

**DAZED AND CONFUSED: MAKING SENSE OF
THE SUPREME COURT’S CONFUSING SECOND
AMENDMENT JURISPRUDENCE TO ARGUE
THAT 922(G)(3) IS UNCONSTITUTIONAL AND
RECOMMENDING A LEGISLATIVE FIX FOR
THAT UNCONSTITUTIONALITY**

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ABSTRACT

Federal law, specifically 18 U.S.C. § 922(g)(3), prohibits the possession, purchase, transport, and receipt of firearms by anyone who is addicted to or is an “active user” of a controlled substance. This law, and others like it, prohibit the possession, purchase, transport, and reception of firearms by a particular class of people. They have been the law of the land for forty years. Their constitutionality, however, has been called into doubt by the Supreme Court’s recent rulings on the Second Amendment holding that all modern gun regulations must comport with the regulatory history of the Second Amendment. This Comment analyzes the Court’s recent rulings, Bruen and Rahimi, and sets out to determine the true test for gun regulations.

Moreover, this Comment analyzes Founding Era laws to argue that the Founding’s regulatory principle was to prohibit the possession of firearms from people who are currently intoxicated. Based on that principle, this Comment argues that § 922(g)(3) is unconstitutional as applied to many people who are charged under it. To address this unconstitutionality, this Comment is the first to propose changes to § 922(g)(3) to prohibit the possession of guns from people who are currently intoxicated or who have been convicted of a drug crime within the last year. This Comment argues that this legislative change aligns with the Second Amendment’s regulatory principle at the Founding and accomplishes the same mission as § 922(g)(3).

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I. INTRODUCTION

A man in his fifties, with thin salt-and-pepper hair, wearing a blue suit, walks out of a Delaware courtroom holding the hand of his now wife and stepmother.¹ His biological mother and his sister died in a car crash when he was a boy.² He and his brother survived that crash, but his brother died forty years later from brain cancer.³

His brother's death triggered a spiral of alcohol and drug abuse.⁴ His behavior became more erratic as he self-medicated his trauma with intoxicants.⁵ The abuse strained the relationship with his then wife and children, and he became distant from them.⁶ Distant from his family, he turned to his brother's widow, Hallie, for support, and the two eventually began a "grief-stricken romance."⁷

During this dark period in his life, he purchased a gun, and a few days later, Hallie discovered the gun.⁸ Scared that he would use it to take his own life, and scared that she would lose another person she cared about, she threw the gun away in a public dumpster.⁹ A man discovered the gun as he looked for recyclables in the dumpster and turned it over to the authorities.¹⁰

Six years later, that gun, and his grief and drug-addled decision to purchase it, led him to that courtroom.¹¹ He, now sober, sat there with his family by his side to hear the jury find him guilty on three charges.¹² He and his family left the courtroom hand in hand and into an SUV with a flurry of cameras going off in the background.¹³ His father, Joe, who had always

1. Randall Chase et al., *President Joe Biden's Son, Hunter Biden, Is Convicted of All 3 Felonies in Federal Gun Trial*, ASSOCIATED PRESS (last updated June 11, 2024, 5:20 PM), <https://apnews.com/article/hunter-biden-gun-trial-federal-charges-delaware-5dd8a9380235c6360a1ddb691ef24a06#> [hereinafter AP Hunter Biden Article].

2. Alex Woodward, *How the Tragic Deaths of Joe Biden's First Wife and Daughter Changed His Politics*, THE INDEP. (Jan. 8, 2024, 5:21 PM), <https://www.independent.co.uk/news/world/americas/us-politics/biden-wife-daughter-deaths-b2475025.html>.

3. *Id.*

4. See Katy Waldman, *Is Hunter Biden a Scapegoat or a Favored Son?*, THE NEW YORKER (June 10, 2024), <https://www.newyorker.com/news/dispatch/is-hunter-biden-a-scapegoat-or-a-favored-son>.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Alanna Durkin Richer, *From Collapsed Plea Deal to Trial: How Hunter Biden Has Come to Face Jurors on Federal Gun Charges*, ASSOCIATED PRESS (last updated June 1, 2024, 9:54 AM), <https://apnews.com/article/hunter-biden-trial-gun-charges-delaware-cc96568ac3428802557e85876c820dec>.

11. See Marshall Cohen & Holmes Lybrand, *Hunter Biden Convicted on All 3 Charges at Federal Gun Trial*, CNN (last updated June 11, 2024, 5:18 PM), <https://www.cnn.com/2024/06/11/politics/hunter-biden-gun-trial-verdict/index.html>.

12. *Id.*

13. See AP Hunter Biden Article, *supra* note 1.

supported his son, avoided the courtroom to not be a distraction.¹⁴ While his son heard the verdict, Joe was preparing to give a speech about gun violence.¹⁵ After the speech, Joe flew to Delaware where he embraced his son.¹⁶ Later, Joe issued a statement to the press.¹⁷ He said he accepted the verdict and that, although he had the power as President of the United States, he would not be pardoning his son for his crimes.¹⁸

That was the story of Hunter Biden, the son of the forty-sixth President of the United States, Joe Biden. Hunter Biden's addiction became fodder for the press and his father's political opponents,¹⁹ which eventually led to a special counsel indicting and convicting him.²⁰ One of the charges that he was found guilty of was a violation of 18 U.S.C. § 922(g)(3), which prohibits the possession of a firearm for "active users", people otherwise addicted to narcotics, or someone who is addicted to narcotics.²¹ Its current language has been the law of the land for forty years.²² However, recent changes to Second Amendment jurisprudence have called its constitutionality into question.²³

In 2022, the United States Supreme Court heard *New York State Rifle & Pistol Ass'n v. Bruen*, which held that regulations of firearms need to align with the history and tradition of our nation to comport with the Second

14. *Id.*

15. *Id.*

16. *Id.*

17. Alexandra Hutzler, *Biden Shows Support for Son Hunter After Conviction, Says He Will Respect Verdict*, ABC NEWS (June 11, 2024, 4:10 PM), <https://abcnews.go.com/Politics/biden-support-hunter-after-conviction/story?id=111020929>.

18. *Id.* The author would like to note that while the President did commit to not pardoning his son, the President ultimately did pardon his son for this conviction. Statement from President Joe Biden, The White House (Dec. 1, 2024) (available at <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/01/statement-from-president-joe-biden-11/>).

19. See, e.g., Miranda Devine, *Big Daddy Joe Biden Couldn't Save Hunter This Time Around*, N.Y. POST (June 11, 2024, 7:28 PM), <https://nypost.com/2024/06/11/opinion/big-daddy-joe-biden-couldnt-save-hunter-this-time-around/> (attacking Hunter's business acumen and asserting President Biden lied about his son's behavior); Steven Nelson & Samuel Chamberlain, *Republicans Hail Hunter Biden Trial Verdict as 'Step Toward Accountability'—Call for 'Big Guy' to Be Next*, N.Y. POST (June 1, 2024, 5:09 PM), <https://nypost.com/2024/06/11/us-news/republicans-hail-hunter-biden-trial-verdict-as-step-toward-accountability/> (detailing Republican calls for further investigation into the Biden family); Sam Cabral, *Hunter Biden: The Struggles and Scandals of the US President's Son*, BBC (June 11, 2024), <https://www.bbc.com/news/world-us-canada-55805698> (detailing Hunter's battle with addiction, his prosecution, and his business dealings); Alexandra Hutzler, *Trump Campaign, Republicans Seize on Hunter Biden Verdict to Ramp Up Attacks on Father*, ABC NEWS (June 11, 2024, 1:01 PM), <https://abcnews.go.com/Politics/trump-campaign-republicans-seize-hunter-biden-verdict-ramp/story?id=111021376> (covering the Trump campaign's use of the verdict as an attack on President Biden and the Biden family).

20. Hutzler, *supra* note 17.

21. 18 U.S.C. § 922(g)(3) (2022).

22. See discussion *infra* Section II.A.2 (discussing the legislative history of § 922(g)(3)).

23. Jacqueline Thomsen, *Hunter Biden Gun Conviction Law Has Divided US Appeals Courts*, BLOOMBERG L. (June 13, 2024, 2:29 PM), <https://news.bloomberglaw.com/us-law-week/hunter-biden-gun-conviction-law-has-divided-us-appeals-courts>. The Author would like to note that this Comment takes no position on whether the Court has interpreted the Second Amendment or decided Second Amendment cases correctly. This Comment simply interprets the Court's decisions and applies them.

Amendment.²⁴ *Bruen* sets forth a detailed test for courts to use when determining whether a government regulation aligns with the regulatory history of the Second Amendment.²⁵

Two years later, the Court heard *United States v. Rahimi*, where a man challenged the constitutionality of 18 U.S.C. § 922(g)(8), or possession of a firearm while subject to a domestic violence restraining order.²⁶ There, the Court claimed it clarified and applied its rule from *Bruen* to the facts in *Rahimi*.²⁷ The Court, however, ignored much of *Bruen*, applying its seemingly clear-cut rule so broadly as to create a new rule where modern gun regulations need not comport with the nation's regulatory history and tradition of the Second Amendment so long as they align with the "principles that underpin" them.²⁸

Because of the impact of *Bruen* and *Rahimi*, constitutional questions regarding many of our nation's gun laws still remain.²⁹ Chief among these questions, and the focus of this Comment, is the constitutionality of § 922(g)(3).

This Comment provides an in-depth discussion and analysis of *Bruen* and *Rahimi* to show their contradictions and extracts the new Second Amendment *Rahimi-Bruen* standard.³⁰ Applying that new standard, this Comment argues that § 922(g)(3) is currently unconstitutional as applied to many people who have or will be prosecuted under it because there is little to no principle supported by history and tradition in our country that allows restricting an individual's Second Amendment right merely because they used drugs in the past.³¹ Therefore, Congress should narrow § 922(g)(3) to restrict the possession of firearms for those who are currently intoxicated with drugs or alcohol and to restrict gun ownership for those who have been convicted of a drug crime.³²

Part II of this Comment explores the modern history of gun regulations in this country and how they evolved to the current language of § 922(g)(3).³³ Part II also discusses the evolution of the Court's treatment of the Second

24. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 19 (2022).

25. See discussion *infra* Section II.B.2 (discussing the *Bruen* test and the Court's application).

26. United States v. Rahimi, 602 U.S. 680, 684 (2024).

27. *Id.* at 692.

28. See *id.*; discussion *infra* Section II.B and Part III (discussing *Bruen* and *Rahimi*, showing their differences and determining the rule for Second Amendment cases).

29. See Britt Houston Lindsey, *A Little Post-Bruen Clarity in U.S. v. Rahimi*, TEX. DIST. & CNTY. ATTY'S ASS'N (last visited Dec. 13, 2024), <https://www.tdcaa.com/journal/a-little-post-bruen-clarity-in-u-s-v-rahimi/>.

30. See *infra* Part III (arguing that because of their inconsistencies and different holdings, *Rahimi* abrogates *Bruen*).

31. See *infra* Part IV (arguing that firearm laws during the Founding do not support prohibiting gun possession for those who have used drugs in the past).

32. See *infra* Part V (suggesting a legislative fix for § 922(g)(3)).

33. See discussion *infra* Section II.A (discussing the history of regulating the possession of firearms by classes of individuals).

Amendment and how it arrived at the *Rahimi-Bruen* analysis.³⁴ Furthermore, Part II illustrates how circuit courts of appeals have applied *Bruen* and *Rahimi* to § 922(g)(3).³⁵

Part III discusses the inconsistencies of *Bruen* and *Rahimi* and identifies the rule that courts should apply to gun regulation cases in the future.³⁶ Moreover, Part IV argues that under the *Rahimi-Bruen* analysis, § 922(g)(3) is unconstitutional as applied to many people.³⁷

Part V of this Comment is the first to argue that to align § 922(g)(3) with the principles of the Second Amendment's regulatory tradition, Congress should narrow the statute to prohibit firearm possession only by those who are currently intoxicated and those who have been convicted of drug use within the last year.³⁸

II. SUMMARY OF 18 U.S.C. § 922(g)(3) AND THE SUPREME COURT'S SECOND AMENDMENT JURISPRUDENCE

The Second Amendment reads as follows: “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.”³⁹ The meaning and scope of these twenty-seven words have been hotly debated in the country.⁴⁰ Meanwhile, an increase in gun violence throughout the United States has created a need for federal, state, and local governments to respond by regulating the possession and acquisition of firearms.⁴¹ These ingredients have shoved the constitutionality of gun regulations into the forefront of the Court and society.⁴²

A. Legislative History and Modern Enforcement of § 922(g)(3)

As crime, especially high-profile crime, became more frequent in the United States, the government moved to address it with stronger gun laws.⁴³

34. See discussion *infra* Section II.B (discussing the evolution of Supreme Court jurisprudence on the Second Amendment).

35. See discussion *infra* Section II.C (discussing the lower courts' applications of *Bruen* and *Rahimi* to § 922(g)(3) cases).

36. See discussion *infra* Part III (analyzing *Bruen* and *Rahimi* and extracting a rule).

37. See discussion *infra* Part IV (arguing that § 922(g)(3) is unconstitutional using the *Rahimi-Bruen* framework).

38. See discussion *infra* Part V (recommending legislation that aligns with the regulatory principle of the Second Amendment at the Founding).

39. U.S. CONST. amend. II.

40. PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 1 (2009).

41. See *District of Columbia v. Heller*, 554 U.S. 570, 693–96 (2008) (discussing the District of Columbia's gun crimes and its attempts to respond to them).

42. See *id.* at 557.

43. Brandon E. Beck, *The Federal War on Guns: A Story in Four-and-a-Half Acts*, 26 U. PA. J. CONST. L. 53, 55 (2024).

Today, one of the federal government's primary tools for combating gun crime is the Unlawful Acts section of the U.S. Code, which restricts gun possession for certain classes of people, including drug users.⁴⁴ These restrictions have developed over nearly a century.⁴⁵

1. The Federal Firearms Act of 1938

The federal government's first attempt to regulate firearms came in the 1930s to fight organized crime.⁴⁶ Although Congress enacted several modest laws that regulated firearms at this time, the most important for the purposes of this Comment was the Federal Firearms Act of 1938 (FFA).⁴⁷ The FFA laid the foundation for Congress to prohibit certain classes of people from purchasing and possessing firearms.⁴⁸ The FFA prohibited any individual "who is under indictment or who has been convicted of a crime of violence or who is a [fugitive] from justice" from shipping or receiving a firearm through interstate commerce.⁴⁹ Moreover, the law prohibited any individual "who has been convicted of a crime of violence or who is a [fugitive] from justice" from possessing a firearm.⁵⁰

2. Congressional Action on Firearms in 1968

In the 1960s, thirty years after the enactment of the FFA, Congress looked again to regulate firearms.⁵¹ The 1960s were a time of increased gun violence, high-profile assassinations, and civil unrest.⁵² Additionally, a surplus inventory of military weapons from World War II made it easier to obtain cheap foreign firearms, which consequently threatened domestic producers.⁵³ These factors inspired Congress to address and regulate firearms.⁵⁴

One of the ways Congress addressed these concerns was the Omnibus Crime Bill and Safe Streets Act of 1968 (Omnibus Crime Bill).⁵⁵ After the assassinations of John F. Kennedy, Martin Luther King, and Robert F. Kennedy, Congress felt pressured to prevent future assassinations of political

44. *See id.* at 85.

45. *Id.* at 60–61.

46. *See id.* at 64.

47. *See id.* at 67.

48. *Id.* at 69–70.

49. Federal Firearms Act of 1938, Pub. L. No. 75-785, § 2(d)–(f), 52 Stat. 1250, 1251.

50. *Id.*

51. Beck, *supra* note 43, at 70–71.

52. *Id.*

53. *See id.* at 69–70, 72.

54. *See id.* at 70–71.

55. *Id.* at 74–76.

leaders.⁵⁶ Accordingly, the Bill contained provisions restricting the possession, shipment, and receipt of firearms by individuals who matched the descriptions of these leaders' assassins.⁵⁷ For example, John F. Kennedy's assassin, Lee Harvey Oswald, renounced his citizenship, was discharged from the armed services with less than an honorable discharge, and had a rifle from a military surplus mail order service.⁵⁸ The Omnibus Crime Bill restricted individuals who "ha[ve] been discharged from the Armed Forces under other than honorable conditions, or" who have renounced their citizenship from possessing, transporting, or receiving any firearm that traveled through commerce.⁵⁹ Moreover, these restrictions extended to felons like King's assassin⁶⁰ and to non-citizens like Robert F. Kennedy's assassin.⁶¹ Also included in this prohibition were people who were in the United States illegally and those who had been adjudicated mentally incompetent.⁶²

Not only was the Omnibus Crime Bill concerned with preventing assassinations, but it also aimed to restrict certain people from possessing firearms to prevent everyday crime.⁶³ To do this, the Bill made it illegal for importers, manufacturers, and dealers to "dispose of any firearm or ammunition" to a fugitive from justice or an individual who was "under indictment or has been convicted . . . of a crime punishable by imprisonment" for more than one year.⁶⁴ Moreover, the Bill made it unlawful for these people to receive any firearm that had been shipped through interstate commerce.⁶⁵

A few months later, Congress passed the Gun Control Act of 1968 (Gun Control Act).⁶⁶ Effectively, the Gun Control Act amended the Omnibus Bill in small ways.⁶⁷ One significant change, however, was that it added drug users and people addicted to drugs to those who were prohibited from receiving, transporting, or shipping firearms or ammunition through interstate commerce.⁶⁸ Notably, while this Act prohibited users of narcotics

56. See Beck, *supra* note 43, at 64; see generally Federal Firearms Act of 1938, Pub. L. No. 75-785, § 2(d)-(f), 52 Stat. 1250, 1251 (arguing restriction of possession, receipt, or shipment of firearms by certain individuals was a threat to the President and Vice President of the United States while also acknowledging that this restriction would be a way to combat crime).

57. See Beck, *supra* note 43, at 74-75.

58. See *id.* at 73-75.

59. *Id.* at 75; Omnibus Crime Bill and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1202(a)(2), (4), 82 Stat. 197, 236.

60. Beck, *supra* note 43, at 74-75; Omnibus Crime Bill and Safe Streets Act § 1202(a)(1).

61. Beck, *supra* note 43, at 76; Omnibus Crime Bill and Safe Streets Act § 1202(a)(4).

62. Omnibus Crime Bill and Safe Streets Act § 1202(a)(3), (5).

63. *Id.* § 901(a)(2) ("[T]he ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States.")

64. *Id.* § 922(c).

65. *Id.* § 922(f).

66. Beck, *supra* note 43, at 76.

67. *Id.*

68. Gun Control Act of 1968, Pub. L. No. 90-618, § 922 (g)-(h), 82 Stat. 1213, 1220-21.

and those addicted to narcotics from receiving and shipping firearms, it did not criminalize this group possessing firearms.⁶⁹

3. *The Firearm Protection Act of 1986*

As with the 1930s and 1960s, the 1980s also saw a period of increased crime.⁷⁰ The 1980s, however, were neither a time of mobocracy with Tommy gun-wielding gangsters nor a time of high-profile assassinations that shocked the world.⁷¹ Rather, leaders during the 1980s believed drugs caused hardened street criminals to terrify ordinary citizens and to ruin families and society.⁷² To combat this perception, leaders started instituting law-and-order policies.⁷³ Congress passed and the President signed several new bills that looked to curb crime through law and order, including the Firearm Owners' Protection Act of 1986.⁷⁴ This Act gave the federal government more power to contest crimes involving firearms and narcotics.⁷⁵ It also amended the law to restrict drug users and addicts from possessing firearms, whereas laws from 1968 only restricted drug users from purchasing and shipping firearms.⁷⁶ Congress saw this amendment as closing a loophole present in the 1968 Bill.⁷⁷

The Firearm Owners' Protection Act of 1986 reflected the language now seen today.⁷⁸ Section 922(g)(3) currently reads:

It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.⁷⁹

4. *Enforcement of § 922(g)(3)*

Because of its broad language, the Bureau of Alcohol, Tobacco, and Firearms and Explosives (ATF) set enforcement guidelines for § 922(g)(3).⁸⁰

69. Beck, *supra* note 43, at 77.

70. *Id.* at 80.

71. *See id.* at 70, 80–81.

72. *See* Ronald Reagan & Nancy Reagan, President and First Lady of the U.S., Address to the Nation on the Campaign Against Drug Abuse (Sep. 14, 1986).

73. Beck, *supra* note 43, at 80–81.

74. *Id.* at 81–86.

75. *Id.* at 84–85.

76. Firearm Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449.

77. *See* S. REP. NO. 98-583, at 12 (1984); 132 CONG. REC. 6855 (1986).

78. Firearm Owners' Protection Act, sec. 102, § 101.

79. 18 U.S.C. § 922(g)(3).

80. Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 OHIO STATE J. CRIM. L. 211, 222–23 (2020).

To charge someone with a violation of § 922(g)(3), the ATF does not require a showing that the defendant used drugs on a particular day, or that they used drugs or were intoxicated when they attempted to or purchased or possessed a firearm.⁸¹ Rather, an inference can “be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time.”⁸² This includes the use of a drug or a drug conviction within the last “year, or multiple arrests for [a drug] offense[] within the past five years if the most recent arrest occurred within the past year.”⁸³

B. The Rahimi-Bruen Second Amendment Analysis

Although the Second Amendment has been the subject of constant debate, there is little Supreme Court precedent analyzing it.⁸⁴ When the Supreme Court did hear cases regarding the Amendment, it typically issued narrow holdings that did little to define the contours of the Amendment.⁸⁵ But two hundred years after the Second Amendment’s ratification, the Court heard its first case that detailed the scope of the right.⁸⁶

1. The Heller Decision Sets the Foundation for Bruen and Rahimi

The foundation of modern Second Amendment jurisprudence is the holding and analysis in *District of Columbia v. Heller*.⁸⁷ There, respondent Heller challenged the constitutionality of the District of Columbia’s gun laws, arguing they violated his Second Amendment right to possess a handgun for self-defense.⁸⁸ At the time, it was a crime in the District of Columbia to possess an unregistered firearm.⁸⁹ However, “registration of handguns [was] prohibited,” and aside from this prohibition on carrying a handgun, one was required to have a license that was issued at the discretion of the police chief.⁹⁰

81. *Id.* at 222.

82. *Id.* (quoting T.D. ATF-391, *Definitions for the Categories of Persons Prohibited from Receiving Firearms* (Jun. 27, 1997), <https://www.atf.gov/file/84311/download>).

83. *Id.* at 222–23 (quoting T.D. ATF-391).

84. CHARLES, *supra* note 40, at 6.

85. *See id.*

86. *See* *District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008). *But see* *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that a prohibition on sawed-off shotguns was constitutional because they had no use in a well-regulated militia and therefore no protection under the Second Amendment).

87. *See Heller*, 554 U.S. at 595; *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 19 (2022) (explaining that *Heller*’s holding requires a historical approach for determining the constitutionality of gun regulations).

88. *Heller*, 554 U.S. at 575–76.

89. *Id.* at 574–75.

90. *Id.* at 575.

Ultimately, “[t]he District of Columbia generally prohibit[ed] the possession of handguns.”⁹¹ To decide the case, the Court used a textual analysis and an originalist understanding of the Constitution to find that the Second Amendment was an individual right to possess firearms in the home for self-defense.⁹² To support its conclusion, the Court looked at the history of the Second Amendment and laws enacted around the time of its ratification.⁹³

Applying *Heller*, courts of appeals adopted a two-part means-end scrutiny test to analyze gun regulations that were challenged under the Second Amendment.⁹⁴

2. Bruen Adopts a Detailed Test That Requires Gun Regulations to Comport with the History and Tradition of the Second Amendment

In 2022, the Supreme Court rejected the courts of appeals’ means-end scrutiny test in *Bruen*.⁹⁵ There, the Court held that the two-part framework was “one step too many” because focusing solely on history and tradition is the proper analysis when looking at a regulation to determine whether the Second Amendment covers it.⁹⁶ The Court held that the Government must show that its “firearm regulation is consistent with this Nation’s historical tradition” to justify its regulation and prove that it comports with the Second Amendment.⁹⁷

The Court said that the history and tradition test can be applied in two different situations.⁹⁸ The first situation is when the “challenged regulation addresses a general societal problem that has persisted since the [eighteenth] century.”⁹⁹ In this situation, if the modern regulation is not “distinctly similar [to a] historical regulation addressing that problem,” when early American governments addressed the issue “through materially different means,” or if a jurisdiction considered an analogous regulation but rejected it on constitutional grounds, then the modern regulation is likely unconstitutional.¹⁰⁰

91. *Id.* at 574.

92. *Id.* at 576–578; *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 576–77) (“In *Heller*, we began with a ‘textual analysis’ . . . of the Second Amendment.”).

93. See generally *Heller*, 554 U.S. at 570 (arguing that the individual right to defend oneself “is strongly confirmed by the historical background of the Second Amendment”); *Bruen*, 597 U.S. at 20–22 (explaining how *Heller* used the historical record to determine the meaning and scope of the Second Amendment).

94. *Bruen*, 597 U.S. at 18.

95. *Id.* at 19.

96. *Id.*

97. *Id.* at 17, 19.

98. *Id.* at 26–30.

99. *Id.* at 26.

100. *Id.* at 26–27.

The second situation is one where the government tries to regulate a problem that was “unimaginable at the [F]ounding” or emerged because of a “dramatic technological change[.]”¹⁰¹ In this situation, the reviewing court must use analogical reasoning to determine whether the modern regulation is somehow relevantly similar to Founding Era regulations.¹⁰² While the Court acknowledged that two statutes can be similar in an infinite amount of ways, the two relevant metrics are the “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.”¹⁰³ Simply put, the central consideration is “whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.”¹⁰⁴ Moreover, the Court concluded that the Government does not have to produce “a historical twin” to pass constitutional muster; it need only show “a well-established and representative historical analogue.”¹⁰⁵

The Court then applied this new test to the facts of *Bruen*, in which two individuals challenged the constitutionality of New York’s firearm licensing regime, arguing that it violated their Second Amendment rights.¹⁰⁶ At the time, it was illegal to possess a firearm in New York without a license.¹⁰⁷ To obtain a license to possess a firearm for use in the home, an individual had to show a licensing officer that they were “of good moral character, ha[d] no history of crime or mental illness, and that” there was no other good reason to deny the license.¹⁰⁸

To possess a firearm outside of the home, New York law required potential gun owners, Koch and Nash, to obtain an unrestricted license, which in turn required a showing that they had “proper cause” to obtain the license.¹⁰⁹ New York courts defined proper cause as a specific need for a weapon because of a particular threat of attack.¹¹⁰ If an individual could not obtain an unrestricted license, he could obtain a restricted license, which permitted individuals to possess a firearm and publicly carry it “for a limited purpose, such as hunting, target shooting, or employment.”¹¹¹ If an individual was denied a license, they were afforded little to no recourse.¹¹² The petitioners in *Bruen* were both denied licenses.¹¹³

101. *Id.* at 27–29.

102. *Id.* at 28–29.

103. *Id.* at 29.

104. *Id.*

105. *Id.* at 30.

106. *Id.* at 15–16.

107. *Id.* at 11–12.

108. *Id.* at 12.

109. *Id.*

110. *See id.* at 12–13.

111. *Id.* at 12.

112. *Id.* at 13.

113. *Id.* at 15–16.

To justify its law, New York provided historical evidence from various historical periods, ranging from the medieval period and early–modern England, to the late nineteenth and early twentieth centuries in America.¹¹⁴

The Court first made clear that historical periods should not be treated equally when conducting the history and tradition analysis.¹¹⁵ This is because the scope of the Second Amendment must be construed with reference to “the public understanding of the right when the Bill of Rights was adopted in 1791.”¹¹⁶ Therefore, governmental practices from the time of the Founding should be given great, if not dispositive, weight in the Court’s history and tradition analysis.¹¹⁷

Further, the Court noted that while English common law was adopted in the United States, there should be “[a] long, unbroken line of common-law precedent” to support its adoption in the United States.¹¹⁸ Moreover, the Court stated that the further removed a historical analogue is to the time of the Founding, the less weight it should be given.¹¹⁹ Thus, Middle Ages England and post-Civil War practices do not provide the same level of insight as practices that existed at the time of the Founding.¹²⁰

The Court went through each piece of evidence that New York offered to show that history and tradition supported its law and ultimately found that there was not “an American tradition justifying the State’s proper-cause requirement” because historically “American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense.”¹²¹ In reaching its conclusion, the Court spent a considerable amount of time on two pieces of evidence New York offered: affray laws and surety statutes.¹²²

Affray laws started with the Statute of Northampton in 1328, in which the king prohibited people from riding armed to cause an “affray of the peace.”¹²³ Moreover, there were two Colonial Era laws that authorized arrests of individuals who rode armed and caused affray.¹²⁴ Furthermore, after the ratification of the Second Amendment, there were common law offenses and statutory prohibitions against affray.¹²⁵ The Court, however, stated that these laws only prohibited the carrying of firearms if there was the additional action

114. *Id.* at 34.

115. *Id.*

116. *Id.* at 37.

117. *See id.* at 35–36.

118. *Id.* at 35.

119. *See id.* at 35–36.

120. *See id.* at 34, 36–37.

121. *Id.* at 40–60, 70.

122. *See id.* at 40–60.

123. *See id.* at 40 (citing Statute of Northampton, 2 Edw. 3, c. 3 (1328)) (discussing the 1328 Statute of Northampton).

124. *Id.* at 46.

125. *Id.* at 50–54.

of terrifying people; unlike the New York law, these laws did not prohibit the public carry of weapons.¹²⁶

Surety statutes “required certain individuals to post bond before carrying weapons in public.”¹²⁷ Some laws “required any person who was reasonably likely to ‘breach the peace,’ and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm.”¹²⁸ The Court, however, discounted these statutes, claiming they were not used often¹²⁹ and “were not viewed as substantial restrictions on public carry.”¹³⁰ Therefore, these laws—affray laws and surety statutes—did not “prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public” as the New York scheme did.¹³¹ Consequently, the Court deemed the scheme unconstitutional.¹³²

3. *Rahimi Holds That Modern Gun Regulations Must Comport with the Principles of the Regulatory Tradition of the Second Amendment*

Two years after the Court decided *Bruen*, it heard *Rahimi*.¹³³ There, the defendant assaulted his girlfriend, shot a firearm during the altercation, and threatened her after the altercation.¹³⁴ In response, the girlfriend filed a police report, and a state court subsequently found that he committed family violence.¹³⁵ The state court then placed a restraining order on him.¹³⁶ The restraining order, among other things, “suspended [the defendant’s] gun license for two years” or, if he was imprisoned, for one or two years after he was released from prison.¹³⁷ After the court issued, the defendant violated it by contacting the victim, implicating himself in several other shootings, and threatening another woman with a gun.¹³⁸ In response, the police executed a warrant and searched his residence where they discovered firearms and ammunition.¹³⁹

The defendant was charged with and pled guilty to violating § 922(g)(8), which prohibits “possessing a firearm while subject to a domestic violence

126. *Id.* at 45–55 (“Respondents do not offer any evidence showing that, in the early [eighteenth] century or after, the mere public carrying of a handgun would terrify people.”).

127. *Id.* at 55.

128. *Id.* at 56.

129. *Id.* at 58 (“[R]espondents offer little evidence that authorities ever enforced surety laws.”).

130. *Id.* at 59.

131. *Id.* at 60.

132. *Id.* at 71.

133. *United States v. Rahimi*, 602 U.S. 680, 689 (2024).

134. *Id.* at 686.

135. *Id.*

136. *Id.* at 686–87.

137. *Id.* at 687.

138. *Id.* at 688.

139. *Id.*

restraining order.”¹⁴⁰ Rahimi challenged § 922(g)(8)’s constitutionality on its face, arguing that it violated his Second Amendment right.¹⁴¹ After the *Bruen* decision, the Fifth Circuit agreed and found the law unconstitutional.¹⁴² The Supreme Court, however, disagreed and found that § 922(g)(8) was consistent with the Second Amendment.¹⁴³

To reach this conclusion, the Court clarified its holding in *Bruen*.¹⁴⁴ It explained that “[a] court must ascertain whether the new law is ‘relevantly similar’ to laws that” historically restricted an individual’s Second Amendment right.¹⁴⁵ Moreover, “[w]hy and how the [modern] regulation burdens the [Second Amendment] right [is] central to this inquiry.”¹⁴⁶ The Court reiterated, as it did in *Bruen*, that modern laws are permissible if they regulate a particular problem that was present at the Founding in a similar way the Founders regulated the problem.¹⁴⁷ Conversely, a regulation may be unconstitutional when it goes “beyond what was done at the [F]ounding.”¹⁴⁸ However, the regulation may pass constitutional muster if it is analogous enough to its historical precursors, even if it does not precisely match.¹⁴⁹ Moreover, although the modern regulation does not exactly mirror historical precedents, it “must comport with the principles underlying the Second Amendment.”¹⁵⁰ The Court, however, made no mention of the two circumstances the firearm regulations can fall into as it did in *Bruen*.¹⁵¹

In its history and tradition analysis, the Court found that the English common law had firearm regulations which “barr[ed] people from misusing weapons to harm or menace others,”¹⁵² and by the eighteenth and nineteenth centuries “two distinct legal regimes had developed that specifically addressed firearms violence” in the United States.¹⁵³

The first of these legal regimes, as discussed in *Bruen*, were surety laws.¹⁵⁴ These laws, the Court reasoned, were not only used to prevent spousal abuse, but could also be used to target the misuse of firearms.¹⁵⁵

140. *Id.*

141. *Id.* at 689.

142. *Id.*

143. *Id.* at 690.

144. *See id.* at 692.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* at 706 (Sotomayor, J., concurring).

152. *Id.* at 693 (majority opinion).

153. *Id.* at 694–95.

154. *Id.* at 695.

155. *Id.* at 695–96.

In addition to the surety laws, the Court also pointed to affray laws.¹⁵⁶ It noted that this common law prohibition was adopted into the American system and even codified by four states.¹⁵⁷

These two regulations, the Court concluded, together showed a tradition in this country of disarming people who “pose[] a clear threat of physical violence to another.”¹⁵⁸ While the Court conceded that § 922(g)(8) is not identical to the surety laws or the common law of affray, it is “‘relevantly similar’ . . . in . . . why and how it burdens the Second Amendment right.”¹⁵⁹

First, the Court concluded the “why” underlying this Founding Era tradition was to “restrict[] gun use to mitigate demonstrated threats of physical violence” as does § 922(g)(8).¹⁶⁰

Second, the § 922(g)(8) restriction acts similarly to how surety laws restricted possession of firearms at the Founding.¹⁶¹ For example, surety laws required a court finding of directed violence toward an individual.¹⁶² Section 922(g)(8) also restricts an individual’s Second Amendment right after a court finds that the individual presents a credible threat to another.¹⁶³

The Court also pointed out that surety laws and § 922(g)(8) were only temporary restrictions.¹⁶⁴ Under surety laws, the bonds could only be in effect for six months.¹⁶⁵ Comparatively, § 922(g)(8) only restricts a person’s Second Amendment rights while they are subject to a state court’s restraining order.¹⁶⁶

Moreover, the Court said that the punishment of § 922(g)(8) was relevantly similar to the punishment of affray laws.¹⁶⁷ Specifically, the punishment for affray was imprisonment, “and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that [§] 922(g)(8) imposes is also permissible.”¹⁶⁸ Therefore, the Court held that § 922(g)(8) was facially constitutional because it fit the principle of the Founding’s Second Amendment regulatory principle.¹⁶⁹

156. *Id.* at 697.

157. *Id.* at 697–98.

158. *Id.* at 698.

159. *Id.*

160. *Id.*

161. *Id.* at 698–99.

162. *Id.* at 699.

163. *Id.*

164. *See id.*

165. *Id.* at 697.

166. *Id.* at 699.

167. *See id.*

168. *Id.*

169. *See id.* at 700.

C. How Courts of Appeals Have Applied Rahimi-Bruen to § 922(g)(3)

After the *Bruen* decision, courts of appeals looked to apply the history and tradition test to § 922(g)(3) cases.¹⁷⁰ After *Rahimi* the courts changed their analysis slightly, but came to the same result that § 922(g)(3) is unconstitutional as applied to many people.¹⁷¹

I. United States v. Daniels

One of the first cases that applied *Bruen*'s framework was *United States v. Daniels* out of the Fifth Circuit.¹⁷² There, the defendant was pulled over for driving without a license plate.¹⁷³ During the stop, officers smelled marijuana and searched the defendant's vehicle.¹⁷⁴ They found several used marijuana cigarettes and two firearms.¹⁷⁵ During questioning, the defendant admitted that he was a regular user of marijuana.¹⁷⁶ There was no evidence that the defendant was under the influence at the time he was in the car with the guns.¹⁷⁷ Nevertheless, he was charged with and convicted of violating § 922(g)(3).¹⁷⁸

The Fifth Circuit decided that § 922(g)(3) fell into the second category laid out in *Bruen*—a government response to an issue that did not exist at the time of the Founding.¹⁷⁹ Therefore, the Government was only required to show a historical analogue that was relevantly similar to § 922(g)(3).¹⁸⁰ To do this, the Government pointed to three historical analogues: regulations regarding alcohol, the confinement of the mentally ill, and disarming those the government deemed dangerous.¹⁸¹ The Court rejected these as analogues to § 922(g)(3) because these historical regulations all prohibited an individual from possessing a firearm when they were intoxicated and, as a result, dangerous.¹⁸² Section 922(g)(3), however, can restrict an individual's Second

170. *See generally*, *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023), *vacated and remanded*, 144 S. Ct. 2707 (2024) (holding that § 922(g)(3) is not within the history and tradition as applied to defendant); *United States v. Veasley*, F.4th 906 (8th Cir. 2024) (using the history and tradition test in a § 922(g)(3) case).

171. *See generally*, *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024) (holding § 922(g)(3) unconstitutional as to Connelly).

172. *Daniels*, 77 F.4th at 337.

173. *Id.* at 340.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 340–41.

179. *Id.* at 343–44.

180. *Id.*

181. *Id.* at 344.

182. *Id.* at 377.

Amendment right even when they are sober.¹⁸³ Because the defendant was sober while possessing the firearm at the time of his arrest, § 922(g)(3) was unconstitutional as applied to him.¹⁸⁴

2. United States v. Veasley

The Eighth Circuit faced a challenge to § 922(g)(3) in *United States v. Veasley*.¹⁸⁵ There, a defendant “pulled out a handgun and shot at his [drug] dealer.”¹⁸⁶ The defendant pled guilty to a § 922(g)(3) charge, but after *Bruen*, he challenged the statute on constitutional grounds, arguing it violated his Second Amendment rights.¹⁸⁷ Because he pled guilty, he could only challenge the law facially.¹⁸⁸

The *Veasley* court held that the law was facially constitutional.¹⁸⁹ It reasoned that the historical analogues of confinement of the mentally ill and disarming dangerous people supported its conclusion because the theory underlying these historical analogues was to keep guns out of the hands of risky or dangerous people.¹⁹⁰ The court reasoned that these were sufficient analogues because the use of drugs “can cause terrifying and dangerous behavior . . . [a]t least in some drug users.”¹⁹¹

While the *Veasley* court found § 922(g)(3) facially constitutional, it acknowledged that the law could be unconstitutional as applied to many people.¹⁹² It provided the example of an eighty year old grandmother who has a handgun for self-defense but uses medicinal marijuana as a person who might be able to raise a successful as-applied constitutional challenge to § 922(g)(3).¹⁹³

3. United States v. Connelly

After the *Rahimi* decision, the Fifth Circuit heard another Second Amendment challenge to § 922(g)(3) in *United States v. Connelly*.¹⁹⁴ The result, however, was the same as in *Daniels*.¹⁹⁵ In *Connelly*, police responded

183. *Id.* at 340 (“[O]ur 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 citizen based exclusively on his past drug usage.”).

184. *Id.* at 355.

185. *United States v. Veasley*, 98 F.4th 906, 908 (8th Cir. 2024).

186. *Id.* at 908.

187. *Id.*

188. *Id.* at 908–09.

189. *Id.* at 918.

190. *Id.* at 915–16.

191. *Id.* at 917.

192. *Id.*

193. *Id.* at 917–18.

194. *United States v. Connelly*, 117 F.4th 269, 272 (5th Cir. 2024).

195. *See id.*; *United States v. Daniels*, 77 F.4th 337, 340 (5th Cir. 2023).

to gunshots in El Paso, Texas.¹⁹⁶ As officers arrived at the scene, they heard several gunshots and found the defendant's husband holding a shotgun.¹⁹⁷ The husband was arrested at the scene.¹⁹⁸ During their investigation, officers learned that the defendant's husband used drugs, and the defendant also admitted to using marijuana "at times . . . as a sleep aid and for anxiety."¹⁹⁹ During a sweep of the house, officers discovered "drug paraphernalia and an array of unsecured firearms and ammunition."²⁰⁰

The defendant was charged with violating § 922(g)(3).²⁰¹ The district court however, dismissed the charges, reasoning that the statute was both facially unconstitutional and unconstitutional as applied to the defendant.²⁰² The Fifth Circuit heard the appeal.²⁰³

The Government offered the same Founding Era historical analogues of disarming intoxicated individuals, confining the mentally ill, and disarming those perceived as dangerous.²⁰⁴ The court, applying *Rahimi*, found these laws unconstitutional as applied to the defendant.²⁰⁵ It concluded, as in *Daniels*, that § 922(g)(3) was broader than these historical analogues because the statute burdens an individual's Second Amendment right differently.²⁰⁶ The historical regulations, the court said, only "provide[d] support for banning the carry of firearms while actively intoxicated."²⁰⁷

III. *RAHIMI*'S HOLDING AND ANALYSIS ABROGATE *BRUEN* TO CREATE A NEW RULE

In its opinion, the *Rahimi* Court claimed that it was explaining the *Bruen* opinion because "some courts ha[d] misunderstood [its] methodology."²⁰⁸ In reality, the Court significantly broadened the *Bruen* test and undermined its analysis in a way that indicates that *Rahimi* partially abrogated *Bruen*.²⁰⁹

The *Rahimi* Court held that the proper analysis for the constitutionality of modern gun regulations requires courts to consider whether the modern regulation is "consistent with the principles that underpin our regulatory tradition."²¹⁰ The pages the Court cited from *Bruen*, however, never used any

196. *Connelly*, 117 F.4th at 272.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 273.

203. *Id.* at 272.

204. *Id.* at 275.

205. *Id.* at 283.

206. *See id.* at 281–82.

207. *Id.* at 281.

208. *See United States v. Rahimi*, 602 U.S. 680, 691 (2024).

209. *See id.* at 692 (broadening the holding in *Bruen* by pulling principles out of the law).

210. *Id.* at 692 (citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 26–31(2022)).

form of the word “principle,” other than in a quote from *Heller*.²¹¹ Rather, the *Bruen* Court used language that indicated that the modern regulation must be similar to a single historical regulation.²¹²

When comparing the two cases, one can see this shift from *Bruen*’s singular historical regulation analysis to *Rahimi*’s principles analysis.²¹³ For example, *Bruen*’s analysis requires courts to consider every historical law that the government offers to either distinguish them from the modern law or dismiss them altogether.²¹⁴ The *Bruen* Court did not attempt, however, to pull principles out of these regulations.²¹⁵ This analysis is indicated when the *Bruen* Court discusses different types of historical laws from after the ratification of the Second Amendment.²¹⁶ There, the Court acknowledged that the laws regulated the “manner of public carry[.]”²¹⁷ but the Court never attempted to discern a principle as to why these laws restricted public carry.²¹⁸ Rather, the Court implied that if one of these historical regulations limited the Second Amendment in a manner similar to New York’s licensing scheme, the licensing scheme would be constitutional.²¹⁹

Rahimi’s principle analysis not only attempts to pull a principle out of historical regulations but also considers different regulations together to do so.²²⁰ Therefore, *Rahimi* allows courts to look at historical regulations together to pull a common principle.²²¹

Moreover, the type of historical regulations the Court relied on in *Rahimi* only further contradicts much of *Bruen*’s analysis.²²² To justify the New York regulation in *Bruen*, the Government pointed to the Statute of Northampton, which codified the common law crime of affray, which had

211. See *Bruen*, 597 U.S. at 26–31.

212. *Id.* at 26 (“[T]he lack of a distinctly similar historical *regulation*.”) (emphasis added); *id.* at 28–29 (“[D]etermining whether a historical *regulation* is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the *two* regulations are ‘relevantly similar.’”) (emphasis added). *But see id.* at 26–27 (“[I]f earlier generations addressed the societal problem, but did so through materially different *means*, that also could be evidence that a modern regulation is unconstitutional.”) (emphasis added).

213. Contrast *Rahimi*, 602 U.S. at 697–700 (pulling principles out of historical regulations), with *Bruen*, 597 U.S. at 39–71 (only comparing modern law to historical law).

214. See *Bruen*, 597 U.S. at 39–71.

215. See *id.*

216. *Id.* at 59.

217. *Id.*

218. See *id.*

219. See *id.* at 60 (“None of these historical limitations on the right to bear arms approach New York’s proper-cause requirement because *none* operated to prevent . . . carrying arms in public.”) (emphasis added).

220. See *United States v. Rahimi*, 602 U.S. 680, 698–700 (2024) (“Taken together, the surety and going armed laws confirm . . . [that] [w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”) (emphasis added).

221. See *id.*

222. See *infra* notes 228–30 and accompanying text (explaining that unlike *Bruen*, *Rahimi* treated affray and surety laws as valid analogues).

been adopted and even codified in parts of the U.S.²²³ When discussing these laws, the *Bruen* Court pointed to the few affray laws that were actually enacted during the Colonial period and the Founding and said that they did not show “a tradition of public-carry regulation.”²²⁴ This further shows the lack of support in *Bruen* for a principle-based analysis.²²⁵ Moreover, the Court states that these gun restrictions were considered constitutional only when coupled with an act of terrifying the people, and therefore did not justify New York’s scheme.²²⁶ *Rahimi*, on the other hand, used these affray laws for the overall principle that the government can disarm those who they believe pose a particularized threat.²²⁷

The Court’s treatment of surety laws also demonstrates how *Rahimi*’s analysis supplanted *Bruen*’s.²²⁸ The *Bruen* Court said that surety laws were not helpful historical analogues because they were not used often and were not seen as a severe restriction on public carry.²²⁹ *Rahimi*, however, did not question the usefulness of these laws but rather accepted them as useful analogues.²³⁰

Another way the *Rahimi* Court significantly departed from the *Bruen* analysis is how *Rahimi* applied the history and tradition test. In *Bruen*’s application of the test, the Court laid out a two-part framework that determined the level of similarity a modern and historical regulation should have based on whether the societal problem was present or unimaginable at the Founding.²³¹

Rahimi dispensed with this framework and simply stated that a modern regulation need only be similar to a historical regulatory tradition.²³² The Court did, however, hint that a modern law is likely unconstitutional when a Founding Era gun regulation addressed the same particular problem with a dissimilar restriction when compared to the modern law.²³³

Ultimately, when looking at the two cases together, one can find the new standard that is the *Rahimi–Bruen* analysis for regulations of the Second Amendment.²³⁴ This new standard is that modern regulations must align with the principles set forth in historical regulations.²³⁵ To determine this principle

223. *Bruen*, 597 U.S. at 40–53.

224. *See id.* at 46.

225. *See id.*

226. *See id.* at 45–46, 52–55.

227. *See* United States v. *Rahimi*, 602 U.S. 680, 698–700 (2024).

228. *See id.* at 693–97.

229. *See Bruen*, 597 U.S. at 58–59.

230. *See Rahimi*, 602 U.S. at 693–95.

231. *See Bruen*, 597 U.S. at 26–29.

232. *See Rahimi*, 602 U.S. at 692–93.

233. *See id.* (“[I]f laws at the [F]ounding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.”).

234. *See id.* at 692–94; *Bruen*, 597 U.S. at 26–29.

235. *See Rahimi*, 602 U.S. at 692–94.

a court can look at the historical regulations together.²³⁶ Moreover, the historical regulations must be analogous to the modern regulation.²³⁷ To determine if the historical regulations are analogues to the modern regulation a court must ascertain if they are relevantly similar by looking at “why and how [the regulation] burdens the . . . right.”²³⁸ Moreover, historical surety laws and affray laws can be used as evidence that historical regulations support disarming those who the government identifies as dangerous.²³⁹

Although this standard found § 922(g)(8) constitutional in *Rahimi*, applying this standard to § 922(g)(3) results in it being unconstitutional as applied to many people who have been charged with it.²⁴⁰

IV. SECTION 922(g)(3) IS UNCONSTITUTIONAL UNDER THE *RAHIMI–BRUEN* ANALYSIS

Now that the Court established this new *Rahimi–Bruen* standard, it needs to be applied to § 922(g)(3) to show how it is unconstitutional to many people.²⁴¹ First, it needs to be shown that drug users and those who are addicted to drugs are covered by the Second Amendment, which they are.²⁴² Second, one needs to survey the regulatory tradition of the Second Amendment at the Founding to determine if there is a principle that supports prohibiting gun possession by those who have used drugs in the past.²⁴³

A. Drug Addicts and Users Are Among “the People” Covered by the Second Amendment

The first step in any Second Amendment challenge is to ensure that “the Second Amendment’s plain text covers an individual’s conduct.”²⁴⁴ If it does, “the Constitution presumptively protects that conduct.”²⁴⁵

The Second Amendment states that the right to bear arms is “the right of the people.”²⁴⁶ The “people” refers to those in the political community, not

236. *See id.* at 697–99.

237. *See id.* at 692–93.

238. *See id.*

239. *See id.* at 697–99.

240. *Id.* at 698–701.

241. *See id.* at 692–94; N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 26–29 (2022).

242. *See* discussion *infra* Section IV.A (proving the Second Amendment protects users of and those addicted to drugs).

243. *See* discussion *infra* Section IV.B (proving the regulatory history of the Second Amendment does not support the prohibition of firearms from those who have used drugs in the past, but does support prohibiting possession of firearms from those who are currently high).

244. *Bruen*, 597 U.S. at 17 (citing *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008)).

245. *Id.* at 17 (citing *Heller*, 554 U.S. at 580).

246. U.S. CONST. amend. II (emphasis added).

just law-abiding citizens.²⁴⁷ Therefore, drug users are part of the people because they are part of the political community.²⁴⁸

This principle can be seen in *Rahimi*. There, the Court did not address whether an individual under a protective order for domestic violence was considered part of the people.²⁴⁹ Instead, the Court assumed as much and proceeded with the rest of its Second Amendment analysis.²⁵⁰ Moreover, the Government, in its briefing, conceded that the defendant in *Rahimi* is part of the people.²⁵¹ If an individual under a protective order for domestic violence is considered a part of the people, then an individual who has used a narcotic in the past would certainly also be considered a part of the political community.²⁵²

B. There Are No Combined Principles of Laws at the Founding, Nor a Historical Analog That Justifies the Disarmament of Drug Users When They Are Not Intoxicated

In the cases challenging the constitutionality of § 922(g)(3), the Government points to Founding Era laws that regulate intoxication, confining the mentally ill, and laws disarming dangerous individuals as showing a principle supporting disarming drug users.²⁵³ When looking at these Founding Era laws, individually and taken together, it is clear that they do not support a principle of banning firearms for the past use of narcotics as the government claims, but do, however, support a principle that the government can prohibit the possession of firearms when an individual is currently intoxicated or shows a particularized threat to society.²⁵⁴

247. *Heller*, 554 U.S. at 580 (“[T]he people . . . unambiguously refers to all members of the political community, not an unspecified subset.”) (internal quotations omitted); see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[T]he people . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”) (internal quotations omitted); *United States v. Connelly*, 117 F.4th 269, 274 (5th Cir. 2024) (stating the people “refers to all members of our political community, not a special group of upright citizens”).

248. See *Heller*, 554 U.S. at 580.

249. See generally *United States v. Rahimi*, 602 U.S. 680 (2024) (not discussing whether an individual under a protective order was considered part of the people).

250. See *id.* at 698–701.

251. See Brief for the United States at 37, *United States v. Rahimi*, 602 U.S. 680 (2024) (No. 22-915) (“[H]istory and tradition establish that the Second Amendment allows legislatures to disarm persons who are not law-abiding, responsible citizens, regardless of whether they are among the people.”) (internal quotations omitted).

252. See *Connelly*, 117 F.4th at 274.

253. See *id.* at 274–75.

254. See *infra* Sections IV.B.1–4 (analyzing gun regulations at the Founding to show that they support disarming people who are presently intoxicated and dangerous).

1. While Intoxication Was Pervasive in the Founding Era, There Were No Laws That Restricted Firearms for Those Who Had Abused Alcohol

During the Founding Era, alcohol was present and pervasive.²⁵⁵ Moreover, leaders knew alcohol was a danger to society that would lead to crime.²⁵⁶ While alcohol was pervasive and its dangers known, there were only a few laws from the Founding aimed at preventing intoxicated people from using firearms: a 1655 Virginia law prohibited shooting guns at drinking events,²⁵⁷ a 1731 Rhode Island law prohibited firing guns in taverns at night,²⁵⁸ and a 1771 New York law prohibited firing guns during New Year's Day events.²⁵⁹ These laws all prohibited the use of weapons in places where actively intoxicated people would likely be, not because of their past intoxication, but because of their current intoxication.²⁶⁰

Moreover, even though militia laws in New Jersey, Pennsylvania, and South Carolina disarmed and confined intoxicated militia service members, and some states prohibited known alcoholics from serving in the militia,²⁶¹ these laws are not for the public as § 922(g)(3) is, but for military service.²⁶² This distinction is important because extending these prohibitions to the general public would go “beyond what was done at the [F]ounding.”²⁶³

2. Laws Confining the Mentally Ill Are Not Relevantly Similar to the Restrictions on Gun Possession for Those Who Have Used Drugs in the Past

Founding Era laws regarding the mentally ill are offered as a historical analogue to § 922(g)(3) because “justices of the peace were authorized to ‘lock up’ ‘lunatics’ who were ‘dangerous to be permitted to go abroad,’”²⁶⁴ and the Founders considered those intoxicated with alcohol as having a “‘temporary fit of madness.’”²⁶⁵ And because those suffering from mental illness could be imprisoned or confined, the lesser restriction of disarmament

255. See W. J. Rorabaugh, *Alcohol in America*, OAH MAG. OF HIST., 1991, at 17.

256. BENJAMIN RUSH, AN INQUIRY INTO THE EFFECT OF ARDENT SPIRITS UPON THE HUMAN BODY AND MIND (1785), reprinted in *DRUGS IN AMERICA: A DOCUMENTARY HISTORY* 28 (David F. Musto ed., 2002).

257. *Id.* at 19.

258. Opening Brief for the United States at 19, *Connelly*, 117 F.4th at 280 (No. 23-50312).

259. *Connelly*, 117 F.4th at 280.

260. See *id.*

261. Opening Brief for the United States at 19–20, *Connelly*, 117 F.4th 269 (No. 23-50312).

262. See *Connelly*, 117 F.4th at 281.

263. *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

264. Carlton F.S. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L. J. 1371, 1377 (2009).

265. Opening Brief for the United States at 25–26, *Connelly*, 117 F.4th 269 (No. 23-50312).

is permissible.²⁶⁶ This argument cannot justify § 922(g)(3)'s broad restriction.²⁶⁷ It may be true that those on drugs are going through a “temporary fit of madness,” but the key word to Benjamin Rush’s description of intoxicated individuals is “temporary.”²⁶⁸ There is no indication that a person who is sober and no longer intoxicated with narcotics is going through a “fit of madness” that could justify their confinement, and, in turn, their disarmament.²⁶⁹

Moreover, William Blackstone acknowledged that the law considered mental infirmities as temporary and capable of being “removed.”²⁷⁰ This shows that the Founders understood that confinement for the mentally ill need not always be perpetual.²⁷¹ Moreover, anecdotal evidence from the Founding shows that confinement for the mentally ill was considered temporary.²⁷² Therefore, even the confinement and disarmament of the mentally ill was historically temporary.

3. Laws Disarming Those the Government Deemed Dangerous Are Also Not Similar to § 922(g)(3)

Founding Era laws that disarmed people who the government deemed dangerous are also offered as historical analogues, including laws that disarmed people who were seen as disloyal to the colony, kingdom, state, or the country.²⁷³ For example, a 1756 Virginia statute disarmed Catholics if they did not pledge allegiance to the King of England.²⁷⁴ Moreover, after the Declaration of Independence, many states had laws that disarmed those who did not agree to swear an oath to the state.²⁷⁵

266. See *Connelly*, 117 F.4th at 275; Larson, *supra* note 264, at 1377 (arguing that if confinement of the mentally ill was permissible, then it follows that disarmament would also likely be permissible); *Rahimi*, 602 U.S. at 699 (“[I]f imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that [§] 922(g)(8) imposes is also permissible.”).

267. See *Connelly*, 117 F.4th at 275.

268. See RUSH, *supra* note 256.

269. *Connelly*, 117 F.4th at 275–76.

270. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3, *294–95.

271. See *Alden v. Maine*, 527 U.S. 706, 715 (1999) (stating Blackstone’s “works constituted the preeminent authority on English law for the founding generation”); *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008) (arguing Blackstone’s works provide insight to the Founding generation’s understanding of the textual meaning of the Second Amendment).

272. See MARY ANN JIMENEZ, CHANGING FACES OF MADNESS: EARLY AMERICAN ATTITUDES AND TREATMENT OF THE INSANE 32 (1987) (telling the story of Samuel Coolidge, who was mentally ill and confined for a short time but taught school when he was lucid).

273. Brief of Appellee at 43–44, *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023) (No. 22-60596).

274. Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & HIST. REV. 139, 157 (2007).

275. *Id.* at 159–60.

These laws, however, are not relevantly similar.²⁷⁶ Yes, these Founding Era laws regulated firearms to address the particular problem of those the government has deemed dangerous.²⁷⁷ But they do so for dissimilar reasons.²⁷⁸ Section 922(g)(3) may disarm people who are perceived as dangerous because of their drug use.²⁷⁹ But Founding laws, however, disarmed people who were considered a threat to the security of the nation.²⁸⁰ These are not “similar reasons” and, therefore, fall out of “a permissible category of regulations.”²⁸¹ Furthermore, Founding Era laws disarming those who did not swear loyalty still allowed them to legally possess firearms after they took an oath of loyalty and were no longer a danger.²⁸² Section 922(g)(3), on the other hand, disarms people when they are no longer intoxicated nor considered a danger.²⁸³

Precursors of the Second Amendment are offered as evidence that it was the Founders’ understanding that governments could disarm certain individuals who pose a danger of public injury.²⁸⁴ However, their source for this was a proposed Pennsylvania amendment that was not adopted.²⁸⁵ And this does not provide much insight because “[i]t is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process.”²⁸⁶ The Government, however, believed that this proposed amendment showed the understanding that the Founders could disarm people they believed were dangerous because this draft was viewed as “highly influential” in *Heller*.²⁸⁷ But this amendment was highly influential in *Heller* because it referenced an individual right, not because of its implication of disarming those who the government deemed dangerous.²⁸⁸ Therefore, this

276. *Contrast id.* at 157 (describing Founding Era laws that disarmed Catholics if they did not pledge allegiance), with 18 U.S.C. § 922(g)(3) (disarming people for drug use).

277. *United States v. Rahimi*, 602 U.S. 680, 693 (2024).

278. *See id.*

279. *See* 18 U.S.C. § 922(g)(3).

280. *See* Larson, *supra* note 264, at 1377.

281. *Rahimi*, 602 U.S. at 692.

282. Churchill, *supra* note 274.

283. *See* 18 U.S.C. § 922(g)(3).

284. Opening Brief for the United States at 22–23, *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024) (No. 23-50312).

285. *Compare* 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971) (“That the people have a right to bear arms . . . and no law shall be passed for disarming the people . . . unless for crimes committed, or real danger of public injury from individuals.”), with § A.XIII of 5 FRANCIS N. THORPE, *Constitution of Pennsylvania—1776*, in *THE FEDERAL AND STATE CONSTITUTIONS* 3081, 3083 (1909) (“That the people have a right to bear arms for the [defense] of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.”).

286. *District of Columbia v. Heller*, 554 U.S. 570, 590 (2008).

287. *See* Brief of Appellee at 43–44, *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023) (No.22-60596); Brief of Appellee at 22–23, *United States v. Veasley*, 98 F.4th 906 (8th Cir. 2024) (No. 23-1114); *Heller*, 554 U.S. at 604.

288. *Heller*, 554 U.S. at 604 (“But so was the highly influential minority proposal in Pennsylvania, yet that proposal, with its reference to hunting, plainly referred to an individual right.”).

argument gives little insight into “the principles that underpin our regulatory tradition” of the Second Amendment.²⁸⁹

Affray laws are also offered as potential justifications because they show that the government could disarm those who “spread fear or terror.”²⁹⁰ But when comparing these laws to § 922(g)(3), it becomes clear that § 922(g)(3) was enacted for entirely different reasons.²⁹¹ Affray laws “punish[] those who had menaced others with firearms.”²⁹² Section 922(g)(3) does not punish individuals after they have caused terror; it punishes the potential of causing terror in many cases.²⁹³ Therefore, affray laws and § 922(g)(3) were enacted for different reasons.

4. These Laws, When Viewed Together, Are Still Not Relevantly Similar to § 922(g)(3)

Intoxication laws and laws confining the mentally ill are similar to why Congress enacted § 922(g)(3).²⁹⁴ However, § 922(g)(3)’s “how” is different than the Founding Era laws because it goes “beyond what was done at the [F]ounding.”²⁹⁵ This is because Founding Era intoxication laws and laws confining the mentally ill, taken together, support a principle of disarming individuals who are currently intoxicated or undergoing a fit of madness.²⁹⁶ Section 922(g)(3), on the other hand, can punish people even after they are no longer intoxicated or mad.²⁹⁷

Moreover, laws disarming dangerous people are not relevantly similar to § 922(g)(3) because Congress enacted these laws for dissimilar reasons.²⁹⁸ Founding Era laws disarmed people during wartime, and affray laws punished people after they menaced someone with a firearm.²⁹⁹ Conversely, Congress passed § 922(g)(3) to protect against the potential of drug users committing violent crimes,³⁰⁰ and therefore, does not show a “principle[] that underpin[s] our regulatory tradition.”³⁰¹

289. *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

290. Opening Brief for the United States at 22, *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024) (No. 23-50312).

291. *Rahimi*, 602 U.S. at 692.

292. *Id.* at 697 (emphasis added).

293. *See* 18 U.S.C. § 922(g)(3).

294. *See supra* Sections IV.B.1–2 (surveying Founding Era laws regulating intoxication and the confinement of the mentally ill as possible analogues to § 922(g)(3)).

295. *See Rahimi*, 602 U.S. at 692.

296. *See id.*

297. *See* 18 U.S.C. § 922(g)(3).

298. *Rahimi*, 602 U.S. at 692 (explaining that “[w]hy and how the regulation burdens the right are central to” determining whether a modern law is relevantly similar to its historical counterparts).

299. *See supra* Section IV.B.3 (explaining how Founding Era laws regulated people the government considered dangerous).

300. *See supra* Section II.A (explaining the origin of § 922(g)(3)).

301. *Rahimi*, 602 U.S. at 692.

These laws, taken together, support a principle of disarming an individual who poses a particularized threat to the public.³⁰² For example, the particularized threat addressed by Founding Era intoxication laws and laws confining the mentally ill was the threat of misusing weapons while experiencing the temporary madness of intoxicants,³⁰³ such as affray laws punishing someone after the particular crime of menacing others with a firearm.³⁰⁴ Simply put, Founding Era laws disarmed those who did not swear loyalty to the state because these people posed a particular threat that they might harm the security of the country.³⁰⁵ While § 922(g)(3) is constitutional when applied to those who are currently under the influence of drugs, it is unconstitutional when applied to those who have used drugs in the past.³⁰⁶ Disarming past users of narcotics is an “undefined set” that does not have the required particularization that these Founding Era laws had.³⁰⁷

V. CONGRESS CAN ALIGN 18 U.S.C. § 922(g)(3) WITH THE SECOND AMENDMENT BY NARROWING IT TO CRIMINALIZE POSSESSION ONLY WHEN THE OWNER IS PRESENTLY INTOXICATED

As discussed above, § 922(g)(3) is only constitutional when applied to those who are presently intoxicated,³⁰⁸ but the statute is written so broadly and typically is only applied to disarm and punish those for their past intoxication.³⁰⁹ While courts can interpret the law as punishing and disarming solely for current intoxication, doing so would essentially rewrite the law—a task specifically reserved for Congress.³¹⁰ Therefore, to make § 922(g)(3) constitutional for all of its applications and not just some of them, Congress should rewrite the statute in a way that aligns with the “principles that

302. See *supra* Sections IV.B.1–3 (detailing how Founding Era laws disarmed individuals who presented a threat to the public).

303. See *United States v. Connelly*, 117 F.4th 269, 280–82 (5th Cir. 2024).

304. *Rahimi*, 602 U.S. at 694.

305. See *supra* Section IV.B.3 (explaining that Founding Era laws disarming individuals who refused loyalty oaths were enacted to address threats to national security, not to regulate private conduct such as past drug use).

306. See generally *Connelly*, 117 F.4th at 281–82 (arguing that intoxication laws, laws confining the mentally ill, and disarming those who are dangerous supports a modern regulation of disarming those actively intoxicated, not those who have used intoxicants in the past).

307. See *id.* at 282.

308. See *supra* Section IV.B.1 (showing Founding Era gun regulations prohibited those who were currently intoxicated from possessing firearms).

309. See, e.g., *United States v. Richard*, 350 F. App'x 252, 261–63 (10th Cir. 2009) (upholding conviction under § 922(g)(3) based on defendant's prior admission of drug use, even absent proof of intoxication at the time of possession); *United States v. Seay*, 620 F.3d 919, 920 (8th Cir. 2010) (affirming conviction where the Government relied on history of drug use rather than evidence that defendant was under the influence when possessing the firearm); *United States v. Turner*, 842 F.3d 602, 603–04 (8th Cir. 2016) (holding that past, repeated drug use was sufficient to support conviction under § 922(g)(3), without showing contemporaneous intoxication during firearm possession).

310. See *infra* Section V.A (discussing why this as-applied challenge is a rewriting of legislation).

underpin our regulatory tradition.”³¹¹ Doing so would still ensure that firearms would not be lawfully possessed by those who could misuse them.³¹²

A. Congress, Not the Courts, Is the Proper Party to Remedy the Problems with § 922(g)(3)

In *Daniels* and *Connelly*, the courts utilized an as-applied challenge to hold § 922(g)(3) unconstitutional to the defendants.³¹³ Moreover, the *Veasley* court hinted that an as-applied challenge would be successful for a defendant challenging the constitutionality of the statute.³¹⁴ This is no surprise because as-applied challenges are the preferred avenue for courts to determine the constitutionality of a statute.³¹⁵ But relying on as-applied challenges creates an environment where courts abandon their judicial duty and enter into a legislative function where they create a new law, which this interpretation of § 922(g)(3) does.³¹⁶

To understand how radically the as-applied challenge changes § 922(g)(3), we should look at the statute.³¹⁷ The current language was enacted in 1986, and the bill read “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)).”³¹⁸ Looking at the structure of the statute, the reference to the Controlled Substances Act definition coming after the words “controlled substance” indicates that Congress wanted to use the Controlled Substances Act’s definition of controlled substance.³¹⁹ While that Act does define controlled substance, it also defines the term “addict” as an “individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.”³²⁰

This definition is broken up into two parts.³²¹ While the latter half of the definition appears to refer to someone who is dependent on drugs, the former half indicates that the person is a danger while using drugs, which was a

311. United States v. Rahimi, 602 U.S. 680, 692 (2024); see *infra* Section V.B (proposing statutory language to comport with the regulatory principles of the Second Amendment).

312. See *infra* Section V.D (discussing how this statutory change will combat some of the same issues as the current language).

313. See *supra* Sections II.C.1, 3 (discussing the holdings of *Daniels* and *Connelly*).

314. See United States v. Veasley, 98 F.4th 906, 917–18 (8th Cir. 2024).

315. See Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

316. See David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 696–97 (2008).

317. See 18 U.S.C. § 922(g)(3).

318. *Id.*; see *supra* Section II.A (discussing the legislative history of the statute).

319. See generally *Niz-Chavez v. Garland*, 593 U.S. 155, 160–62 (2021) (explaining that the Court uses structural clues to understand a statute’s meaning).

320. Controlled Substances Act, Pub. L. No. 91-513, § 102(1), 84 Stat. 1242, 1242 (1970).

321. *Id.*

common belief when this legislation was passed.³²² Therefore, this definition includes those who are active users of a narcotic as well as those who have used narcotics in the past and have developed a dependency.

However, because Congress specifically separated the term “user” from “addict,” user should also be given effect and not ignored.³²³ The term user is not defined in the 1986 statute, nor in the Controlled Substances Act; thus, statutory interpretation calls for the common use definition.³²⁴ User is defined simply as “one that uses.”³²⁵ This definition, taken with past use covered in the addict definition, shows that user means active use.³²⁶

Therefore, the language in § 922(g)(3) shows that Congress intended to prohibit those who used drugs in the past and are addicted, and those who were currently using narcotics from possessing firearms.³²⁷ But because the law is only constitutional for those who are currently intoxicated and unconstitutional for all others, the courts would be forced to institute a rule where only users are covered under the statute.³²⁸ This violates the surplusage canon because that interpretation would render words idle and not operative.³²⁹

Moreover, in effect, this rule would create a new law where only those who are currently intoxicated are prohibited from possessing a firearm.³³⁰ This runs counter to the governmental system that our Founders instituted and violates the separation of powers.³³¹ This law regulates commerce, a power solely reserved for the legislative branch.³³² With a judicial rule that nullifies half of the statute, it “directly and completely administer[s]” a power belonging to another branch of government.³³³ This is an overstep by the weakest of our branches of government,³³⁴ where they are supposed to call

322. See Reagan & Reagan, *supra* note 72; A PRESIDENTIAL COMMISSION SUGGESTS A MEDICAL APPROACH, *reprinted in* DRUGS IN AMERICA: A DOCUMENTARY HISTORY 287, 291–92 (David F. Musto ed., 2002).

323. See generally ANTONIN SCALIA & BRIAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174–75 (2012) (discussing statutory construction and interpretation).

324. See generally *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 409–08 (2011) (explaining that if a term is not defined, the Court must use the common definition).

325. *User*, G & C MERRIAM CO., *WEBSTER’S NEW COLLEGIATE DICTIONARY* 1279 (1980).

326. Compare *id.* (giving the common definition of user), with Controlled Substances Act § 102(1) (defining addict).

327. See 18 U.S.C. § 922(g)(3).

328. *Id.*; see *supra* Section V.A (analyzing the definitions and inclusions of the language in the statute).

329. See SCALIA & GARNER, *supra* note 323, at 174.

330. See *infra* Section V.C.1 (arguing that the statute is only constitutional for those currently intoxicated).

331. See THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

332. U.S. CONST. art. I, § 8, cl. 3.

333. See THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

334. See THE FEDERALIST NO. 78, at 465–67 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he judiciary is beyond comparison the weakest of the three [branches].”).

balls and strikes—not throw the pitches.³³⁵ Therefore, Congress should step in and remedy § 922(g)(3) in such a way that is consistent with the *Rahimi–Bruen* analysis and, thus, constitutional.³³⁶

B. Proposed Amendments to § 922(g)(3) That Will Align It with the History and Tradition of the Second Amendment

Because Congress is the proper party to remedy the problems with § 922(g)(3), Congress should amend § 922(g)(3) to criminalize the possession of a firearm by those who are presently intoxicated.³³⁷ Specifically, the law should be amended to read:

It shall be unlawful for any person who is under the influence of alcohol or any controlled substance to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Code should also be amended to read:

It shall be unlawful for any person who has been convicted in any court, of using or possessing any controlled narcotics (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) within the last year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

C. The Proposed Amendments Fit Within the Principles of the Country’s Regulatory Tradition

The rewriting of the statute this way will align with the “why” and “how” intoxication and firearms were regulated at the Founding.³³⁸ Moreover, these amendments align with the Founding principle that the government can disarm people who show a particularized threat, a principle that “underpin[s] our regulatory tradition.”³³⁹

335. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

336. See *supra* Part III (discussing how the *Rahimi–Bruen* analysis requires modern regulations to align with principles set forth in historical analogues).

337. See *supra* Section V.A (arguing that the courts are not the proper parties to remedy the issues with § 922(g)(3)).

338. *United States v. Rahimi*, 602 U.S. 680, 692 (2024).

339. *Id.*

1. The History and Tradition Support Disarmament of Those Who Are Currently Intoxicated

At the Founding, few laws disarmed those who were intoxicated out of the fear that they would misuse their firearms.³⁴⁰ These laws support the notion that the Founders believed they should disarm intoxicated individuals because of the possibility that they would misuse firearms.³⁴¹

The *Connelly* court, however, believed that there were only a few of these laws which could not suffice to show the tradition that *Rahimi-Bruen* requires.³⁴² However, the amount of laws is irrelevant in establishing a history of the regulation and its constitutionality.³⁴³ What is important is its lawfulness at the time of the Founding.³⁴⁴ For example, there were relatively few places in the eighteenth century where weapons were prohibited, but there were also “no disputes regarding the lawfulness of such prohibitions.”³⁴⁵ Therefore, these laws, though few, justify the amended language because there is no known challenge to their constitutionality.³⁴⁶

Furthermore, the Founders temporarily confined those who were mentally ill because they were considered dangerous.³⁴⁷ Additionally, the Founders regarded drunkenness as a form of temporary insanity.³⁴⁸ And “if imprisonment was permissible to respond to” insanity, then the lesser restriction of liberty in disarmament for those who are currently intoxicated, and thus suffering a form of temporary insanity, would also be permissible.³⁴⁹

The proposed amendment prohibiting intoxicated individuals from possessing firearms is to prevent the misuse of firearms by people who may be dangerous.³⁵⁰ There are indications that § 922(g)(3) was passed out of the fear that those who are high on drugs would misuse firearms and be a danger to others.³⁵¹ Therefore, this amendment is relevantly similar because the amendment has a “similar reason[.]” when compared to the historical analogues of confining the mentally ill and those who were intoxicated.³⁵²

340. See *supra* Section IV.B.3 (discussing how the Founding prohibited the use of guns where they may be misused).

341. See *United States v. Connelly*, 177 F.4th 269, 280 (5th Cir. 2024).

342. *Id.* at 281.

343. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 30 (2022).

344. *Id.*

345. *Id.*

346. See *id.*

347. See *Larson*, *supra* note 264, at 1377 (quoting HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT’S INHERITANCE 329 (6th ed. 1774)).

348. See *United States v. Rahimi*, 602 U.S. 680, 691 (2024).

349. *Id.* at 699.

350. See *supra* Section V.B (discussing proposed amendments to § 922(g)(3)).

351. See *supra* Section II.A (discussing the political background of the time the current legislation passed).

352. See *United States v. Connelly*, 117 F.4th 269, 276 (5th Cir. 2024) (“The [G]overnment highlights nothing demonstrating that laws designed to confine (and consequently, disarm) those so severely mentally ill that they presented a danger to themselves and others”); *id.* at 281 (explaining how

Moreover, the proposed statute “impos[es] similar restrictions” on the gun rights of people when compared to Founding Era laws.³⁵³ Founding Era laws restricted gun possession when an individual was presently intoxicated.³⁵⁴ The proposed statute does exactly that because it makes it unlawful to possess, ship, transport, or receive firearms only for those who are presently intoxicated.³⁵⁵

2. *History and Tradition Support a Temporary Prohibition of Firearms After a Court Determination of Drug Use*

When Congress passed § 922(g)(3) and its forebearers, it was particularly concerned about drug users possessing and using guns to commit crimes.³⁵⁶ Having language in the statute that temporarily disarms those who have been convicted of narcotics use or possession prevents this fear from becoming a reality.

Additionally, Founding Era surety statutes and affray laws disarmed those who were shown to be a threat to an individual.³⁵⁷ These laws, together, burden the Second Amendment to “mitigate demonstrated threats of physical violence.”³⁵⁸ The proposed statute burdens the Second Amendment because drug use makes someone more crime-susceptible and, therefore, creates a threat of physical violence.³⁵⁹ Thus, these laws are created for similar reasons.³⁶⁰

Moreover, surety statutes only required a bond after there was a court finding that it was reasonable that an individual may breach the peace.³⁶¹ Furthermore, affray laws also required a judicial determination that an individual had threatened another or the public with a weapon.³⁶² Thus, disarmament occurred after a magistrate determined there was a need.³⁶³ Disarming an individual only after they are convicted of possession or use of a narcotic aligns with the history and tradition of surety statutes and affray laws because they are “similar restrictions.”³⁶⁴

intoxication laws “pass the ‘why’ . . . test” when compared to the present § 922(g)(3)); *Rahimi*, 602 U.S. at 692.

353. *Rahimi*, 602 U.S. at 692.

354. *See supra* Sections IV.B.1–4 (discussing gun regulations at the Founding).

355. *See supra* Section V.B (discussing the proposed amended statute).

356. *See supra* Section II.A (discussing Congress’s motivation behind gun regulation).

357. *See supra* Section IV.B.3 (discussing how Founding Era laws disarmed those who had committed an act of violence).

358. *Rahimi*, 602 U.S. at 698.

359. *See id.* at 696.

360. *See id.* at 692.

361. *See id.* at 696.

362. *See id.* at 699.

363. *See id.* at 698–99.

364. *Id.* at 692.

Moreover, surety statutes were temporary because the bonds could not last for more than six months.³⁶⁵ This proposed legislation aligns with surety statutes' temporary status because it only disarms for a year.³⁶⁶ Therefore, both of these burden an individual's Second Amendment right in a similar way.

Additionally, in *Rahimi*, surety statutes and affray laws were determined to be evidence of a history and tradition of disarming those found to be a threat of physical violence.³⁶⁷ There, the Court found that a law disarming an individual under a protective order for domestic violence was constitutional.³⁶⁸ This statute is similar to the challenged statute in *Rahimi* in relevant ways. First, both statutes—and their historical analogue of surety statutes—are temporary disarmaments.³⁶⁹ Second, both statutes—and their historical analogues of surety statutes and affray laws—require a judicial determination before disarmament can occur.³⁷⁰

D. The Proposed Amendments Combat the Same Problem as § 922(g)(3)

Section 922(g)(3) was enacted to further public safety, which is exactly what the proposed amendments would do.³⁷¹ One of the proposed amendments prohibits an individual from possessing a firearm when he or she is under the influence of drugs.³⁷² This prohibition furthers public safety because many crimes are committed while an individual is under the influence of narcotics.³⁷³

Moreover, the proposed amendment goes beyond what Congress did with its original enactment of § 922(g)(3) by prohibiting firearms for those who are intoxicated with alcohol in addition to narcotics.³⁷⁴ This would only further Congress's goal of keeping the public safe.³⁷⁵ For example, according to a study, one in four victims of violent crime believed that the perpetrator was under the influence of alcohol.³⁷⁶

365. *Id.* at 697.

366. *See supra* Section V.B (discussing the proposed amended statute).

367. *Rahimi*, 602 U.S. at 698–99.

368. *Id.*

369. *Id.* at 699 (“[L]ike surety bonds of limited duration, [§] 922(g)(8)’s restriction was temporary.”).

370. *Id.* at 698–99.

371. *See supra* Section II.A (discussing motivations behind modern gun control measures).

372. *See supra* Section V.B (proposing legislation that would prohibit possession of a firearm while under the influence of narcotics).

373. *See* U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT., NCJ–149286, FACT SHEET: DRUG RELATED CRIME, 2 (1994) <https://bjs.ojp.gov/content/pub/pdf/DRRC.PDF>.

374. *See supra* Section V.B (proposing an amendment that would prohibit firearm possession for those under the influence).

375. *See supra* Sections II.A.1–3 (describing that the goal of firearm legislation is to protect the public from violence).

376. *See* U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, NCJ–168632, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME, 3 (1998) <https://bjs.ojp.gov/content/pub/pdf/ac.pdf>.

Some could argue that drug users are not violent and, therefore their Second Amendment rights should not be infringed even temporarily.³⁷⁷ While drug users may not be violent, they have been known to commit property crime to purchase more drugs.³⁷⁸ Adding a gun to property crime may increase the likelihood that property crime will turn violent.³⁷⁹ Requiring a year-long gun prohibition after a drug conviction will help ensure that a person who is addicted to narcotics will not use a firearm while committing a property crime.³⁸⁰

A possible counterargument is that Congress should simply repeal § 922(g)(3). Section 922(g)(3) appears unconstitutional to many people.³⁸¹ Not many people are charged or convicted with it.³⁸² Nevertheless, this solution is not practical.³⁸³ To do this, politicians would have to convince the American public that drug users and addicts should categorically be able to possess a firearm.³⁸⁴ This is a tall task, and politicians that do advocate for this position could lose their position electorally.³⁸⁵ Rewriting the statute, on the other hand, has the potential to escape the public's attention because the language mirrors the original language so closely (but in a constitutional way).³⁸⁶ Thus, escaping voter attention would allow a politician to avoid electoral backlash.

VI. CONCLUSION

Bruen changed Second Amendment jurisprudence forever and set a standard that made it difficult for the people's representatives to legislate an important issue.³⁸⁷ But a few years later, *Rahimi*'s analysis abrogated *Bruen* and gave the courts more discretion to find gun regulations constitutional.³⁸⁸ Even with this discretion, § 922(g)(3) is unconstitutional as applied to many

377. See BUREAU OF JUST. STAT., *supra* note 373, at 2 (showing a higher rate of property crimes than violent crimes amongst drug users).

378. See A PRESIDENTIAL COMMISSION SUGGESTS A MEDICAL APPROACH, *supra* note 322, at 292.

379. See *Firearm Violence in the United States*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, <https://publichealth.jhu.edu/center-for-gun-violence-solutions/research-reports/firearm-violence-in-the-united-states> (last visited Aug. 26, 2025) (“It has been well-documented that firearm ownership rates are associated with increased firearm-related death rates.”).

380. See, e.g., *United States v. Rahimi*, 602 U.S. 680, 687 (providing one example of a two-year-long gun prohibition after a conviction).

381. See *Stevenson*, *supra* note 80, at 232–34.

382. *Id.* at 221.

383. *Id.* at 219–20 (noting that the number of recorded unlawful drug users is rising).

384. See, e.g., Abdallah Fayyad, *Tough-on-Crime Laws Are Winning at the Ballot Box*, VOX (Nov. 6, 2024, 9:00 A.M.), <https://www.vox.com/policy/383079/california-prop-36-tough-on-crime-colorado-prop-128> (providing one example of voter turnout on crime laws).

385. *Id.*

386. Compare 18 U.S.C. § 922(g)(3) (demonstrating the current statutory language), with *supra* Section V.B (proposing rewriting the statute with similar, but constitutional language).

387. *N.Y. State Rifle & Pistol Ass'n. v. Bruen*, 597 U.S. 1, 91 (2022) (Breyer, J., dissenting).

388. See *United States v. Rahimi*, 602 U.S. 680, 704–05 (2024) (Sotomayor, J., concurring).

people.³⁸⁹ This is because the history and tradition only support a principle of disarming those who are currently intoxicated,³⁹⁰ but the statute is written in a way that restricts an individual's Second Amendment right for their past drug use.³⁹¹ Because half of the statute is inoperable, Congress should amend the law to cover people who are currently intoxicated and who have been recently convicted of a drug crime.³⁹² This change would not only align with the principles of our history and tradition, but would also address the same problems as § 922(g)(3).³⁹³

389. *See supra* Part IV (applying the *Rahimi-Bruen* standard to § 922(g)(3) to find that it is unconstitutional when applied to people who previously used narcotics).

390. *See supra* Sections IV.B.4, V.C.2 (arguing that Founding Era laws, when viewed together, support prohibiting gun ownership for people who are presently intoxicated or who have demonstrated a particularized threat of violence).

391. *See supra* Section II.A.4 (explaining how the statute is enforced against those who have used drugs in the past).

392. *See supra* Section V.B (proposing legislative language to address § 922(g)(3)'s current unconstitutionality).

393. *See supra* Section V.D (explaining how the proposed legislation will address the same issues as § 922(g)(3) currently does).