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Legal Sidebar

To Possess or Not to Possess: The Second Amendment and Unlawful Users of Controlled Substances

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The Gun Control Act of 1968 bars nine categories of individuals from possessing firearms or ammunition. One such prohibition, 18 U.S.C. § 922(g)(3), forbids any person "who is an unlawful user of or addicted to any controlled substance" from possessing a firearm or ammunition. Before 2024, federal circuit courts had routinely upheld Section 922(g)(3) against Second Amendment challenges, but in 2024 and 2025 the U.S. Courts of Appeals for the Fifth and Eighth Circuits (the Fifth and Eighth Circuits, respectively) issued a series of rulings—*Daniels v. United States*, *Hemani v. United States*, *Sam v. United States*, *Cooper v. United States*, and *Baxter v. United States*—each providing that Section 922(g)(3) violates, or could violate, the Second Amendment insofar as the statute was applied to the specific defendants. The United States asked the Supreme Court to review these decisions (see *Daniels*, *Hemani*, *Sam*, *Cooper*, and *Baxter*). In response, the Court agreed to hear *Hemani*, rejected the petitions in *Cooper* and *Baxter*, and has taken no action as to the petitions in *Daniels* and *Sam*; these latter two petitions may be held pending the Court's disposition of the case in *Hemani*.

This Sidebar offers an overview of these constitutional challenges to Section 922(g)(3) as background to the Court's consideration of the *Hemani* case. This Sidebar begins with a brief sketch of modern Supreme Court cases on the Second Amendment that form the general framework for an analysis of the constitutionality of Section 922(g)(3). The Sidebar then discusses the aforementioned five opinions addressing the constitutionality of Section 922(g)(3). This summary does not include other Section 922(g)(3) cases that were not appealed to the Supreme Court by the government. The Sidebar closes with considerations for Congress.

Survey of Modern Second Amendment Jurisprudence

Text and Early Development of Second Amendment Doctrine

The Second Amendment, ratified in 1791, provides, "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." For more

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than two hundred years, the Supreme Court remained largely silent on the Second Amendment. In several recent rulings, however, the Court has provided some guidance on the substance and scope of this constitutional provision.

In 2008, in *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess an operable firearm for certain purposes, particularly self-defense in the home. Whatever the full extent of the Second Amendment right, the Court wrote, it "surely" includes "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." This right, the Court determined, does not depend on an individual's affiliation with a militia or the military. Then, in *McDonald v. City of Chicago*, the Court recognized that, by virtue of the Fourteenth Amendment, the Second Amendment applies not only to the federal government, but to state and local governments as well.

Bruen

In a 2022 decision, *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Court clarified that the right to bear arms applies outside the home, extending the Second Amendment to nonsensitive public spaces where confrontation may occur. The Court also announced a history-centric test to apply to Second Amendment challenges. Under this test, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." Accordingly, to justify regulation of that conduct, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." The Court explained that, under this history-focused test, the government need only put forward "a well-established and representative historical *analogue*, not a historical *twin*" to the regulated conduct.

Rahimi

In *Rahimi*, the Supreme Court held that Section 922(g)(8), which bars individuals subject to certain domestic violence restraining orders from possessing a firearm, is consistent with the Second Amendment, rejecting the facial challenge mounted by the defendant. The Supreme Court emphasized that the scope of the Second Amendment is not limited to those laws that "precisely match its historical precursors" or that are "identical" to laws from 1791, as if the Second Amendment were "trapped in amber." Instead, the Court explained, under *Bruen*, a court is required to assess whether a challenged law is "relevantly similar" to laws from the country's regulatory tradition, and the Court noted that "why and how" the challenged law burdens the Second Amendment right are "central" considerations in this inquiry.

In the context of Section 922(g)(8), the Supreme Court determined that sufficient historical support existed for the principle that "[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed" temporarily. In support, the Court pointed to historical surety laws, which were designed to prevent firearm violence by requiring an individual who posed a credible threat of violence to another to post a surety, and "going armed" laws, which punished individuals who had menaced others or disturbed the public order with firearms through imprisonment or disarmament. Section 922(g)(8), which disarms individuals found to threaten the physical safety of another, "fits neatly" within the tradition of these two legal regimes, particularly as all three involve judicial determinations that the individuals threatened or would threaten others, the Court added.

As Rahimi himself received such a judicial determination and was temporarily disarmed as a consequence, the Supreme Court also held that Section 922(g)(8) was constitutional as applied to Rahimi. In its analysis, the Court took note that Section 922(g)(8) is of "limited duration," prohibiting firearm possession only for "so long as the defendant 'is' subject to a restraining order."

Selected Constitutional Challenges to the Unlawful Drug User Prohibition

Daniels (Fifth Circuit)

Daniels stemmed from an April 2022 traffic stop in which the defendant admitted that he had used marijuana regularly. The defendant was charged with being an "unlawful user" of marijuana, a controlled substance under federal law, while possessing a firearm in violation of Section 922(g)(3). Under circuit precedent, the Fifth Circuit has held that an "unlawful user" is "someone who uses illegal drugs regularly and in some temporal proximity to the gun possession." The defendant moved to dismiss the indictment, asserting that Section 922(g)(3) is inconsistent with the Second Amendment.

In 2023, a panel of the Fifth Circuit ruled for the defendant. The Fifth Circuit first determined that the defendant belongs to the "law-abiding" class of individuals protected by the Second Amendment because the universe of "law-abiding" individuals historically excluded only "felons and the mentally ill." The court then concluded that the historical regulations presented by the government were insufficiently comparable to Section 922(g)(3) to establish a historical tradition of firearm regulation justifying the provision's application to the defendant. First, the court explained that the government had not identified any "Founding-era law or practice of disarming ordinary citizens for drunkenness, even if that intoxication was routine." Second, to the extent that intoxication was historically viewed as a "short-term illness" or "temporary insanity," the court reasoned that such an understanding would justify disarming individuals only during periods of intoxication. Third, historical regulations that disarmed "dangerous" individuals were motivated by different political and social purposes and regulated different categories of individuals that did not include "ordinary drunkards," the court concluded.

The government sought review before the Supreme Court. The Court sent the *Daniels* case back to the circuit court to reconsider its ruling in light of *Rahimi*. On remand, the Fifth Circuit reached the same conclusion as it had previously. It first determined that its analysis of Section 922(g)(3) was largely controlled by its post-*Rahimi* circuit precedent, *United States v. Connelly*. The defendant in *Connelly* admitted that she "would at times smoke marijuana." The circuit court held support existed for laws restricting the possession of firearms by those who are actively intoxicated, but that "there is a substantial difference between an actively intoxicated person and an 'unlawful user' under § 922(g)(3)." The circuit court also expressed concern that the government's reasoning would potentially enable Congress to restrict the firearms access of "anyone who has multiple alcoholic drinks a week." The *Connelly* court therefore held that Section 922(g)(3) cannot be applied to a defendant based solely on the defendant's "habitual or occasional" use of drugs.

Applying *Connelly*, the Fifth Circuit on remand in *Daniels* similarly ruled that Section 922(g)(3) was unconstitutional as applied to the defendant. While the defendant used marijuana "roughly half the days of each month," the jury was asked to find whether the defendant had used marijuana "recently enough to indicate that the individual [was] actively engaged in such conduct." The court deemed "recently enough" to be too "nebulous" and observed that it could even reach a defendant who "had not used marihuana for several weeks." Given the absence of sufficient temporal proximity, the court concluded that "[the defendant] was convicted for exactly the type of 'habitual or occasional drug use' that we said, in *Connelly*, could not support an indictment (let alone a conviction)."

Hemani (Fifth Circuit)

According to the government, the defendant in the *Hemani* case "confessed" that he "smoked marijuana every other day." Following the remand in *Daniels*, a district court, citing *Daniels*, dismissed a Section

922(g)(3) indictment against the defendant. The government stipulated to the dismissal and filed a joint motion for summary affirmance with the Fifth Circuit to fast-track an appeal to the Supreme Court. The Fifth Circuit granted the motion, observing that here, as in *Connelly*, the government did not "prove that [the defendant] was unlawfully using a controlled substance at the time [the defendant] was found in possession of a firearm."

Sam (Fifth Circuit)

Subsequent to *Hemani*, the Fifth Circuit in another brief per curiam opinion upheld a district court's finding that Section 922(g)(3) is unconstitutional as applied to the defendant. The district court observed that the case was effectively governed by the Fifth Circuit's ruling in *Daniels*: the facts of the cases are "substantially similar" and in neither case did the government "contend that defendant was intoxicated at the time charged in the indictment." Citing *Connelly* and *Daniels*, the Fifth Circuit agreed, faulting the government for not showing that the defendant "was intoxicated or unlawfully using a controlled substance at the time he was found in possession of a firearm" or that the defendant's "marijuana use was so extensive as to render him analogous to the dangerously mentally ill or a danger to others."

Cooper (Eighth Circuit)

The Eighth Circuit has also found Section 922(g)(3) to be constitutionally suspect. In *Cooper*, a district court in South Dakota rejected a defendant's contention that Section 922(g)(3) was constitutionally invalid as applied to him. In doing so, the court wrote that Section 922(g)(3) does not "criminalize a drug user's firearm possession only at the exact moment of intoxication" or when the defendant is simultaneously under the influence of a drug and in possession of a firearm. The court reasoned that a "regular user" of a controlled substance presents an "inherent danger" in possessing a firearm, adding that the law is anticipatory in nature and does not require waiting for any actual danger (*i.e.*, being under the influence or intoxicated) to arise.

The Eighth Circuit reversed. The court acknowledged that, as a matter of historical tradition, the "mentally ill," and by extension drug users, could be disarmed, but only to the extent that they posed a danger to others. The court thus drew a distinction between "someone whose 'regular use of . . . PCP . . . induce[s] violence,'" who could be lawfully disarmed, and a "frail and elderly grandmother who uses marijuana for a chronic medical condition," who still could retain her right to bear arms. Similarly, the court observed, that historic going-armed laws justify disarmament only when the individual has exhibited some "terrorizing behavior" or where such behavior was "foreseeable." Although the court determined that a subset of drug users may be dangerous and may be correspondingly disarmed, the court refused to adopt the proposition that drug users are per se dangerous and may be categorically disarmed. The court remanded the case for the district court to develop an otherwise "thin" record and ascertain additional facts as to whether the defendant belonged to this subset of dangerous drug users.

Baxter (Eighth Circuit)

The same day that *Cooper* was decided, a separate panel of the Eighth Circuit similarly ruled that Section 922(g)(3) may be unconstitutionally applied to a defendant, depending on facts that would need to be further found at the district court level. The panel specifically observed that "the extent and frequency of [the defendant's] drug use and the overlap of [that] drug use with his firearm possession" were absent from the district court's findings, and without an understanding of the "nature of [the defendant's] drug use," the panel was left unable to properly evaluate whether Section 922(g)(3) validly applied to the defendant. The panel therefore remanded the case to the district court to conduct more factual development, importantly for purposes of the doctrine acknowledging that it was at least possible that Section 922(g)(3) may be unconstitutionally applied in some circumstances.

The Supreme Court's Grant of Review in *Hemani*

In both the *Daniels* and *Sam* petitions, the United States argued that *Hemani* is a "better vehicle" for the Court to address the constitutionality of Section 922(g)(3) because *Daniels* suffers from a "procedural wrinkle," namely the focus on the district court's jury instructions, and the record in *Hemani* contains greater detail on the defendant's drug use compared to *Sam*. As such, the United States recommended that the Court grant the petition in *Hemani*. The Court agreed to accept the *Hemani* petition. *Hemani* has not yet been set for oral argument.

Considerations for Congress

The *Bruen* Court indicated that the history-centric test to Second Amendment challenges is "neither a regulatory straightjacket nor a regulatory blank check." Within these guideposts, courts are grappling with how to apply constitutional principles to firearms laws, including the federal restrictions in 18 U.S.C. § 922(g). The Court in *Rahimi* expanded upon the *Bruen* test and indicated how it may apply to some categorical restrictions in the Gun Control Act. *Hemani* too may define with additional clarity the bounds of the *Bruen* framework. Congress may review the ruling to assess whether amendments may strengthen existing firearms laws, or whether any such laws should be rescinded for lack of historical support. Congress may also consider *Hemani* as it crafts and considers new firearms legislation or as it considers potential changes to controlled substances laws and the impact of them on potential disarmament.

With respect to Section 922(g)(3) in particular, the Court in *Hemani* may address, among other things, the temporal proximity between drug use and possession of a firearm, the overall frequency and potency of the defendant's drug use, whether anticipatory or foreseeable danger may justify disarmament, the temporary nature of drug use and thus the temporary duration of any disarmament, and the sufficiency of historical analogues pertaining to the mentally ill and going-armed laws. These and any other potential components of the *Hemani* analysis may bear on the meaning of Section 922(g)(3) and whether any amendments thereto may be appropriate.

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