, *Cannabis Regulatory Confusion and Its Impact on Consumer Adoption*, 57 AM. BUS. L.J. 735, 738 (2020).

17. *Id.* at 738-39.

18. Pub. L. No. 59-384, 34 Stat. 768 (codified at 21 U.S.C. §§ 1-5) (repealed by an Act of June 25, 1938).

19. *Id.* at § 8.

20. Steve P. Calandrillo & Katelyn Fulton, *"High" Standards: The Wave of Marijuana Legalization Sweeping America Ignores the Hidden Risks of Edibles*, 80 OHIO ST. L.J. 201, 207 (2019).

21. *Id.*

22. *Id.*

recreationally with the rise of jazz music culture and medicinally as pharmaceutical companies used the extract for painkillers and asthma treatments.[23] However, the 1920s marked the height of the Prohibition movement; many prohibitionists held serious anti-drug sentiments.[24] Also at work was invidious racism and prejudice, specifically against Black Americans and Mexican Americans.[25] Supporters of criminalization alleged that marijuana influenced racial minorities to commit violent crimes.[26] Racial animus played a significant role in states' efforts to criminalize marijuana, and by 1931, at least twenty-two states enacted legislation that curbed marijuana possession and use.[27] Throughout the early twentieth century, approximately half of the states classified marijuana as an addictive drug equivalent to opiates and cocaine.[28] This classification and state regulation influenced public opinion about the harmful effects of marijuana, creating effectively uniform prohibition across the states during the 1930s.[29]

Federal efforts to curb marijuana possession and use progressed more slowly than state legislation. The first federal attempt to enact widespread marijuana restrictions occurred in the early 1930s, when the Bureau of Narcotics promulgated a Uniform Narcotic Drug Act, or model legislation for individual states to enact.[30] Eventually, Congress passed the Marijuana Tax Act in 1937, which imposed stringent requirements for possession and transportation of marijuana, effectively making it illegal in almost all circumstances.[31]

In the 1950s, Congress passed the Boggs Act, which created severe punishments for marijuana possession and distribution.[32] Efforts to completely criminalize marijuana culminated in the early 1970s. In 1970, Congress passed The Controlled Substance Act of 1970 (CSA) which regulates the manufacture and distribution of all drugs, both illegal and legal.[33] Marijuana was classified as a Schedule I drug. Schedule I classification means Congress determined that marijuana had a high

23. *Id.*

24. *Id.*

25. *Id.* at 208.

26. *Id.*

27. *Id.*; *see* Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

28. Bonnie and Whitebread, *supra* note 27, at 1027.

29. *Id.* at 1028.

30. *Id.* at 1030.

31. *Id.* at 1062.

32. 82 Pub. L. No. 255, 65 Stat. 767; David R. Katner, *Up In Smoke: Removing Marijuana From Schedule I*, 27 B.U. PUB. INT. L.J. 167, 175 (2018).

33. 21 U.S.C. § 811; Practice Note on Cannabis and the Practice of Law, Lexis (2023). For clarity, in federal legislative materials, marijuana is also referred to as cannabis or marihuana.

potential for abuse, had no then-accepted medicinal use in the United States, and lacked accepted safety protocols for its use under supervision.[34] In similar fashion to the anti-narcotics movement of the early twentieth century, marijuana's designation as a Schedule I drug placed it in the same category as narcotics such as heroin, methamphetamine, and LSD.[35] The categorization of cannabis as a Schedule I drug under the CSA was primarily politically, as opposed to scientifically, motivated.[36] Marijuana's Schedule I classification came at the height of the Vietnam conflict, and was largely aimed at "the anti-war left and Black American" groups commonly associated with the drug.[37]

Over the next twenty years, decriminalization efforts collided with the federal "War on Drugs" and the resulting strict enforcement of drug laws.[38] However, in 1996, California passed the Compassionate Use Act, which legalized marijuana cultivation for several medicinal uses.[39] Since the passage of the Compassionate Use Act, many states followed suit and legalized marijuana medicinally and recreationally.[40] Today, marijuana is widely used by individuals across the country for a variety of reasons, including for cancer treatment, pain management, and recreation.[41]

Despite extensive state decriminalization measures, marijuana remains illegal at the federal level.[42] Thus, state laws that purport to legalize marijuana are generally in direct conflict with federal law. However, in 2011, Deputy Attorney General James Cole published a memorandum explaining that the federal government would not focus its resources on pursuing marijuana charges against individuals using the drug for medical reasons in compliance with state laws.[43] Then, in 2013, Deputy Attorney

34. 21 U.S.C. § 812 (Schedule I (c)(10)).

35. *Id.*

36. Katner, *supra* note 32, at 188-89.

37. Practice Note on Cannabis and the Practice of Law, Lexis (2023).

38. Katner, *supra* note 32, at 189.

39. Gonzales v. Raich, 545 U.S. 1, 5 (2005); *see* Christina E. Coleman, *The Future of the Federalism Revolution: Gonzales v. Raich and the Legacy of the Rehnquist Court,* 37 LOY. U. CHI. L.J. 803, 828 (2006).

40. Florence Shu-Acquaye, *The Role of States in Shaping the Legal Debate on Medical Marijuana*, 42 MITCHELL HAMLINE L. REV. 697, 718-27 (2016) (providing tables outlining every state's medical marijuana regulation); Amy Kellog, Caitlin Anderson, & Meg Michels, *A Cannabis Conflict of Law: Federal vs. State Law* (American Bar Association, 2022), https://www.americanbar.org/groups/business_law/resources/business-law-today/2022-april/a-cannabis-conflict-of-law-federal-vs-state-law/.

41. Shu-Acquaye, *supra* note 40, at 718-27.

42. 21 U.S.C. § 811; 21 U.S.C. § 812 (Schedule I (c)(10)).

43. Memorandum from James M. Cole, Deputy Attorney General of the United States to United States Attorneys (June 29, 2011) (on file at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf) ("The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts. . . . Accordingly, the Ogden Memo

General Cole published the "Cole Memorandum," which explained that the Department of Justice would continue to focus enforcement of marijuana laws on the most significant threats, including preventing marijuana revenue from funding criminal gangs and cartels.[44] The memorandum further provided that the Department of Justice expected that states, having developed their own robust regulatory and enforcement systems, would assume responsibility for the prosecution of minor possession violations.[45]

Although these memoranda indicate that federal marijuana laws are generally not an enforcement priority, federal prosecutors continue to enforce other federal laws that implicate marijuana use or possession.[46] A specific example is 922(g)(3), which makes it unlawful for any person 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, possess, or receive a firearm transported through interstate commerce.[47] Because marijuana is a Schedule I drug under the CSA, it falls into the prohibited categories of 922(g)(3).[48] Therefore, this statute virtually creates a felony penalty for individuals who are unlawful users of marijuana and possess or otherwise receive a firearm, and it is routinely prosecuted by federal law enforcement.[49]

To be convicted of a 922(g)(3) violation, federal regulations define an "unlawful user" of a controlled substance as an individual who has either lost the power of self-control due to the drug or who is a current user of a controlled substance other than as provided for by a physician.[50] However, the regulations provide that a loss of self-control is not

reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. . . . The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed.").

44. Memorandum from James M. Cole, Deputy Attorney General of the United States to All United States Attorneys (August 29, 2013) (on file at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf) (noting that the memorandum included preventing the use of firearms in the cultivation and distribution of marijuana but did not mention firearms in conjunction with private marijuana use).

45. *Id.*

46. United States v. Daniels, 77 F.4th 337, 340 (5th Cir. 2023); United States v. Posey, 655 F. Supp. 3d 762, 765 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1236 (W.D. Okla. 2023).

47. 18 U.S.C. § 922(g)(3).

48. 1 U.S.C. § 812 (Schedule 1 (c)(10)); 21 U.S.C. § 802(16)(B) (defining marijuana as all parts of the Cannabis sativa L. plant, but does not include hemp, or compounds or fiber produced from mature stalks, thus limiting illegal marijuana to that which is used in consumption).

49. *See Daniels*, 77 F.4th at 340; *Posey*, 655 F. Supp. 3d at 765; *Lewis*, 650 F. Supp. 3d at 1236.

50. 27 C.F.R. § 478.11.

necessary at the precise time of a 922(g)(3) violation.[51] An individual does not have to be under the influence of a drug at any particular time, but must merely be a current and continual user when in possession of a firearm.[52] The Fifth Circuit further explained that "[a]n 'unlawful user' is someone who uses illegal drugs regularly and in some temporal proximity to the gun possession."[53] This means that a person may be an unlawful current user of marijuana at the time they seek possession of a firearm, even if they are not using drugs at that precise time.[54] Thus, 922(g)(3) creates stringent, oft-enforced, criminal liability for those individuals who both use marijuana and possess a firearm.[55]

The policy behind this blanket prohibition is revealed by the Congressional Record and subsequent case law. In *United States v. Cheeseman*, the Third Circuit discussed these policy underpinnings.[56] The *Cheeseman* court determined the Congressional Record makes clear that 18 U.S.C. § 922 was broadly enacted to restrict public access to firearms.[57] 922(g)(3) specifically was designed to keep firearms out of the hands of those Congress viewed as dangerous, namely drug users.[58] Further, in upholding 922(g)(3), courts tend to find that drug users pose a risk to society if allowed to possess firearms.[59] However, in defining "drug users," federal legislation indicates that Congress does not distinguish between users of different drugs when categorizing them as dangerous individuals.[60] Therefore, the policy underpinnings for categorical firearms prohibitions for unlawful narcotics users and for marijuana users are the same, despite vast differences in the usage and effects of these drugs.

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51. *Id.*

52. *Id.*

53. *Daniels*, 77 F.4th at 340; *see* United States v. McCowan, 469 F.3d 386, 392 (5th Cir. 2006).

54. *Daniels*, 77 F.4th at 340.

55. Kimberly J. Winbush, *Proscription of 18 U.S.C. § 922(g)(3) that Persons Who Are Unlawful Users of or Addicted to Any Controlled Substance Cannot Possess Any Firearm or Ammunition in or Affecting Commerce*, 44 A.L.R. Fed. 3d. 3 (this database is updated weekly and explains interpretation, challenges, and enforcement of 922(g)(3)).

56. United States v. Cheeseman, 600 F.3d 270, 279 (3d Cir. 2010).

57. *Id.*

58. *Id.*

59. United States v. Gil, No. EP-22-CR-773-DB, 2023 U.S. Dist. LEXIS 115051, at *14 (W.D. Tex. 2023) (providing numerous examples of court decisions expounding upon congressional intent in enacting 922(g)(3) (note that this decision vacated and remanded by the Fifth Circuit in United States v. Gil, No. 23-50525 2024 U.S. App. LEXIS 11787 *1 (5th Cir. 2024))).

60. *See* 1 U.S.C. § 812 (Schedule 1(c)(10)); *see* United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010) (the defendant, a marijuana user, appealed his §922(g)(3) conviction, and the court concluded that Congress was constitutionally justified in enacting §922(g) in order to "to keep guns out of the hands of risky people.").

B. Bruen *and Its Predecessors: Defining the Scope of Americans' Second Amendment Rights*

The Second Amendment to the United States Constitution states that, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[61] The Amendment is fraught with controversy over its meaning, breadth, and social and political consequences.[62] This controversy has not evaded the Supreme Court, which has decided several cases over the past twenty years to determine the scope and meaning of the Second Amendment.

The first Supreme Court decision to thoroughly examine the scope of the Second Amendment was *District of Columbia v. Heller,* authored by Justice Antonin Scalia in 2008.[63] In *Heller*, Justice Scalia engaged in a textual analysis of each phrase of the Second Amendment.[64] He drew several important conclusions. First, to better understand the Second Amendment, he broke its text up into prefatory and operative clauses.[65] The prefatory clause reads "a well regulated Militia, being necessary to the security of a free State," and the operative clause reads, "the right of the people to keep and bear Arms, shall not be infringed."[66]

The Court determined the prefatory clause's function was to explain the purpose for which the Second Amendment was codified—to protect the militia.[67] However, the Court was careful to explain that the prefatory clause does not limit the Amendment to this stated purpose, but merely articulates one of the many reasons for the preservation of the right to keep and bear arms.[68]

Justice Scalia analyzed the language of the operative clause and concluded that the "right of the people" applies unambiguously "to all members of the political community, not a specified subset."[69] Next, the language "keep and bear Arms" is interpreted to mean that individuals generally have the right to possess weapons, including modern ones.[70] Ultimately, the Court determined that the Second Amendment established an individual right for "law-abiding, responsible citizens to use arms in

61. U.S. CONST. amend II.

62. Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 235 (2020).

63. District of Columbia v. Heller, 554 U.S. 570, 573 (2008).

64. *Id.* at 576.

65. *Id.* at 577.

66. *Id.*

67. *Id.* at 599.

68. *Id.*

69. *Id.* at 580.

70. *Id.* at 585-86.

defense of hearth and home."[71]

Two years after *Heller*, the Supreme Court decided *McDonald v. City of Chicago*, which extended the Second Amendment to apply to the states through incorporation by the Fourteenth Amendment.[72] After these decisions, the lower federal courts began to apply the holdings of *Heller* and *McDonald* to state and federal gun regulations.[73] Because *Heller* failed to establish a test to determine when a challenged firearm regulation is permissible under the Second Amendment, the lower courts were left to define a standard to fit the parameters of these decisions.[74]

In the years following *Heller* and *McDonald*, the lower courts generally adopted a two-part test that first analyzed the historical tradition of the challenged regulation and then subjected the regulation to means-end scrutiny.[75] The threshold question the courts asked was whether the regulated activity fell within the scope of the Second Amendment.[76] If the government demonstrated that the regulated activity fell outside "the scope of the right as originally understood, then the regulated activity [was] categorically unprotected and the law [was] not subject to further Second Amendment review."[77] In other words, if the regulated activity was not considered protected by the Second Amendment at the Founding, it is unprotected today and the inquiry ends.

If, however, the regulated activity was historically protected by the Second Amendment, the courts applied a form of means-end scrutiny that evaluated the government's regulation in light of the public benefit it hoped to achieve.[78] The rigorousness of the review depended on "how close the law [came] to the core of the Second Amendment right and the severity of the law's burden on the right."[79]

Then, in 2022, the Supreme Court decided *N.Y. State Rifle and Pistol Ass'n v. Bruen*, which definitively rejected the means-end scrutiny prong adopted by the lower courts.[80] Instead, the Court held:

> Today, we decline to adopt that two-part approach. In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.

71. *Id.* at 635.

72. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

73. *See* Ezell v. City of Chicago, 846 F.3d 888, 892 (7th Cir. 2017); Kanter v. Barr, 919 F.3d 437, 441 (7th Cir. 2019); United States v. Yancey, 621 F.3d 681, 683 (7th Cir. 2010).

74. *See* Ezell v. City of Chicago, 651 F.3d 684, 703 (7th Cir. 2011).

75. N.Y. State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1, 18 (2022); *Kanter*, 919 F.3d at 441 (discussing the two-part test).

76. *Kanter*, 919 F.3d. at 441; *Ezell*, 846 F.3d. at 892.

77. *Kanter*, 919 F.3d. at 441 (citation omitted).

78. *Id.*

79. *Ezell*, 846 F.3d. at 892 (citations omitted).

80. *N.Y. State Rifle*, 597 U.S. at 17.

> To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[81]

Under this analysis, the right to bear arms is presumptively protected, and the Government has the burden of affirmatively proving that the challenged regulation is of a kind that has traditionally and historically been outside the scope of the Second Amendment's protection.[82] The Court explained that when a challenged regulation addresses a problem persistent in the eighteenth century, the government must find "distinctly similar" regulations; whereas, if the problem were unimaginable in the eighteenth century, the government must only find "relevantly similar" regulations.[83] In other words, unless the limit on the individual right to keep and bear arms is distinctly or relevantly similar to Founding-Era regulations (i.e., when the Second Amendment was ratified or during Reconstruction, when the Fourteenth Amendment was adopted) the regulation is likely unconstitutional.[84]

The *Bruen* Court held that *Heller* did not support means-ends scrutiny because "it has always been widely understood that the Second Amendment codified a pre-existing right" to keep and bear arms; it did not affirmatively create the right.[85] The Court also rejected the interest balancing aspect of the two-step test, stating, "[m]oreover, *Heller* and *McDonald* expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[86]

However, the Court acknowledged that the Second Amendment is not unlimited.[87] Justice Clarence Thomas, citing *Heller,* rejected the idea that Americans have the right to keep and carry weapons in any way and for any purpose.[88] Further, Justice Thomas explained that prohibitions on certain "dangerous and unusual weapons" comport with the Second

81. *Id.*

82. *Id.* at 17-18.

83. *Id.* at 26-29.

84. *Id.* (noting that the *Bruen* Court did not intend the analogical reasoning to be a "regulatory straightjacket" or a "regulatory blank check," and did not require a "historical twin," but merely a historical analogue).

85. *Id.* at 20 (citation omitted).

86. *Id.* at 22 (internal quotations omitted) (citation omitted).

87. *Id.* at 21.

88. *Id.*

Amendment, and reiterated that the boundaries of the Amendment are guided by the common possession and use of weapons at the time of the Founding.[89]

Ultimately, the Second Amendment test articulated by the *Bruen* Court more closely resembles the standards the Court created to protect other fundamental rights.[90] For example, Justice Thomas drew parallels between the burden the government must prove to demonstrate that a categorical exception exists to the First Amendment, and the burden the government must now prove for the Second Amendment.[91] The Court concluded by determining that reliance on history—at the time of the Second Amendment's adoption—creates a more legitimate and administrable rule "than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions."[92] Thus, under *Bruen*, the Court sought to more fully define and protect the individual right to possess and use firearms that was first articulated in *Heller*, in accordance with the original Founding-Era understanding of the right.

C. Circuit Split

Following *Bruen*'s explicit overruling of the previous tests adopted by lower courts to determine the scope of the Second Amendment, lower courts have grappled with applying the *Bruen* test and understanding how it may change the constitutionality of some federal legislation.[93] One such law that has become the subject of litigation is 922(g)(3), the statute that prohibits an unlawful user of a substance from possessing a firearm.[94] Specifically, *United States v. Daniels*, *United States v. Posey*, and *United States v. Lewis* demonstrate opposing positions regarding the constitutionality of 922(g)(3) as applied to marijuana users.[95] These courts in the post-*Bruen* era are decisively split on whether there is a historical tradition of barring marijuana users from possessing firearms.

United States v. Daniels is a Fifth Circuit decision that involved the appeal of a 922(g)(3) criminal conviction.[96] In *Daniels*, the defendant was

89. *Id.*

90. *Id.* at 24.

91. *Id.* at 24-25.

92. *Id.* at 25 (citation omitted).

93. United States v. Daniels, 77 F.4th 337, 339 (5th Cir. 2023); United States v. Posey, 655 F. Supp. 3d 762, 765 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1236 (W.D. Okla. 2023).

94. 18 U.S.C. § 922(g)(3).

95. *Daniels*, 77 F.4th at 357; *Posey*, 655 F. Supp. 3d at 776; *Lewis*, 650 F. Supp. 3d at 1242.

96. *Daniels*, 77 F.4th at 339.

pulled over for driving without a license plate.[97] Upon searching the vehicle, the officers found marijuana cigarette butts in the ashtray and two loaded firearms.[98] Daniels was taken into custody and to a local Drug Enforcement Administration office, but he was never drug-tested or asked whether he was under the influence of marijuana or otherwise intoxicated.[99] Daniels admitted that he had been a regular user of marijuana since high school, and was thereafter charged with a 922(g)(3) violation.[100] The jury ultimately found Daniels guilty and sentenced him to nearly four years in prison.[101]

On appeal, the Fifth Circuit considered whether Daniels' conviction violated his right to bear arms under the Second Amendment, and, in light of *Bruen*, whether 922(g)(3) was consistent with the United States' historical tradition of firearm regulation.[102] The Fifth Circuit ultimately concluded that, although there is a historical tradition of regulating firearms and intoxicating substances, the government did not unilaterally prohibit firearm possession for those who used drugs and alcohol at some point in time.[103] Therefore, the Fifth Circuit held that, "[i]n short, our history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober person based exclusively on his past drug usage."[104]

To arrive at this conclusion, the Fifth Circuit followed the test laid out in *Bruen* and asked whether the Second Amendment's plain text covered Daniels' conduct.[105] First, the Fifth Circuit cited *Heller*, which found that the Second Amendment applied to all members of the political community, and reasoned that, "even as a marijuana user, Daniels is a member of our political community."[106] The Fifth Circuit then considered that *Heller* qualified the Second Amendment's protection as applying to "law-abiding, responsible citizens," and that *Bruen* also used the phrase repeatedly.[107] However, the Fifth Circuit determined that it did not need to closely examine the Supreme Court's choice of phrase, citing its own decision in *Rahimi*, where it found that more than just model citizens are

97. *Id.* at 340.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 341.
102. *Id.* at 339-40.
103. *Id.*
104. *Id.*
105. *Id.* at 342.
106. *Id.*
107. *Id.* (additionally, the Government used this language in its argument to assert that the Second Amendment did not apply to criminal cases, as here).

accorded Second Amendment rights.[108] The Fifth Circuit acknowledged that the Supreme Court's emphasis on whether a citizen is law-abiding indicates at least some limitation on the Second Amendment, but concluded that Daniels' conduct was presumptively protected anyway.[109]

The Fifth Circuit then moved to the second step of the *Bruen* analysis, which required it to determine whether the historical tradition of American firearm regulation supported the 922(g)(3) prohibition.[110] The Fifth Circuit considered whether to apply the distinctly or relevantly similar standard, finding that, although intoxication was a persistent social problem at the time of Founding, neither marijuana use nor the drug trade were widespread concerns. Therefore, the Fifth Circuit determined that it only needed to find a relevant similarity between historical regulations and 922(g)(3).[111]

In light of this, the Fifth Circuit analyzed three categories of historical laws the Government offered in support of 922(g)(3)'s constitutionality: (1) statutes disarming the intoxicated, (2) statutes disarming the mentally ill, and (3) statutes disarming the dangerous.[112] The Fifth Circuit determined that the closest analogues to 922(g)(3) were regulations relating to alcohol intoxication and disarmament.[113] The Fifth Circuit then discussed that, while a few states historically prohibited carrying weapons while under the influence of alcohol, none barred gun possession altogether for those who generally consumed it.[114] Likewise, the Fifth Circuit found that historical restrictions on those with mental illness were

108. *Id.* at 343; *see* United States v. Rahimi, 6 F.4th 443, 452, 461 (5th Cir. 2023). There, the Fifth Circuit found that individuals subject to domestic protection orders are law-abiding citizens for the purpose of the *Bruen* analysis. In *Rahimi*, the Fifth Circuit discussed *Heller* and *Bruen*'s indication that the Second Amendment applies only to "law-abiding citizens," and concluded that, while this phrase may "exclude those who have demonstrated disregard for the rule of law through the commission of felony and felony-equivalent offenses," Mr. Rahimi's domestic protection order (which notably did not require a criminal conviction) did not create a "strong presumption" that he was excluded from Second Amendment protections. The *Rahimi* court also noted that it would have considered policy implications that outweighed Mr. Rahimi's Second Amendment rights under the previous means-end scrutiny test, but that *Bruen* foreclosed these considerations. However, the Supreme Court reversed the Fifth Circuit's decision, holding instead that an individual subject to a domestic violence restraining order may be banned from possessing firearms consistent with the Second Amendment. *See* United States v. Rahimi, 144 S. Ct. 1189, 1897 (2024). The Court found that laws "confirm[ed] what common sense suggests," that when an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. *Id.* at 368.

109. *Daniels*, 77 F.4th at 343.

110. *Id.*

111. *Id.* at 343-44. Recall that in *Bruen*, the Supreme Court held that the firearms restriction must either be distinctly or relevantly similar to Founding-Era or Reconstruction-Era regulations, with "distinctly similar" being the more stringent analysis. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26-29 (2022).

112. *Daniels*, 77 F.4th at 344.

113. *Id.* at 345.

114. *Id.*

not sufficiently analogous because Daniels (as a marijuana user) was unlike the historical "categorically insane" person, and much more like a repeat alcohol user.[115]

The Government's final argument—that the historical tradition of limiting gun possession rights of dangerous individuals applied to Daniels as a marijuana user—was also rejected by the Fifth Circuit.[116] The Fifth Circuit noted that the Government cannot simply adhere to a "general notion of dangerousness" whenever it wants to justify a regulation.[117] The Fifth Circuit explained that, "[n]o one piece of evidence suggests that when the founders ratified the Second Amendment, they authorized Congress to disarm anyone it deemed dangerous. . . . Those laws suggest an abstract belief that the individual's right to bear arms could be curtailed if he was legitimately dangerous to the public."[118] The Fifth Circuit rejected laws the Government offered to support its dangerousness theory, finding that although a historical tradition exists of disarming classes of persons perceived to be dangerous, the Government must analogize to "particular regulatory traditions instead of a general notion of dangerousness."[119] Because the Government did not produce a historical analogue of persons classified as dangerous sufficiently comparable to marijuana users, the dangerousness argument failed.[120]

Although the Fifth Circuit held that 922(g)(3) was inconsistent with the history and tradition of firearms regulation, *Daniels* was an as-applied challenge—the Fifth Circuit did not strike down 922(g)(3) on its face, but only held that 922(g)(3) was unconstitutional *as applied* to Daniels' circumstance.[121] Although the Fifth Circuit was careful to emphasize the narrowness of its holding, reminding its audience that the Second Amendment is compatible with reasonable gun regulations, it nonetheless determined that 922(g)(3) is inconsistent with original understandings of the Second Amendment in this context.[122]

By contrast, the Northern of District of Indiana in the Seventh Circuit upheld the application of 922(g)(3) to marijuana users in *United States v.*

115. *Id.* at 349.

116. *Id.* at 350.

117. *Id.* at 354.

118. *Id.* (discussing Kanter v. Barr, 919 F.3d 437, 451, 456, 469 (7th Cir. 2019) (Barrett, J. dissenting)).

119. *Id.* at 354 (quotations omitted).

120. *Id.* (the Government's categories of laws generally fell into two classes: British loyalists (categorized as political traitors) and Catholics and other religious dissenters (categorized as political insurrectionists), which are clearly inapplicable to marijuana users. The Fifth Circuit also rejected the Government's argument that these categories demonstrate a tradition of disarming those who threaten public peace, instead finding that these laws demonstrate disarmament only to prevent violence and rebellion).

121. *Id.* at 355.

122. *Id.*

Posey.[123] There, Posey was charged with a 922(g)(3) violation for possessing marijuana and multiple firearms.[124] In response, Posey brought facial and as-applied constitutional challenges to 922(g)(3).[125]

To determine the constitutionality of 922(g)(3), the district court reasoned that *Bruen*'s holding was "neither a regulatory straightjacket nor a regulatory blank check," that "the right secured by the Second Amendment is not unlimited," and that nothing in *Heller*, which *Bruen* expanded upon, "should be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill."[126] The district court found that *Heller* and *McDonald* offered at least two factors to consider when applying the relevantly similar standard: (1) whether the modern and historical regulations create comparable burdens on Second Amendment rights, and (2) whether the burdens are justified by comparable reasoning.[127] Further, the district court explained that, "even if a modern regulation is not a 'dead ringer' for a historical precursor, it may be sufficiently analogous to pass constitutional muster."[128]

In determining the constitutionality of 922(g)(3), the district court decided to assume Posey was protected without affirmatively determining whether Posey's conduct was protected under the Second Amendment.[129] The Government argued that *Bruen* did not apply to Posey, as she was not a law-abiding citizen.[130] The district court discussed the divided precedents in the Seventh Circuit, specifically *United States v. Yancey* and *United States v. Meza-Rodriguez*.[131] In *United States v. Yancey*, the court determined that the right to bear arms is "tied to the concept of a virtuous citizenry," so the government may disarm those who are not virtuous, or, in other words, not law-abiding.[132] But, in *United States v. Meza-Rodriguez,* the Seventh Circuit extended the right to bear arms to unlawfully-present noncitizens, thus declining to limit the protected political community to law-abiding citizens.[133] Because these precedents conflicted, the district court left the decision to the Seventh Circuit and

123. United States v. Posey, 655 F. Supp. 3d 762, 765 (N.D. Ind. 2023).

124. *Id.*

125. *Id.* at 766.

126. *Id.* at 766, 768 (citations omitted).

127. *Id.* at 767-68 (citations omitted).

128. *Id.* at 768 (citing N.Y. State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022))

129. *Id.* (noting that the court disposed of the defendant's as-applied challenge for several reasons largely unrelated to the *Bruen* inquiry).

130. *Id.* at 770.

131. *Id.*

132. *Id.*; United States v. Yancey, 621 F.3d 681, 684-85 (7th Cir. 2010).

133. United States v. Posey, 655 F. Supp. 3d 762, 770 (N.D. Ind. 2023); United States v. Meza-Rodriguez 798 F.3d 664, 672 (7th Cir. 2015).

determined that, regardless of whether the defendant's conduct was protected under the Second Amendment, the district court could resolve the issue based on the second prong of *Bruen*.[134]

The district court moved on to the second *Bruen* prong and reasoned that, during the twentieth century, numerous states—as well as the federal government—enshrined regulations restricting the rights of habitual drug and alcohol users from possessing or using firearms.[135] The district court also cited the Seventh Circuit *Yancey* decision, which pointed to state laws that disarmed alcoholics, and concluded that 922(g)(3) was sufficiently similar to these historical intoxication laws.[136] The district court justified 922(g)(3) as analogous to such historical statutes because, although 922(g)(3) does not require that unlawful users be actively under the influence at the time of firearm possession, users are still in "the course of their intoxicant use."[137] The district court stated that habitual drug users, like those who are intoxicated, may resume their Second Amendment rights by stopping substance use.[138] For those reasons, the district court concluded that the Government met its burden of demonstrating a historical tradition of restricting the right to bear arms in a manner consistent with the Second Amendment.[139]

The district court also upheld 922(g)(3) under the theory that the regulation is consistent with a historical tradition of prohibiting dangerous people from possessing firearms.[140] In so doing, the court cited then-Judge Amy Coney Barrett's dissent in the Seventh Circuit decision *Kanter v. Barr,* where she stated that "legislatures have the power to prohibit dangerous people from possessing firearms."[141] The district court then cited a line of cases standing for the principle that there is a history and tradition of disarming those who pose a threat to public safety, concluding that marijuana users fit into that category. According to the district court, the deprivation of the Second Amendment right was lenient in this circumstance, as the individual may regain rights when they stop

134. *Posey*, 655 F. Supp. 3d at 771.

135. *Id.* 773.

136. *Id.*

137. *Id.* at 774.

138. *Id.* at 775-76.

139. *Id.* at 776.

140. *Id.*

141. *Id.* at 775 (citing *Kanter v. Barr*, 919 F.3d 437, 451, 456, 469 (7th Cir. 2019) (Barrett, J. dissenting) (finding that the legislature has the authority to disarm dangerous people, but that the power does not extend to 18 U.S.C. § 922(g)(1) (federal prohibition for felons in possession of a firearm)); (then-Judge Barrett provided a thorough historical discussion of evidence of the Founding-Era understanding of the Second Amendment, and concluded that "categorical exclusions from the enjoyment of the right to keep and bear arms . . . [were] about threatened violence and the risk of public injury"; and thus, non-violent felons are not members of a class which the legislature may constitutionally disarm.).

using marijuana.[142] Ultimately, the district court concluded that 922(g)(3) was constitutional under both a historical tradition of regulating firearm use by intoxicated persons and a general theory of legislative authority to disarm the dangerous.[143]

A Western District of Oklahoma case in the Tenth Circuit, *United States v. Lewis*, also found 922(g)(3) constitutional as applied to substance users generally.[144] In *Lewis*, the defendants filed a motion to dismiss their indictments on constitutional grounds after they were charged with 922(g)(3) violations for being unlawful users of controlled substances while in possession of firearms.[145] Although the *Lewis* court ultimately arrived at the same conclusion as the *Posey* court, the *Lewis* court addressed important issues not discussed in *Posey*.[146]

In an attempt to avoid the burden of proving a historical analogue to 922(g)(3), the Government, as it did in *Posey*, argued that individuals who are unlawful users of controlled substances are not law-abiding or virtuous, and therefore their rights are not protected by the Second Amendment.[147] The district court flatly rejected this contention, citing numerous cases where that same principle was rejected by other Oklahoma federal and state judges.[148] The district court found that the Government erred by focusing on the individuals' status as opposed to their conduct, and that "[the defendants] don't walk around with dark clouds over their heads for Second Amendment purposes just because the government deems them unvirtuous and not law abiding."[149]

Nevertheless, the district court found that the Government identified a sufficiently similar historical analogue to justify the constitutionality of 922(g)(3).[150] Here, as opposed to the more lenient relevantly similar standard applied in *Daniels*, the district court applied the distinctly similar standard.[151] The district court found that the Government met its burden of demonstrating a historical tradition of regulating Second Amendment rights as in 922(g)(3)—even under the more stringent distinctly similar standard.[152] The court highlighted certain components of 922(g)(3) to demonstrate that it "treads fairly lightly" in comparison to other firearm regulations including: (1) the mens rea requirement that the defendant

142. *Id.* at 776.
143. *Id.*
144. United States v. Lewis, 650 F. Supp. 3d 1235, 1236 (W.D. Okla. 2023).
145. *Id.* at 1237.
146. *Id.* at 1242; *See Posey*, 655 F. Supp. 3d at 765.
147. *Lewis*, 650 F. Supp. 3d at 1238.
148. *Id.*
149. *Id.*
150. *Id.* at 1240.
151. *Id.*
152. *Id.*

"knowingly" violated the statute, (2) that the controlled substance use must be current, and (3) that the statute "does not disarm anyone for life."[153] The court then discussed the Government's position that there is a historical tradition of disarming those who are "potentially mentally unfit" to bear the responsibility of Second Amendment rights.[154] The district court concluded that the historical analogues relating to mental impairment are sufficiently comparable to 922(g)(3), and that drug users, "like the mentally ill, are more likely to have difficulty exercising self-control, making it more dangerous for them to possess deadly firearms.[155] On these grounds, the district court denied the defendants' motion to dismiss, finding that 922(g)(3) passed constitutional muster.[156]

III. ARGUMENT

The number of Americans who use marijuana or support its legalization has increased dramatically in the past half-century.[157] As the lower federal courts grapple with the applicability of *Bruen* in various firearm regulation contexts, it is important that they determine whether individuals who use marijuana are entitled to the protections of the Second Amendment. Although it may be tempting to adopt the simpler approach of the district courts within the Seventh and Tenth Circuits—that 922(g)(3) is sufficiently similar to historical intoxication laws and that marijuana users are inherently dangerous—this approach is inconsistent with the Supreme Court's jurisprudence.[158] Instead, courts should adopt the Fifth Circuit's approach, which concluded that the American historical tradition of firearm regulation does not support the prohibition of firearm possession merely based on an individual's status as a user of intoxicating substances.[159]

First, this Section recognizes that the Supreme Court vacated the Fifth Circuit's original decision in *Daniels* and ordered reconsideration given the Court's decision in *United States v. Rahimi*.[160] Still, as this Section argues, the Fifth Circuit should not alter its analysis in light of *Rahimi*. *Rahimi* affirmed the basic *Bruen* historical analysis framework, which the

153. *Id.*

154. *Id.* at 1241.

155. *Id.* at 1242 (citing United States v. Yancey, 621 F.3d 681, 685 (7th Cir. 2010)).

156. *Id.*

157. Shu-Acquaye, *supra* note 40, at 717-27.

158. United States v. Posey, 655 F. Supp. 3d 762, 765 (N.D. Ind. 2023); *Lewis*, 650 F. Supp. 3d at 1236; N.Y. State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1 (2022); District of Columbia v. Heller, 554 U.S. 570 (2008).

159. United States v. Daniels, 77 F.4th 337, 340 (5th Cir. 2023).

160. United States v. Daniels, 2024 U.S. LEXIS 2910 at *1 (2024).

Fifth Circuit faithfully applied in the context of marijuana regulation.[161] Further, the *Rahimi* Court offered a helpful analysis for circumstances where an individual becomes sufficiently dangerous to justify limiting their Second Amendment rights.[162] This analysis serves to support the Fifth Circuit's conclusion that, in the context of marijuana users, 922(g)(3) unlawfully violates Second Amendment rights. The Fifth Circuit's decision in *Daniels* demonstrates a thorough understanding of the historical tradition of marijuana regulation, is consistent with recent jurisprudence, and offers compelling policy justifications. For these reasons, the other courts should adopt the Fifth Circuit's approach.

Part A of this Section argues that the *Daniels* court correctly applied *Bruen* by analyzing categories of historical tradition proffered by the Government under the more lenient relevantly similar standard because it allowed for a more robust understanding of American historical traditions regarding regulation of intoxication and firearm use. Part B of this Section argues that the *Posey* and *Lewis* courts incorrectly applied the dangerousness analysis to marijuana users in context of the drug's regulatory history. Part C argues that all three courts correctly disregarded the law-abiding citizen argument, especially given the conflict between federal and state marijuana regulation. Finally, Part D addresses certain policy considerations regarding continued enforcement of 922(g)(3), namely that 922(g)(3) creates a lifetime prohibition on firearms possession that renders it less lenient than other federal firearms regulations.

A. Daniels *Reflects a More Robust Understanding of the Historical Tradition Test*

The Fifth Circuit in *Daniels* conducted a more persuasive analysis of the historical tradition test than the competing district courts. First, applying the relevantly similar standard is more appropriate when the object regulated—modern marijuana use—was non-existent when the Second Amendment was written. Second, analyzing laws by categorizing them into general concepts and timeframes allows courts to develop a more holistic understanding of the historical tradition.

First, *Bruen* instructs courts that general, persistent social problems since the eighteenth century may require a distinctly similar historical regulation for the challenged regulation to comport with the Constitution. Modern problems—those "unimaginable" at the Founding—may only require that the historical regulations be relevantly similar.[163] The Fifth

161. United States v. Rahimi, 144 S. Ct. 1889, 1896 (2024).

162. *Id.* at 1901.

163. *N.Y. State Rifle*, 597 U.S. at 27-29.

Circuit (as well as the Northern District of Indiana) found that, because marijuana was not widely used at the Founding, only the relevantly similar standard applied; in contrast, the Western District of Oklahoma applied the more stringent distinctly similar standard.[164]

The relevantly similar standard should be applied to marijuana users. First, marijuana did not exist in its current capacity during the Founding Era and did not become widely available for use until the late nineteenth century.[165] Those who drafted the Second Amendment could not have known the complex issues surrounding marijuana—including the social and political debates, and the controversies regarding the various effects of marijuana.[166] Although the social problem of intoxication dates back to the eighteenth century, it does not carry the same convoluted and sometimes contradictory regulatory history of marijuana.[167] Distinctly similar regulations did not exist at the Founding—not because the Founders deemed the overlap between marijuana use and gun possession acceptable, but because marijuana use, quite simply, did not occur at the Founding.

Applying a relevantly similar standard makes it less challenging for the Government to satisfy its burden of proving that the challenged regulation is consistent with the Second Amendment.[168] Applying this standard to a regulation like 922(g)(3)—one that was uncontemplated at the time of the Founding—is preferable. This standard more clearly reflects the intent of the *Bruen* test to not be a "regulatory straightjacket" or a "regulatory blank check" and to allow the legislature the flexibility to address the uniquely modern issues created by marijuana use under broader guidelines.[169] However, when a court finds that the challenged regulation has no relevantly similar historical analogue, it indicates that the law clearly extends beyond the boundaries of the Second Amendment as it was originally understood.[170]

When the Fifth Circuit applied the relevantly similar standard and held that 922(g)(3) was unconstitutional as applied to Daniels' conduct, it had to fully analyze a broad spectrum of historical regulations that could possibly justify the constitutionality of 922(g)(3).[171] To do this, the Fifth Circuit sorted the historical regulations into three categories: (1) those that disarmed people who were intoxicated, (2) those that disarmed the

164. *Daniels*, 77 F.4th at 343; *Posey*, 655 F. Supp. 3d at 767-78; *Lewis*, 650 F. Supp. 3d at 1240.

165. *See supra* Section II.A.

166. *Id.* (noting that marijuana is federally classified as a Schedule I narcotic with little to no benefits, while many states have legalized marijuana both recreationally and for medicinal purposes).

167. *Id.*

168. *N.Y. State Rifle*, 597 U.S. at 27-29.

169. *Id.* at 30.

170. *Id.* at 28-29.

171. United States v. Daniels, 77 F.4th 337, 340, 344-45 (5th Cir. 2023).

mentally ill, and (3) those that disarmed dangerous persons.[172] The Fifth Circuit then analyzed the historical regulations in each category individually in context of the collective body of law.[173] This approach enabled the Fifth Circuit to develop a more holistic understanding of each thread of regulatory history to determine whether 922(g)(3) falls within the parameters of the historical tradition. This is the correct approach, especially when applying a relevantly similar standard. This allowed the Fifth Circuit to see whether a given modern regulation follows the principles of the historical tradition to determine whether the drafters of the Second Amendment contemplated the specific exception to the Amendment's protections.

To illustrate, when determining whether 922(g)(3) was compatible with historical regulations regarding intoxication and firearms, the Fifth Circuit examined individual regulations and determined that, in jurisdictions that prohibited firearm use for intoxicated individuals, no jurisdiction barred firearm possession for those who generally consumed alcohol.[174] By examining the regulations individually to determine their specific prohibitions and then discussing them collectively, the Fifth Circuit extracted a generally applicable principle: Founding-Era regulations may have prohibited the act of being intoxicated while using a firearm, but they did not prohibit classes of persons who engaged in drinking alcohol from possessing firearms altogether.[175] When the Fifth Circuit articulated this general principle, it became clear that 922(g)(3) did not fit the pattern of permissible Second Amendment prohibitions, as this statute permanently prohibits marijuana users from possessing firearms altogether.[176] Therefore, by approaching the historical tradition analysis through a categorical lens, the Fifth Circuit more accurately determined the extent of the Second Amendment in specific contexts, even when contemplating a broad regulatory history.

This approach is more consistent with *Bruen* than the historical analyses applied by the Northern District of Indiana and the Western District of Oklahoma.[177] First, the Northern District of Indiana discussed historical regulations broadly—that is, by generally discussing the regulations that restricted the rights of habitual drug users during the twentieth century without categorizing them by their specific prohibitions

172. *Id.* at 344.

173. *Id.*

174. *Id.* at 344-48.

175. *Id.* at 345.

176. *Id.* at 355.

177. United States v. Posey, 655 F. Supp. 3d 762, 765 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1236 (W.D. Okla. 2023).

as the Fifth Circuit did.[178] When the Northern District discussed historical intoxication statutes, it found that 922(g)(3) was sufficiently justified because 922(g)(3) considers marijuana users to be in the course of their intoxicant use even when not actually impaired.[179] However, had the Northern District approached the regulatory history as the Fifth Circuit did, it likely would have concluded that the historical prohibitions specifically related to conduct, not status. Put differently, the regulations barred firearm use while an individual was actively intoxicated, as opposed to barring firearm use for a class of alcoholics.[180] The Northern District's failure to fully consider this important caveat demonstrates the value of the Fifth Circuit's categorical approach, which enables the court to more fully understand the holistic view of the historical tradition of firearm regulation while considering the nuances of specific regulations.

Likewise, the Western District of Oklahoma applied an analysis that was less compliant with *Bruen*.[181] First, the Western District applied the distinctly similar standard to determine whether 922(g)(3) was constitutional.[182] The relevantly similar standard, in contrast, would have been more appropriate because distinctly similar regulations did not exist at the time of the Founding. Although *Lewis* concerned controlled substances generally, neither those substances nor marijuana were widely used at the time of the Founding, and the Second Amendment drafters simply did not contemplate the complex social and political backdrop of substance regulation. Further, if 922(g)(3) does not pass constitutional muster under the more lenient relevantly similar standard, as the Fifth Circuit found, it is much less likely that the Western District could find the statute constitutional under a more stringent analysis.[183]

Further, the Western District concluded that 922(g)(3) is justified under a theory that substance users fall into the category of individuals potentially mentally unfit to bear arms.[184] However, by applying a categorical analysis, the Fifth Circuit determined that regulations prohibiting individuals with mental illnesses from owning firearms did not apply to individuals who drank alcohol or used substances.[185] This is better aligned with historical tradition because individuals who have mental illnesses are fundamentally unlike those who use substances. This is evidenced by the fact that there is a historical tradition of limiting

178. *Posey*, 655 F. Supp. 3d at 773.
179. *Id.* at 774.
180. *Daniels*, 77 F.4th at 344-45.
181. *Lewis*, 650 F. Supp. 3d at 1240.
182. *Id.*
183. *Daniels*, 77 F.4th at 355.
184. *Lewis*, 650 F. Supp. 3d at 1241.
185. *Daniels*, 77 F.4th 337 at 349.

Second Amendment rights for those who have mental illnesses, but those prohibitions generally did not include those who used alcohol.[186] Had the Western District applied the Fifth Circuit's categorical analysis approach, it may have examined the historical tradition more holistically and arrived at a different conclusion.

Therefore, in line with the intent of the *Bruen* test, the Fifth Circuit's application of the more lenient relevantly similar standard to determine that 922(g)(3) does not fit the historical tradition of Second Amendment regulation is the correct analysis to apply to this statute. As such, 922(g)(3) is unconstitutional as applied to users of marijuana.

B. Marijuana Users Do Not Belong Under the Umbrella of Dangerousness

It is generally recognized and accepted that Congress has the authority to disarm individuals who are legitimately dangerous.[187] However, it is also generally recognized that Congress's authority to disarm is not unlimited, and that the Constitution places parameters on the right of the legislature to circumscribe Second Amendment rights.[188]

In a dissenting opinion in *Kanter v. Barr*, then-Judge Barrett engaged in a lengthy discussion of the Founding-Era understanding of Congress's right to limit Second Amendment rights to those perceived to be dangerous, concluding that this categorical exclusion was primarily concerned with "threatened violence and the risk of public injury."[189] Likewise, the Fifth Circuit held that the Founders never intended to authorize Congress to disarm *anyone* it deemed dangerous, which therefore required the Government to identify a specific regulatory tradition of regulating dangerous individuals comparable to marijuana users to justify the constitutionality of 922(g)(3).[190] The Government did not do so, leading the Fifth Circuit to conclude that the dangerousness argument failed.[191] The views taken by then-Judge Barrett and the Fifth Circuit demonstrate that Congress may lawfully limit the Second Amendment rights of "dangerous" individuals. However, those dangerous individuals must present a real risk of violence or public injury and there must be a historical tradition of Congress's desired regulation.[192]

186. *Id.*

187. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

188. *Id.*; *Daniels*, 77 F.4th at 350.

189. *Kanter*, 919 F.3d at 456.

190. *Daniels*, 77 F.4th at 350.

191. *Id.* at 354.

192. *Id.*; *Kanter*, 919 F.3d at 469.

This view is affirmed by the Supreme Court's recent decision in *United States v. Rahimi*.[193] In *Rahimi*, the Court used the *Bruen* framework and held that an individual subject to a domestic violence restraining order may be prohibited from possessing firearms consistent with the Second Amendment.[194] In arriving at that conclusion, the Court cited to a long record of historical laws intended to prevent spousal abuse and explained that those laws permitted limiting Second Amendment rights for those who present a credible threat to others.[195] However, the Court carefully explained that rights may only be burdened *after* the individual has been found to pose a credible threat to the physical safety of others.[196] Here, the Supreme Court reaffirmed what *Kanter* and *Daniels* already suggested: the Second Amendment rights of legitimately dangerous individuals may be limited, but only if those individuals pose a real risk of violence or a credible threat to the physical safety of others.[197]

This is readily distinguishable from the burden 922(g)(3) places on Second Amendment rights. As *Daniels* demonstrates, 922(g)(3) creates a blanket prohibition on firearm possession for marijuana users.[198] Unlike in *Rahimi*, no particular regulatory tradition unilaterally prohibits marijuana users—or other substance users—from possessing firearms merely because the individual is a user.[199] As the *Daniels* court demonstrated, the government cannot simply regulate under a general notion of dangerousness.[200] Instead, as *Kanter* and *Rahimi* make clear, to justify a Second Amendment burden, the individual must pose a credible threat to the physical safety of others.[201] An examination of the flaws in the Northern District of Indiana's reasoning demonstrates that 922(g)(3) is simply not in line with a historical tradition of regulating legitimately dangerous behavior.[202]

The Northern District found that marijuana users are a threat to public safety, thus justifying 922(g)(3) as consistent with Second Amendment exceptions.[203] However, the Northern District did not point to any specific regulatory tradition that supports disarming individuals similar to marijuana users for being dangerous.[204] Instead, it broadly relied on the

193. United States v. Rahimi, 144 S. Ct. 1889, 1896-97 (2024).
194. *Id.*
195. *Id.* at 1901.
196. *Id.* at 1902.
197. *Id.*; *Daniels*, 77 F.4th at 350; *Kanter*, 919 F.3d at 469.
198. *Daniels*, 77 F.4th at 350.
199. *Id.*
200. *Id.*
201. *Kanter*, 919 F.3d at 469; *Rahimi*, 144 S. Ct. at 1902.
202. United States v. Posey, 655 F. Supp. 3d 762, 776 (N.D. Ind. 2023).
203. *Id.* at 773-74.
204. *Id.* at 774.

historical tradition of disarming felons and those with mental illnesses, which the Fifth Circuit rejected as being applicable to marijuana users in its analysis.[205] Further, *Rahimi* makes clear that the regulation must address a real threat of violence in accordance with an appropriate historical regulation.[206] The Northern District does not demonstrate that either of these factors are present and for that reason alone, arguments that marijuana users are dangerous do not justify the subsequent limitation on Second Amendment rights.

In upholding its dangerousness analysis, the Northern District also failed to consider the regulatory history of marijuana itself. The historical tradition of marijuana regulation indicates that its prohibitions, while sometimes framed as preventing danger, often sought to accomplish specific social and political objectives.[207] Beginning in the early twentieth century, marijuana regulation was often used as a tool by prohibitionists and was a product of prejudice towards Black and Mexican Americans.[208] Again, in the 1970s, the classification of marijuana as a Schedule I substance was at least in part a response to anti-Vietnam War sentiments and general prejudicial attitudes towards Black Americans.[209] Further, before anti-marijuana sentiments became prevalent, physicians widely prescribed marijuana for medicinal purposes, and as prejudicial sentiments waned, legalization efforts largely began with recognition of marijuana's medicinal value.[210] Thus, the historical record of marijuana regulation largely demonstrates that it was prohibited not because of intrinsic dangerousness—its medicinal value alone indicates otherwise—but rather because such prohibition served certain political objectives.

Finally, the Northern District explained that Congress enacted the prohibitions in 922(g)(3) "'to keep guns out of the hands of presumptively risky people.'"[211] While this may be true, it falls short of the standard *Rahimi* established for dangerousness required to justify Second Amendment burdens. The government bears the heavier burden of proving that the individual poses a credible threat to physical safety, which is more substantial than proving that the individual is merely

205. *Id.*; *Daniels*, 77 F.4th at 350; *see* United States v. Cheeseman, 600 F.3d 270, 279 (3d Cir. 2010) (discussing the Congressional Record indicating Congress enacted 922(g)(3) to keep firearms away from those it viewed as dangerous). However, Congress made no distinction between different types of drug users in its consideration, indicating that at least some prohibitions may be Congress's attempt to regulate under a general notion of dangerousness.

206. United States v. Rahimi, 144 S. Ct. 1889, 1896-97 (2024).

207. *See supra* Section II.A.

208. Calandrillo & Fulton, *supra* note 20, at 208.

209. Katner, *supra* note 32, at 175.

210. Geiger-Oneto & Sprague, *supra* note 16, at 738, 745-46.

211. United States v. Posey, 655 F. Supp. 3d 762, 776 (N.D. Ind. 2023).

presumptively risky.[212] Further, given this heightened standard, it is difficult to demonstrate that marijuana users consistently pose a credible threat to the physical safety of others. Many marijuana users utilize marijuana for medicinal purposes and do not experience altering effects. Even those who use marijuana for its altering effects are not constantly under its influence.[213] Historical intoxication laws recognized this reality: laws that prohibited alcohol users from possessing firearms were only effective when the user was actively under the influence of alcohol.[214] Therefore, the existing regulatory history makes clear that marijuana users generally do not pose a credible threat to the physical safety of others and therefore, their Second Amendment rights should not be burdened as they are under 922(g)(3).

Application of the standards articulated in *Kanter*, *Daniels*, and *Rahimi* reveals that 922(g)(3) does not pass constitutional muster under the argument that marijuana users constitute dangerous individuals who Congress may lawfully regulate.[215] In *Rahimi*, the Court explained that "why and how" the regulation burdens the right are central to this inquiry. That is, even if a law regulates firearm possession for a permissible reason, it may still violate the Second Amendment if it regulates beyond the extent permitted at the Founding.[216] History demonstrates that 922(g)(3) burdens the rights of marijuana users largely for social and political objectives, not because marijuana users are inherently dangerous.[217] The regulatory history indicates that marijuana users do not pose a real risk of violence or a credible risk to the physical safety of others, much in the way that alcohol drinkers or prescription drug takers do not pose such risks.[218] Thus, because no specific regulatory history exists and because marijuana users do not pose a credible threat to the physical safety of others, 922(g)(3) as applied to marijuana users cannot be found constitutional under a theory of dangerousness.

212. United States v. Rahimi, 144 S. Ct. 1889, 1901-02 (2024). To be clear, the *Rahimi* Court found that there is a Second Amendment exception "when an individual poses a clear threat of physical violence to another," after examining surety laws and "going armed" laws in the domestic violence context.

213. Peter Grinspoon, *Common Questions About Medical Cannabis,* HARV. HEALTH PUBLISHING (May 28, 2021), https://www.health.harvard.edu/blog/common-questions-about-medical-cannabis-202105282467 ("The doses needed for medical purposes are often significantly lower than what is used recreationally. . . . a medical patient using a small dose of cannabis twice a day would be markedly less impaired than a more recreational cannabis user who uses a high dose, say, once a month.").

214. United States v. Daniels, 77 F.4th 337, 340, 344-45 (5th Cir. 2023).

215. Kanter v. Barr, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting).; *Daniels*, 77 F.4th 337 at 350.

216. Rahimi, 144 S. Ct. at 1898.

217. *See supra* Section II.A.

218. *See supra* Section II.A.

C. The Law-Abiding Citizen: Application to Marijuana Users

In both *Heller* and *Bruen*, the Court used the term "law-abiding citizen" as a generalization to refer to those whom the Second Amendment protects.[219] This phrase has prompted much controversy, with litigants questioning the potential limits that "law-abiding citizen" places on the right to bear arms.[220] In this context, all three courts addressed the law-abiding citizen component of the *Bruen* analysis and determined it was not dispositive for various reasons.[221] The Northern District of Indiana and the Western District of Oklahoma relied on earlier precedents suggesting the Second Amendment applied to more than just model citizens, with the Western District plainly stating that individuals do not "walk around with dark clouds over their heads" just because they are not law-abiding.[222]

However, none of these three opinions explicitly considers the possibility that, regardless of whether the Second Amendment is confined to law-abiding citizens, marijuana users may be considered law-abiding for the purposes of the Second Amendment. Although federal law criminalizes marijuana use, state legalization efforts and federal deference to state prosecutorial discretion cast serious doubt on the argument that marijuana users are not law-abiding citizens.[223]

Marijuana use, medicinally and recreationally, has proliferated over the past few decades and is now legal in many jurisdictions.[224] Additionally, memorandums circulated by the Department of Justice in 2011 and 2013 indicated that the federal government would not focus its resources on pursuing marijuana charges against those in compliance with state laws and would instead defer to state prosecutorial discretion.[225] For those in compliance with state laws, the Department of Justice has deemed marijuana users not sufficiently unlawful to warrant wasting federal resources to prosecute them. The combination of state legalization and federal prosecutorial deference demonstrates that the conduct of marijuana users is, at the very least, not necessarily unlawful.

A marijuana user in compliance with state laws has relied both on federal deference to state prosecutorial authority for marijuana offenses

219. District of Columbia v. Heller, 554 U.S. 570, 635 (2008); N.Y. State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1, 9 (2022).

220. *Daniels*, 77 F.4th 337 at 342-43.

221. *Id.*; United States v. Posey, 655 F. Supp. 3d 762, 770 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1238 (W.D. Okla. 2023).

222. *Lewis*, 650 F. Supp. 3d at 1238.

223. *See supra* Section II.A.

224. Shu-Acquaye, *supra* note 40, at 717-27.

225. Cole, *supra* note 43; Cole, *supra* note 44.

and on general Second Amendment protections.[226] If the federal government will not prosecute a user for a marijuana-related offense, it makes little sense that they be prosecuted for possession of a firearm when they are ostensibly violating no law other than 922(g)(3). If the government can justify any law restricting firearm usage under the auspices that those in violation of the law are not law-abiding and therefore do not receive Second Amendment protection, then almost every law becomes justifiable, and the Second Amendment becomes meaningless.

Further, even if the Second Amendment applies only to law-abiding citizens, the regulatory framework and enforcement of marijuana violations indicate that marijuana users do not fall within the prohibited category. Therefore, the constitutionality of 922(g)(3) as applied to marijuana users should not be grounded in the theory that marijuana users are not law-abiding citizens exempt from the Second Amendment.

D. 922(g)(3): An Effective Lifetime Prohibition

Finally, public policy interests demand adoption of the Fifth Circuit's analysis and ultimate determination that 922(g)(3) is unconstitutional.[227] In *District of Columbia v. Heller*, the Supreme Court determined that the Second Amendment is a fundamental right, and as such, it applies unambiguously to all members of the political community.[228] *Bruen* likewise articulates that the Second Amendment is no less important than the other individual rights enumerated in the Constitution.[229] Finally, *Heller* reasoned that "[c]onstitutional rights are enshrined within the scope they were understood to have when people adopted them."[230] The Supreme Court is clear: there is a right to keep and bear arms enshrined in the Constitution, and the right—as originally contemplated by those who drafted it—may not be infringed upon by the legislature. Government infringement on the Second Amendment is no different than silencing those who exercise the First Amendment or denying Sixth Amendment protections to criminal defendants.[231]

However, the Second Amendment does not mean that Congress is powerless to legislate against the myriad dangers associated with firearm use.[232] On the contrary, Congress may certainly regulate—within

226. Cole, *supra* note 43; Cole, *supra* note 44.

227. United States v. Daniels, 77 F.4th 337, 340-42 (5th Cir. 2023).

228. District of Columbia v. Heller, 554 U.S. 570, 580 (2008).

229. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70 (2022).

230. *Heller*, 554 U.S. at 634-35.

231. U.S. CONST. amend I; U.S. CONST. amend VI.

232. *Heller*, 554 U.S. at 636.

prescribed limitations.[233] The Fifth Circuit addressed these limitations and concluded that, while Congress may lawfully limit the right to bear arms, its authority does not extend so far as to strip a constitutional right from this entire class of persons.[234] The Fifth Circuit carefully cabined its holding by determining that 922(g)(3) is unconstitutional only insofar as it applies to current users of marijuana—in other words, for those individuals to whom 922(g)(3) makes it illegal to have the status of marijuana user, as opposed to those actively engaged in the conduct.[235] This ultimately reflects the policy that Congress may lawfully regulate conduct but—except in exceptional circumstances—it should not regularly deny any constitutional rights to an entire class of persons.

In upholding 922(g)(3) as constitutional, both the Northern District of Indiana and the Western District of Oklahoma attempted to frame the statute as less restrictive than other firearms laws.[236] Specifically, the Northern District and Western District both reasoned that under 922(g)(3) a marijuana or substance user may regain Second Amendment rights when they stop using the unlawful substance.[237] However, this reasoning failed to address two important considerations. First, numerous states no longer categorize marijuana as unlawful, and the federal government largely permits states to exercise prosecutorial direction for marijuana offenses.[238] Second, conviction of a 922(g)(3) violation is a felony, which invokes 922(g)(1), thus creating a lifetime firearm prohibition.[239]

Marijuana is still classified as a Schedule I drug under federal law—a fact that should not be dismissed lightly.[240] However, many marijuana users comply with state laws, which federal prosecutors typically do not enforce.[241] These facts cast doubt on the argument that a 922(g)(3) prohibition may be lifted if the user discontinues unlawful use, when the substance may be legal under state law and is often unenforced by those tasked with enforcing federal laws.

Further, it may be correct to assert that the 922(g)(3) prohibition on firearm possession is lifted when the individual ceases use of the

233. *N.Y. State Rifle*, 597 U.S. at 21.

234. United States v. Daniels, 77 F.4th 337, 354-55 (5th Cir. 2023).

235. *Id.* at 355.

236. United States v. Posey, 655 F. Supp. 3d 762, 775-76 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1240 (W.D. Okla. 2023).

237. United States v. Posey, 655 F. Supp. 3d 762, 775-76 (N.D. Ind. 2023); United States v. Lewis, 650 F. Supp. 3d 1235, 1240 (W.D. Okla. 2023).

238. *See supra* Section II.A; Cole, *supra* note 43; Cole *supra* note 44.

239. 18 U.S.C. § 922(g)(3); 18 U.S.C. § 924(a)(1); 18 U.S.C. § 922(g)(1).

240. 1 U.S.C. § 812 (Schedule 1(c)(10)). It should be noted that the Department of Justice recently proposed moving marijuana from Schedule I of the CSA to Schedule III. Schedules of Controlled Substances, Rescheduling of Marijuana 89 Fed. Reg. 44597 (May 21, 2024).

241. Cole, *supra* note 43; Cole *supra* note 44.

substance.[242] However, this presupposes that the unlawful user has not been caught—should that individual be prosecuted and convicted of a 922(g)(3) violation, the statutory sentencing guidelines demand felony punishment.[243] Therefore, individuals convicted under 922(g)(3) become categorized as "felons," subject to a permanent lifetime stripping of their Second Amendment rights through the felon-in-possession statute (922(g)(1)).[244] Therefore, in reality, a 922(g)(3) violation does not tread more lightly than other federal firearms regulations; it ultimately creates the same lifetime prohibition that exists for violent felons. For example, the defendant in *Daniels* was sentenced to four years in prison, and had his 922(g)(3) conviction been upheld, he would have received a comparable lifetime ban.[245] Whether or not he ceases his unlawful conduct is irrelevant. Because a felony conviction under 922(g)(3) invokes the lifetime prohibitions of 922(g)(1), he can never, in his natural life, possess a firearm.[246]

The Fifth Circuit makes clear—and the other courts do not dispute—that there is generally a historical tradition of fully proscribing Second Amendment rights only to those who have mental illnesses and those who are genuinely dangerous.[247] The Fifth Circuit also demonstrates that extending categorical prohibitions to other classes of persons lacks support in the historical tradition, and the legislature should tread carefully when doing so.[248] The implications of 922(g)(3) indicate that its stringent prohibition is not supported by historical tradition, therefore making it unconstitutional.

IV. CONCLUSION

Marijuana users should not be stripped of Second Amendment rights merely for possessing a firearm while being a current user of marijuana. Federal prosecutors routinely decline to prosecute marijuana offenses, and it makes little sense for the government to prosecute these individuals when they are often acting in compliance with state law.

Further, 922(g)(3) is unconstitutional under the *Bruen* test. The Fifth Circuit's approach demonstrates that, even though courts need only find relevantly similar regulations to 922(g)(3) to justify its constitutionality, no historical tradition of this type of regulation exists, making it

242. 18 U.S.C. § 922(g)(3).
243. *Id.*; 18 U.S.C. § 924(a)(1).
244. 18 U.S.C. § 922(g)(1).
245. United States v. Daniels, 77 F.4th 337, 355 (5th Cir. 2023).
246. 18 U.S.C. § 922(g)(3); 18 U.S.C. § 924(a)(1); 18 U.S.C. § 922(g)(1).
247. *Daniels*, 77 F.4th at 349-50.
248. *Id.* at 353.

unconstitutional. Finally, the lifetime firearm prohibition created by a felony penalty for 922(g)(3) is a stringent prohibition that the Fifth Circuit demonstrates should be reserved for persons who are dangerous or mentally ill—of which marijuana users are neither. Ultimately, 922(g)(3) reflects the political and social attitudes of marijuana use in American history, but not constitutional limitations of the Second Amendment.