

United States v. Hemani: A Narrow Holding Full of Problems

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In *United States v. Hemani*,¹ a unanimous Supreme Court found that prosecution for possessing a firearm while a regular marijuana smoker violated the Second Amendment. Although the Court purportedly based its decision on this country's "historical tradition of firearm regulation,"² it largely replaced Congress's policy judgment on disarming marijuana users with its own.³ Even if *Hemani* produces a desirable policy outcome, there are also some problems with the Court's opinion that merit discussion. Instead of clarifying the boundaries of Second Amendment protections for the lower courts and for law enforcement, the Court issued a decision that sheds no light on the Second Amendment's scope for future cases. The decision is so narrow that prosecutors can easily circumvent the Second Amendment by submitting a few additional pieces of evidence. At the same time, *Hemani* wreaks havoc with the operation of the National Instant Criminal Background Check System (NICS) for gun purchases, and it ignores the recent overhaul of Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) regulations interpreting the statute, offering no direction on whether any of those interpretive regulations are still valid.

For six decades, federal law has prohibited anyone "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" from

¹ *United States v. Hemani*, 146 S. Ct. 1677 (2026). Citations to *Hemani* that follow will use the Supreme Court Reports pagination.

² *Id.* at 1685.

³ For a fuller development of the arguments that the Court should have deferred to Congress in this case, see Brief of Second Amendment Law Scholars as Amici Curiae in Support of Petitioner, *United States v. Hemani*, (No. 24-1234). 146 S. Ct. 1677 (2026).

possessing a firearm.⁴ This restriction is certainly not the centerpiece of federal firearms law⁵ and gives rise to far fewer prosecutions and convictions every year than some other sections of the same statute,⁶ such as the provision that prohibits convicted felons from possessing firearms.⁷

Section 922(g)(3)'s incorporation-by-reference of the Controlled Substances Act (CSA) into firearm prohibitions presents thorny trade-offs in terms of policy.⁸ On the one hand, most Americans want some additional restrictions on access to firearms.⁹ Gun rights have become highly partisan, and therefore radioactive, in Congress. Restricting access to guns for at least some types of drug users may

⁴ 18 U.S.C. § 922(g)(3) (2018) (enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968)).

⁵ In his dissent in *Rehaif v. United States*, Justice Alito characterized § 922(g) as the backbone of our nation's gun violence prevention efforts, but omitted the subsection about drug users from his litany about this:

And § 922(g) is no minor provision. It probably does more to combat gun violence than any other federal law. It prohibits the possession of firearms by, among others, convicted felons, mentally ill persons found by a court to present a danger to the community, stalkers, harassers, perpetrators of domestic violence, and illegal aliens.

Rehaif v. United States, 588 U.S. 225, 239 (2019) (Alito, J., dissenting).

⁶ As of 2019, there were about 200 prosecutions per year with this crime as the lead charge. *See Federal Weapons Prosecutions Continue to Climb in 2019*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE (June 5, 2019), <https://trac.syr.edu/tracreports/crim/560/>.

⁷ *See* 18 U.S.C. § 922(g)(1). The prosecutions under § 922(g)(3) are far fewer than those for felon-in-possession convictions, though it is still one of the most important subsections of § 922(g) in terms of lead charge in federal prosecutions. *See Federal Weapons Prosecutions Rise for Third Consecutive Year*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, tbl.2 (Nov. 29, 2017), <https://trac.syr.edu/tracreports/crim/492/>. Note that based on comparisons of historical data and 2019 TRAC Reports, *supra* note 6, the number of prosecutions with § 922(g)(3) as the lead charge nearly doubled in 2019 compared with previous years.

⁸ *See* Dru Stevenson, *The Complex Interplay between the Controlled Substances Act and the Gun Control Act*, 18 OHIO ST. J. CRIM. L. 211, 213–14 (2020).

⁹ *See* GALLUP NEWS: GUNS, <https://news.gallup.com/poll/1645/guns.aspx> (showing through various poll questions that most Americans want stricter gun laws, though not a complete handgun ban); *see also* POLLING REPORT: GUNS, <https://www.pollingreport.com/guns.htm> (similar results); Margaret Talbot, *The 2020 Democrats and the New Politics of Gun Violence*, THE NEW YORKER (Dec. 8, 2019), <https://www.newyorker.com/magazine/2019/12/16/the-2020-democrats-and-the-new-politics-of-gun-violence>; Rachel Treisman, *Poll: Number of Americans Who Favor Stricter Gun Laws Continues to Grow*, NAT'L PUB. RADIO (Oct. 20, 2019), <https://www.npr.org/2019/10/20/771278167/poll-number-of-americans-who-favor-stricter-gun-laws-continues-to-grow>.

seem like sound policy to many politicians and voters, even if proposals along these lines do not gain legislative traction. On the other hand, there are serious, long-standing problems with the CSA, including the growing conflict between federal and state marijuana laws. These problems in federal drug policy impact both prosecutions for weapons violations and denials of prospective firearm purchases. Even though marijuana use, whether medical or recreational, is now legal under the laws of many states, a marijuana user is still prohibited from possessing a gun under federal law. This firearm disqualification extends to the prescribed use of medical marijuana as well.¹⁰

Part I of the following discussion summarizes the majority opinion in *Hemani*, with a brief mention of the concurring opinions. My summary will contain some critiques along the way, but major points about defects in the opinion will be included in subsequent parts. Part II focuses on a glaring omission in all the opinions, namely, the ATF's narrowing definition of "user" in Section 922(g)(3), which would already have precluded some of the majority's hypothetical prosecutions, and which the Department of Justice (DOJ) amended earlier in 2026 to narrow the scope of the statute even further. It is one thing to adhere to the traditional avoidance canon and leave problematic statutes to Congress or an executive agency to fix at a later time; it is quite another to disregard the fact that Congress had already entrusted narrowing the scope to the Attorney General, and the Attorney General had already significantly remedied the potential overbreadth and vagueness of the statute by promulgating narrow definitions. Part III addresses another remarkable omission: the impact of the Court's bespoke carve-out for marijuana users on the background check system for gun purchases, the FBI's NICS system. Thousands of individuals are in the NICS databases for disqualification under Section 922(g)(3) (meaning they would fail a background check when trying to purchase a firearm from a licensed gun dealer), without specifying whether they are users or addicts, or which drug they use most frequently. Part IV briefly discusses two of the first decisions by a circuit court post-*Hemani*, with one reaching the

¹⁰ See *Open Letter to All Federal Firearms Licensees*, U.S. DEP'T JUST. (Aug. 29, 2011), <https://www.atf.gov/file/60211/download> (discussing marijuana for medicinal purposes).

opposite conclusion with very similar facts and the other following *Hemani* more closely. These are an early foreshadowing that *Hemani* may not change much in the lower courts if prosecutors present evidence tying the drug use to some form of dangerousness. Part V is the conclusion.

I. *United States v. Hemani*

Justice Neil Gorsuch wrote for the majority in *Hemani*. His opening lines offered a clear signal about where he was going:

Ali Hemani uses marijuana a few times a week. That fact alone, the government says, means he is automatically banned from possessing a firearm under federal law. And because Mr. Hemani admits he owns a gun despite this ban, the government now seeks to prosecute him, imprison him for up to 15 years, and disarm him for life. This case poses the question whether the government’s prosecution of Mr. Hemani is consistent with the Second Amendment.¹¹

This statement frames the problem from the outset as a bad “prosecution” problem, as if the government had targeted a random individual out of the blue, in an unprecedented instance of government overreach, rather than focusing on constitutional infirmities of a statute enacted by Congress decades before. Prior to the Court’s 2022 decision in *NYSPPRA v. Bruen*,¹² the Fourth,¹³ Fifth,¹⁴ Seventh,¹⁵ Eighth,¹⁶ Ninth,¹⁷ and Tenth Circuits¹⁸ had upheld the

¹¹ *Hemani*, 146 S. Ct. at 1684.

¹² *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

¹³ See *United States v. Yates*, 746 Fed. App’x 162 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 616 (2018) (per curiam); *United States v. Carter*, 750 F.3d 462 (4th Cir. 2014), *cert. denied*, 574 U.S. 907 (2014).

¹⁴ See *United States v. May*, 538 F. App’x 465 (5th Cir. 2013) (unreported); *United States v. Patterson*, 431 F.3d 832 (5th Cir. 2005).

¹⁵ *United States v. Cook*, 914 F.3d 545 (7th Cir. 2019); *United States v. Thomas*, 426 F. App’x 459 (7th Cir. 2011); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (per curiam).

¹⁶ *United States v. Jacobson*, 406 F. App’x 91 (8th Cir. 2011) (per curiam); *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010).

¹⁷ *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011); see *United States v. Dugan*, 450 F. App’x 633 (9th Cir. 2011).

¹⁸ *United States v. Richard*, 350 F. App’x 252 (10th Cir. 2009).

constitutionality of Section 922(g)(3) against Second Amendment challenges, and federal district courts routinely did so in these and other circuits.¹⁹ This case was not an instance of the government reaching a new low in its tyrannical harassment of citizens; rather, it was routine enforcement of a duly-enacted statute that had been on the books for over a generation.

However, public opinion and state law have shifted sharply on marijuana, creating tension with Section 922(g)(3). The compactness of Section 922(g)(3) presented a severability problem for constitutional analysis, partly because the incorporation-by-reference of the entire CSA means that it also applies to more dangerous and addictive drugs that still carry social opprobrium, and partly because of the alternative prong of “addicted to” in the same clause as “user,” which suggests a very different level of impaired judgment or behavior control. In *Hemani*, the Court was not (yet) prepared to say that the Second Amendment guarantees the right of heroin addicts or methamphetamine addicts to amass a private arsenal of firearms, but at the same time, the Court wanted a broad carve-out for marijuana users that would apply to users besides Mr. Hemani. The *Hemani* opinion proceeds with a quick explanation of the five schedules of substances under the CSA, highlighting how broadly the gun prohibition in Section 922(g) sweeps by incorporating all five schedules in their entirety.²⁰

¹⁹ See *United States v. Westley*, 2018 WL 1832912 (D. Conn. 2018); *United States v. Bruce*, 2016 WL 3580636 (D.S.D. 2016); *United States v. Matthews*, 2015 WL 2170380 (W.D. Mo. 2015); *Gibson v. Holder*, 2015 WL 5635125 (N.D. Fla. 2015), report and recommendation adopted, 2015 WL 5634596 (N.D. Fla. 2015); *United States v. Conrad*, 923 F. Supp. 2d 843 (W.D. Va. 2013); *Roberge v. United States*, 2013 WL 4052926 (E.D. Tenn. 2013); *Fausnaught v. United States*, 2013 U.S. Dist. LEXIS 190916 (M.D. Pa. 2013); *Nodine v. United States*, 2012 WL 4711882 (S.D. Ala. 2012), report and recommendation adopted, 2012 WL 4739949 (S.D. Ala. 2012); *United States v. Emond*, 2012 WL 4964506 (D. Me. 2012); *United States v. Korbe*, 2010 WL 776337 (W.D. Pa. 2010); *United States v. Barrett*, 2010 WL 3767607 (W.D. Wis. 2010); *United States v. Hendrix*, 2010 WL 1372663 (W.D. Wis. 2010); *United States v. Stacy*, 2010 WL 4117276 (S.D. Cal. 2010); *United States v. Bumm*, 2009 WL 1073659 (S.D. W. Va. 2009); *Piscitello v. Bragg*, 2009 U.S. Dist. LEXIS 21658 (W.D. Tex. 2009); *U.S. v. Lacy*, 2009 U.S. Dist. LEXIS 103532 (E.D. Wis. 2009); *United States v. Hendrix*, 2009 WL 3816970 (W.D. Wis. 2009); *United States v. Lyles*, 2009 WL 650182 (N.D. Cal. 2009); *United States v. Prince*, 2009 WL 1875709 (D. Kan. 2009), order rev’d on other grounds, 593 F.3d 1178 (10th Cir. 2010); *United States v. Chafin*, 2008 WL 4951028 (S.D. W. Va. 2008); *United States v. Dugan*, 2008 U.S. Dist. LEXIS 134816 (N.D. Cal. 2008).

²⁰ See *Hemani*, 146 S. Ct. at 1684.

The facts are worth dwelling on. The case originated with a search of the Hemani family home, because “Mr. Hemani and his family members [were suspected] of terrorism-related activities.”²¹ The government would have had to show probable cause to the judge who issued the warrant, so there was more evidence of terrorism-related activities than mere “suspicion.”²² During the search, officers found marijuana and an unspecified quantity of cocaine, as well as a handgun, which Mr. Hemani surrendered to the police.²³ The majority opinion mentions these troubling facts to highlight the absurdity of the charge that the government eventually brought: “[T]he government brought a single-charge indictment against Mr. Hemani. The charge had nothing to do with terrorism, the reason for the search in the first place. Nor did the charge involve possession of cocaine, drug trafficking, or anything like that.”²⁴

I view this as standard practice for overworked prosecutors—the path of least resistance is to bring the charge that is easiest to prove, given the elements of the potential crimes and the evidence at hand. Justice Gorsuch’s tone suggests a note of exasperation about this practice, but there is no rule in our legal system that prosecutors must always bring the most serious charges they could possibly prove. Proving complex charges for terrorism-related activities might require more effort and carry more risk of an acquittal, while a simple gun-possession charge is almost as easy to prove as a strict liability crime. From there the opinion slides into rehabilitating Mr. Hemani:

No matter that the government did not assert Mr. Hemani was a drug addict. No matter that it did not contend his drug use had ever led him to pose a danger to himself or others. No matter, too, that the government did not claim Mr. Hemani had done anything with his gun other than possess it in his home.²⁵

However, the facts suggest that authorities had probable cause to think Hemani was involved in terrorist activities (as a prerequisite

²¹ *Id.*

²² *See, e.g.,* Illinois v. Gates, 462 U.S. 213 (1983); Aguilar v. Texas, 378 U.S. 108 (1964).

²³ *See Hemani*, 146 S. Ct. at 1684.

²⁴ *Id.* at 1685.

²⁵ *Id.*

for a search warrant), and that he had a stash of cocaine in his closet. It is debatable whether Hemani did not “pose a danger to himself or others,” but the opinion here implies that the government needs to show causation between the elements of the crime (that being a drug user caused the defendant to be dangerous with a firearm), but that is not part of the statute. While many marijuana users may be harmless, otherwise law-abiding citizens, we should not pretend that Mr. Hemani is a paragon of virtue, or that he is the exemplar of what the Court means by “not dangerous” for purposes of Second Amendment jurisprudence.²⁶

The heart of the *Hemani* opinion, unsurprisingly, is the Second Amendment analysis, applying the *Bruen* historical-tradition test to 18 U.S.C. § 922(g)(3).²⁷ For the first step of the analysis, the government stipulated that the statute implicated the Second Amendment by disarming an individual.²⁸ Step two requires the government to justify a modern gun restriction with something analogous from the Founding era. The government primarily relied on early-Republic state and local laws that disarmed or confined habitual drunkards or the mentally incompetent.²⁹ The Court rejected these arguments, dissecting both the purpose and the operation of these historical regulations.³⁰ The majority opinion declares that these antebellum “habitual drunkard” laws, which could punish vagrancy, impose civil commitment, or require a surety bond, focused exclusively on those whose persistent, excessive intoxication rendered them

²⁶ See, e.g., Alan Fram, *Why Can People on the Terrorist Watch List Buy Guns, and Other FAQ's*, PBS NEWSHOUR (June 14, 2016), <https://www.pbs.org/newshour/nation/why-can-people-on-the-terrorist-watch-list-buy-guns-and-other-faqs>; Alicia Parlapiano, *How Terrorism Suspects Buy Guns—and How They Still Could, Even With a Ban*, N.Y. TIMES (June 15, 2026), <https://www.nytimes.com/interactive/2016/06/14/us/gun-purchase-ban-for-suspected-terrorists.html>; Dan Friedman, *Why Suspected Terrorists Can Legally Buy Guns, Explained*, THE TRACE (June 15, 2016), <https://www.thetrace.org/2016/06/why-suspected-terrorists-can-legally-buy-guns-explained/>; Geneva Sands, *Individuals on FBI's Terrorist Watchlist Allowed to Legally Purchase Firearms*, ABC NEWS (Nov. 18, 2015), <https://abcnews.com/US/individuals-fbis-terrorist-watchlist-allowed-legally-purchase-firearms/story?id=35264669>.

²⁷ See *Hemani*, 146 S. Ct. at 1685–94.

²⁸ See *id.* at 1685–86.

²⁹ See *id.* at 1686–87.

³⁰ See *id.* at 1687 (discussing the “why” and “how” prongs of the historical analog analysis and applying them to the government’s argument).

mentally incapacitated and incapable of managing their affairs.³¹ The majority opinion devotes two full paragraphs to recounting the heavy, daily alcohol consumption of some of the most famous Founders,³² inferring that the “habitual drunkard” laws from the era must have meant something far worse than imbibing daily, even a substantial amount.³³ In other words, these laws were less focused on reducing potential gun violence and instead focused on restraining the mentally incompetent.³⁴ The modern law codified in Section 922(g)(3), however, imposes an automatic ban on firearm possession for anyone who regularly uses any controlled substance, regardless of whether such use results in incapacitation or increases the likelihood of a physical threat to the public.³⁵

The Court also emphasized significant procedural differences between the government’s proffered historical analogues and the modern statute.³⁶ “The historical laws the government identifies usually provided some form of process before an individual lost any of his liberties, even temporarily. Normally, a vagrant could be sent to a workhouse or jail only upon a ‘conviction.’”³⁷ Even surety statutes in the Founding era required a hearing before a magistrate would order the bond.³⁸ In contrast, “the statute automatically divests an individual of his constitutional right to bear arms the moment he becomes an unlawful user and until he ends his drug use—all without any pre-deprivation process.”³⁹

The final section of the Court’s analysis focuses on what it calls the “why,” or the modern statute’s purpose, and whether that is analogous to the purpose of the historical analogue.⁴⁰ Section 922(g)(3) does not set forth its own category of people to disarm, unlike the other subsections of Section 922(g), but rather it incorporates the CSA schedules by reference.⁴¹ The CSA, however, does not include drugs

³¹ *See id.* at 1687–88.

³² The amount is shocking by today’s standards; *see id.* at 1688.

³³ *See id.*

³⁴ *See id.* at 1689.

³⁵ *See id.*

³⁶ *See id.* at 1691.

³⁷ *Id.*

³⁸ *See id.*

³⁹ *Id.* at 1691–92.

⁴⁰ *See id.* at 1692.

⁴¹ *See id.*

in its schedules solely because each drug causes violent behavior, but for a variety of reasons (e.g., risk of overdose or misuse).⁴² At the time marijuana was listed, it had no known medical use, but things have changed in the intervening years.⁴³ The majority faults the federal government's own inconsistencies in recent years related to marijuana, such as reclassifying marijuana to a Schedule III controlled substance and curtailing enforcement.⁴⁴ The majority opinion omits, for some reason, President Biden's pardon of everyone serving time for a marijuana conviction, which seems to be as noteworthy as some states legalizing medical marijuana or the relisting of marijuana to Schedule III.⁴⁵

One remarkable part of the opinion is a final section that delineates what the Court is *not* deciding, which significantly narrows the holding of this case:

In many respects, this case is a narrow one. We do not address efforts to ban addicts, . . . or those presently intoxicated, from possessing a firearm. We do not address other prophylactic laws Congress might adopt after determining that users of a particular drug pose a special risk of misusing firearms. . . . We do not address 18 U.S.C. § 922(g)(1)'s provision disarming individuals convicted of felonies (often including drug-related ones). . . . We do not even address whether the government could bring a prosecution under § 922(g)(3) accompanied by individualized proof that the defendant's use of marijuana (or any other drug) renders him a danger to himself or others. Or proof that a certain drug always renders its users dangerous because of its potency or for some other reason. None of those issues is before us and we do not pass on them either way.⁴⁶

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ Michael D. Shear & Zolan Kanno-Youngs, *Biden Pardons Thousands Convicted of Marijuana Possession Under Federal Law*, N.Y. TIMES (Oct. 6, 2022), <https://www.nytimes.com/2022/10/06/us/politics/biden-marijuana-pardon.html>; Jamiles Lartey, *Don't Expect Mass Prison Releases From Biden's Marijuana Clemency*, THE MARSHALL PROJECT (Oct. 15, 2022), <https://www.themarshallproject.org/2022/10/15/don-t-expect-mass-prison-releases-from-biden-s-marijuana-clemency>; Deepa Shivaram, *Biden Expands Pardons for Marijuana Possession and Grants Clemency to 11*, NAT'L PUB. RADIO (Dec. 22, 2023), <https://www.npr.org/2023/12/22/1221230390/biden-pardons-clemency-marijuana-drug-offenses>.

⁴⁶ See *Hemani*, 146 S. Ct. at 1693 (citations omitted).

Although this statement is somewhat of a relief for those of us who were hoping for judicial restraint in this case, it highlights the severability problem with handling constitutional challenges to this statute. It would be clunky enough to sever a single phrase like “or a user of” from a sentence while keeping “addicted to,” but any attempt at severing the offending part of the law while saving the rest collapses when the Court *wants* to keep “or a user of” just in case some drug does make people violent, and maybe also in case the government argues, and a trial court finds, that a specific marijuana user is regularly shooting at people. It is unclear whether the majority intended to remedy the constitutional defect with a narrowing construction (i.e., “this statute implicitly requires evidence of individual dangerousness”) or true as-applied relief (“enforcing the statute against this specific individual, given his unique situation and circumstances, would be unconstitutional”).

Overall, this opinion reads more like an “overbreadth” case rather than a civil liberties violation, but it seems like the majority opinion is trying to avoid admitting that.⁴⁷ The main thrust of the opinion criticizes how the government prosecuted and argued the case, rather than settling what part of the statutory text is unconstitutional. The upshot is punishing the legislative branch (invalidating congressional legislation) over actions of the executive branch. In its

⁴⁷ See Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008) (discussing the doctrine in the criminal law context, more relevant to the *Hemani* case than First Amendment discussions); John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. REV. 53 (2004) (arguing that “historically, overbreadth has appeared outside of the First Amendment context and, more importantly, advocates the contemporary use of the overbreadth doctrine beyond the First Amendment arena.”); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (describing the state of the doctrine and making recommendations for reforms or changes); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970) (a frequently cited overview of overbreadth in the First Amendment context). The statute challenged in *Hemani* was also subject to numerous challenges over the years for vagueness, a concept that overlaps with overbreadth. See, e.g., *United States v. Cook*, 914 F.3d 545, 549–55 (7th Cir. 2019), *cert. granted, vacated*, 582 U.S. 902 (2019) (remanding for reconsideration in light of the Supreme Court’s decision in *Rehaif v. United States*, 588 U.S. 225, (2019)); *United States v. Bramer*, 832 F.3d 908 (8th Cir. 2016) (*per curiam*); *United States v. Purdy*, 264 F.3d 809 (9th Cir. 2001) (rejected the defendant’s vagueness challenge); *United States v. Blackard*, 2020 WL 353239 (W.D. Mo. Jan. 21, 2020); *United States v. Stupka*, 2019 WL 6000374 (N.D. Iowa Oct. 10, 2019); *United States v. Kimbrough*, 319 F. Supp. 3d 912 (M.D. Tenn. 2018) (finding § 922(g)(3) not facially void for vagueness); *United States v. Matthews*, 2015 WL 2170380 (W.D. Mo. 2015) (unreported) (rejecting vagueness challenge brought before trial).

strained effort to portray the statute as overly broad, the *Hemani* majority opinion frequently lapses into hyperbole and overstatement, as when the opinion states, “By incorporating the CSA definition of the term ‘controlled substance,’ 18 U.S.C. § 922(g)(3) makes it illegal for anyone who unlawfully uses any drug found on any of the CSA’s schedules to possess a firearm for any reason, upon threat of imprisonment and permanent disarmament.”⁴⁸ This is not exactly true—since it was enacted, courts considering the statute have required: (1) more than past, occasional, or incidental use;⁴⁹ (2) that the ongoing unlawful drug use be reasonably contemporaneous with the possession of the firearm;⁵⁰ and, in theory at least, (3) that affirmative defenses such as necessity, duress,⁵¹ and self-defense⁵² be available for defendants accused of violating the statute.

Even before *Bruen* and *Hemani*, the First Circuit in *United States v. Tanco-Baez*⁵³ had adopted a more stringent standard on the prosecution to prove the judicially created elements of “unlawful user.”⁵⁴ In a case relevant for the facts in *Hemani*, the court there held that a

⁴⁸ *Hemani*, 146 S. Ct. at 1684.

⁴⁹ See, e.g., *United States v. Robles*, 129 Fed. App’x 736 (3d Cir. 2005) (holding single occasion drug use insufficient for conviction under statute); see also *United States v. Augustin*, 376 F.3d 135 (3d Cir. 2004).

⁵⁰ See Ira P. Robbins, *Guns N’ Ganja*, 51 U.C. DAVIS L. REV. 1783, 1805 (2018). The judiciary long ago crafted a test that “confined their focus on two factors: (1) the regularity of the drug use, and (2) the contemporaneous possession of the drug and firearm.” *Id.* (citing *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004)). However, this test resulted in the following downfalls:

While the test seeks to define unlawful user, it fails to expressly include unlawful use in its analysis; courts solely focus on the “judicially created temporal nexus” between gun possession and drug use. By conflating an element of the analysis with the analysis itself, courts omit the integral factor of unlawful use. Therefore, the test is more aptly characterized as (1) the unlawful possession or use of a drug, pursuant to the CSA; (2) the regularity of the drug use; and (3) the contemporaneous possession of the drug and a firearm. *Id.*

See also *United States v. Holmes*, 2016 WL 54918 (E.D. Wis. 2016) (noting that courts have added a temporal element; every circuit to have considered the question has required drug use contemporaneous with the firearm possession).

⁵¹ But see *United States v. Barnes*, 469 F. App’x 733 (11th Cir. 2012) (per curiam).

⁵² But see *United States v. Eads*, 327 F. App’x 671 (8th Cir. 2009) (per curiam).

⁵³ *United States v. Tanco-Baez*, 942 F.3d 7 (1st Cir. 2019).

⁵⁴ See *id.* at 15 (“To establish the ‘unlawful user’ element of this offense, the government must prove beyond a reasonable doubt that (1) the defendant used controlled substances regularly, (2) that the use took place over a long period of time, and (3) that the use was proximate to or contemporaneous with his possession of a firearm.”).

defendant's verbal admission, such as a defendant's "statement in his interview with the law enforcement agent about the length and nature of his drug use[,] must be corroborated if it is to be relied upon to support his conviction."⁵⁵ An officer testified that the defendant in this particular case "admitted . . . in a post-arrest interview that he had gone into a vehicle to smoke marijuana that day, that he 'smoked on a daily basis and that it had been a long time since he had started,' and that he possessed the machinegun on the day of the events."⁵⁶ Since the government did "not argue that there [was] any independent evidence in the record that in and of itself tends to establish that [the defendant] was a long-term drug user"⁵⁷ and failed to point to "the drugs found in [the defendant's] shoe on the day of his arrest—as corroborative of his admission of his recent drug use,"⁵⁸ the court rejected the government's claims that fortification by the defendant's other admissions (for example, his recent drug use and other admissions) sufficiently corroborated "the nature and duration of his past drug use."⁵⁹

In other words, years before *Hemani*, the First Circuit had interpreted the statute and surrounding due process protections as requiring more corroborating evidence than the verbal confession in *Hemani*, without using this as a pretext to attack the constitutionality of the statute itself. This option was available to the Court in *Hemani*, and it is disappointing that the Court did not offer an explanation for rejecting such an easy alternative, which would have honored the traditional judicial canon of constitutional avoidance.

In reviewing the Supreme Court's *Hemani* decision, it is striking that the majority opinion entirely avoids standard phrasing like "facial challenge," "on its face," or "as applied to this defendant" to distinguish what the Court is *not* doing. While the opinion notes the government's claim that the statute is constitutional "as applied to this case and others," it skirts expressly stating the actual nature of its own holding. In federal circuit courts, Second Amendment decisions

⁵⁵ *Id.* at 16.

⁵⁶ *Id.* at 14.

⁵⁷ *Id.* at 16.

⁵⁸ *Id.* at 16, 220 ("We note that the caselaw is not consistent in its treatment of whether such evidence can corroborate such an admission.").

⁵⁹ *Tanco-Baez*, 942 F.3d at 23.

consistently clarify this distinction right at the start,⁶⁰ but in *Hemani* the posture must be inferred from the “we are not deciding” section.⁶¹ The concurrences in the case use the typical phrasing, which raises the question of whether the language was stripped to secure a unanimous vote, or if the Justices were grappling with importing the overbreadth doctrine from First Amendment jurisprudence. Ultimately, it seems possible that the majority wanted to create a categorical carve-out for marijuana that would be as robust as a facial decision, but the statutory language simply did not allow it. Of course, the Supreme Court has a history of ambivalent decisions with facial versus as-applied challenges, leading some commentators to observe that the distinction is notoriously elastic or at least unclear.⁶²

In the end, I agree with other commentators that *Hemani* is a narrow ruling, that other categorical prohibitions under Section 922(g) are left intact by the opinion, and that the decision did nothing to clarify the confusing and often unworkable test the Court set forth

⁶⁰ See, e.g., *United States v. Hoover*, 179 F.4th 454, 467 (6th Cir. 2026) (“We have held that ‘most applications’ of the felon-in possession statute . . . are constitutional, so ‘the provision is not susceptible to a facial challenge’ Recognizing this, Hoover pursues only an as-applied challenge.”); *United States v. DeBorba*, 177 F.4th 1005, 1010 (9th Cir. 2026) (discussing the facial or as-applied challenges in the case); *Christian v. James*, 176 F.4th 189, 191 (2nd Cir. 2026) (“Plaintiffs challenge the Private Property Provision, as applied to private property open to the public. Plaintiffs asserted only a facial challenge to the Public Parks Provision in the district court, but now also seek to raise an as-applied challenge based upon its application to rural parks.”); *United States v. Fort*, 176 F.4th 1, 7–8 (1st Cir. 2026) (discussing the potential facial and as-applied challenges in the case); *United States v. Betancourt*, 139 F.4th 480, 483 (5th Cir. 2025) (explaining that the defendant brought both facial and as-applied Second Amendment challenges to the statute, that the former was precluded by circuit precedent, and that the latter would be considered in the opinion); *United States v. Harrison*, 153 F.4th 998, 1006–07 (10th Cir. 2025) (extended discussion at the outset about whether the case was a facial or an as-applied Second Amendment challenge). For a critique of this practice in the lower courts, see Peter A. Patterson, *Facial Confusion: Lower Court Misapplication of the Facial/As-Applied Distinction in Second Amendment Cases*, 2025 HARV. J.L. & PUB. POL’Y PER CURIAM 1 (2025) (arguing that lower courts have been misapplying the facial/as-applied distinction in Second Amendment cases).

⁶¹ See *Hemani*, 146 S. Ct. at 1693.

⁶² See Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 658 (2010) (“Nevertheless, some of the most basic details regarding the characteristics of the facial and as-applied challenges categories and, in particular, how the preference for as-applied challenges actually operates, remain surprisingly unclear.”); for a more recent student note on the subject, see Sean P. Wilson, Note, “The Persistent and Muddy Dispute”: How the Facial/As-Applied Distinction Creates Problems for Constitutional Litigants, 75 DUKE L.J. 1033 (2026).

in *Bruen*.⁶³ *Hemani* left in place restrictions on gun possession by users of other illegal drugs, or marijuana users shown to be dangerous.⁶⁴ This was a significant case, in that it invalidated one major application of a long-standing federal law, but it did not mark a major shift in Second Amendment jurisprudence. I suspect future legal scholars will view *Hemani* more as a marijuana case than a gun case.

There were three concurring opinions. Justice Clarence Thomas wrote a concurrence,⁶⁵ not joined by any others, arguing that *all* of 18 U.S.C. § 922(g) probably violates the Commerce Clause, that is, exceeds Congress's lawmaking authority. While this idea has not garnered other supporters on the Court, Thomas believes that merely possessing a firearm, without transporting it across state lines, is not economic activity and does not constitute interstate commerce.⁶⁶

Justice Ketanji Brown Jackson also wrote a concurrence,⁶⁷ joined by Justice Sonia Sotomayor, joining the judgment of the Court but attacking the *Bruen* "history and tradition" framework as unworkable in practice and therefore susceptible to arbitrary application by lower courts.⁶⁸ She advocates instead for a return to means-end scrutiny,⁶⁹ arguing that evaluating the tailored fit between a statute's legislative purpose and its practical operation provides a far more coherent and competent standard for Second Amendment adjudication. Justice Jackson makes a compelling point that despite the lip service to historical traditions, the government's argument *and* the majority opinion lean heavily into means-end analysis.⁷⁰ Indeed, the majority opinion suggests that the government in future cases may be able to secure convictions by presenting evidence of individual dangerousness,⁷¹ or that extremely potent versions of the same drug

⁶³ See Hayley Lawrence, *Unpacking Hemani*, DUKE CTR. FOR FIREARMS L. SECOND THOUGHTS BLOG (June 18, 2026), <https://firearmslaw.duke.edu/2026/06/unpacking-hemani>.

⁶⁴ See Eric Ruben, *Hemani Is Not the End of Drug-and-Gun Litigation*, DUKE CTR. FOR FIREARMS L. SECOND THOUGHTS BLOG (July 2, 2026), <https://firearmslaw.duke.edu/2026/07/hemani-is-not-the-end-of-drug-and-gun-litigation>.

⁶⁵ See *Hemani*, 146 S. Ct. at 1694 (Thomas, J., concurring).

⁶⁶ See *id.*

⁶⁷ See *id.* at 1698 (Jackson, J., concurring).

⁶⁸ See *id.*

⁶⁹ See *id.* at 1699.

⁷⁰ See *id.* at 1700.

⁷¹ See *Hemani*, 146 S. Ct. at 1693 (majority opinion) ("In saying this much, we do not question that sometimes an individual's unlawful use of marijuana (or any other

might still be satisfactory grounds for disarmament.⁷² It seems that the *Bruen* test is malleable enough to allow the majority of the Court to obtain the results it wants in any case, regardless of the statutory language, the historical analogues, or the underlying facts.

Finally, Justice Samuel Alito added his own concurrence, joined by Justice Elena Kagan.⁷³ Alito begins by saying that he would have upheld the Fifth Circuit's judgment on other grounds,⁷⁴ but then proceeds to reiterate the majority's points that marijuana users are not in the same category of incapacitated individuals that the Founding-era "habitual drunkard" laws covered.⁷⁵

II. Simply Ignore the Regulations

Perhaps the most surprising aspect of the majority opinion is Justice Gorsuch's insistence that there is no legal indication how much marijuana use is required. Consider this section of his analysis:

But how much marijuana does Mr. Hemani use, in what potency, and to what effect? Is he routinely unable to manage his affairs, a risk to himself or his family? Or does he use a mild gummy as a sleep aid a few times a week? We do not know and, the government says, it doesn't matter.⁷⁶

Perhaps the government expressed the point this way at some point in its briefing or oral argument, but that would be a reason to criticize the prosecution's strategy and performance in this case, not necessarily a problem with the law itself up to now. Gorsuch's characterization is not a good representation of the state of the law in this area, which is my focus in this part. The majority opinion goes further, offering a few alarming hypotheticals:

Nor does the government's theory stop at Mr. Hemani. It extends equally to a husband who regularly takes his wife's prescription Ambien to sleep and a college student who routinely uses a friend's Adderall to cram for exams. The drug involved makes

controlled substance) may render him a danger to others. But, again, the government disclaims the need to show anything like that in this case.").

⁷² See *id.*

⁷³ *Id.* at 1700 (Alito, J., concurring in the judgment).

⁷⁴ See *id.*

⁷⁵ See *id.* at 1701.

⁷⁶ *Id.* at 1689 (majority opinion).

no difference. Nor, again, does it matter how much an individual uses or the effects it has on him. That someone regularly uses any substance found on any of the CSA's five schedules for anything other than its "prescribed purpose" is enough.⁷⁷

The majority opinion completely omits⁷⁸ long-standing regulations, codified in the *Code of Federal Regulations*, that significantly reduced the discretion of prosecutions under Section 922(g)(3). The ATF has specific criteria based on arrests and convictions, which Justice Gorsuch never mentions. For example, in a 1997 Treasury decision from the ATF,⁷⁹ the Bureau set forth the following regulatory definition for purposes of enforcement:

A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm. An inference of current use may 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, e.g., a conviction for use or possession of a controlled substance within the past year, or multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year.⁸⁰

⁷⁷ *Id.*

⁷⁸ I cannot decide if this glaring omission was intentional or inadvertent. Notwithstanding my critique in this section, the majority provides an initial rebuke of the government's position that is a fair characterization of the statute and what it fails to address: *Id.* at 1686. ("It doesn't matter what controlled substance an individual uses, in what amounts he does so, or whether his drug use has ever made him a danger to himself or others. It doesn't even matter why he keeps a gun or how safely he does so.")

⁷⁹ At that time (1997), ATF was under the Department of Treasury. It was relocated to the Department of Justice by the Homeland Security Act of 2002, Pub. L. No. 107-296 (2002), as part of the sweeping reorganization of federal law enforcement and intelligence agencies following the unprecedented terrorist attacks on September 11, 2001.

⁸⁰ *Definitions for the Categories of Persons Prohibited from Receiving Firearms* (June 27, 1997), <https://www.atf.gov/file/84311/download>; see also 27 C.F.R. § 478.11 (2019), (to be codified at 27 C.F.R. pt. 178)

In the following years, the ATF promulgated an expanded version of this definition, so federal regulations also included “persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year.”⁸¹ In other words, for many years codified regulations interpreted § 922(g)(3) as applying to the following:

- Someone with a conviction for use or possession of controlled substances in the past 12 months
- Someone with multiple drug-related arrests in the past five years (even if the defendant ultimately pleaded guilty to other offenses and there was no conviction for the drug charges), but only if the most recent arrest was within the last 12 months
- Individuals who have failed a drug test in the past year
- Individuals who are currently using controlled substances (including prescription drugs) in a manner other than as prescribed

Courts noted that the statutory term “user of” would be void for vagueness or overbreadth (i.e., punishment for past use) without the ATF’s interpretative regulations filling the gaps. Courts have alternatively added their own judicial glosses to the statutes, requiring more than a single use of a controlled substance.⁸² It was frustrating, therefore, that the majority (as well as the concurrences) would overlook this important point.

⁸¹ 27 C.F.R. § 478.11 (2019).

⁸² See, e.g., *United States v. Williams*, 216 F. Supp. 2d 568, 576 (E.D. Va. 2002) (motion for judgment of acquittal must be granted where there is no evidence suggesting a pattern of use, continuous use, or prolonged use of a controlled substance on the part of the defendant); *United States v. Freitas*, 59 M.J. 755, 757–58 (NM. Ct. Crim. App. 2004) (where the government proves only a single use of marijuana by service member, the record lacks an adequate factual basis to substantiate that the appellant was an “unlawful user” under § 922(g)(3)); *United States v. Herrera*, 289 F.3d 311, 323–24 (5th Cir. 2002), *rev’d en banc on other grounds*, 313 F.3d 882 (5th Cir. 2002) (irregular use of cocaine and past use of marijuana was insufficient evidence to establish that appellant was a prohibited person under § 922(g)(3)); *United States v. Purdy*, 264 F.3d 809, 812–13 (9th Cir. 2001); *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1099 (2005). For an excellent overview, see Revising Definition of “Unlawful User of or Addicted to Controlled Substance,” 91 Fed. Reg. 2698, 2700 (Jan. 22, 2026) (to be codified at 27 C.F.R. § 478.11) (effective May 6, 2026), <https://www.govinfo.gov/content/pkg/FR-2026-01-22/pdf/2026-01141.pdf>

Moreover, the DOJ substantially revised 27 C.F.R. § 478.11 in January 2026,⁸³ moderating it considerably:

Unlawful user of or addicted to any controlled substance:

- (1) A person who uses a controlled substance and demonstrates a pattern of compulsively using the controlled substance, characterized by impaired control over use, is addicted to a controlled substance.
- (2) A person who regularly uses a controlled substance over an extended period of time continuing into the present, without a lawful prescription or in a manner substantially different from that prescribed by a licensed physician, is an unlawful user of a controlled substance.
 - (i) Such unlawful use is not limited to using a controlled substance on a particular day, or within a matter of days before shipping, transporting, possessing, or receiving a firearm. Rather, unlawful use requires evidence that the person has unlawfully used the substance with sufficient regularity and recency to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire, ship, transport, receive, or possess the firearm.
 - (ii) A person is not an unlawful user of a controlled substance if the person has ceased regularly unlawfully using the substance, or if the person's unlawful use is isolated or sporadic or does not otherwise demonstrate a pattern of ongoing use. A person is also not an unlawful user if the person, while using a lawfully prescribed controlled substance, deviates slightly or immaterially from the instructions of the prescribing physician.⁸⁴

The codification specifically says the use must be “in a manner substantially different from that prescribed by a licensed physician,”⁸⁵ suggesting that minor off-label uses, or incidental use for the intended

⁸³ *See id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

purpose by a spouse, may not subject an individual to prosecution. Subsection (2)(ii) is particularly relevant: the statute no longer applies to someone as soon as they stop regularly using the substance, or if the deviation from a prescription is slight or immaterial.

The majority opinion mentions other developments in liberalizing marijuana laws,⁸⁶ but it omits the recent overhaul of the regulations that should have defined whether someone is prosecuted or denied a gun purchase due to a failed NICS background check. Some of the hypothetical examples, such as someone taking a prescription pill from a friend or spouse incidentally, would probably have been excluded under the new regulations. Even if the majority could have argued that the current (or previous) regulations were still too restrictive or still sweep too broadly, it is strange to completely ignore the relevant regulations while evaluating the constitutionality of the law as applied to the defendant. At the least, the substantial change in the regulatory framework surrounding the enforcement of § 922(g)(3) raises questions of mootness on the constitutional question in the case, and I would have expected the Court to address that possibility. Ignoring the relevant regulations was inappropriate.

III. The NICS Mess

The majority opinion seemed to treat this decision as a matter of preventing future prosecutions for drug users with guns, for reasons that sound more like overbreadth or substantive due process outside of the buzzword-filled Second Amendment context, but the decision in fact created an extremely complicated situation for the NICS background check system.⁸⁷ The purpose of the January 2026 overhaul of the regulations interpreting Section 922(g)(3) was to remedy “a disconnect [that] has arisen between NICS firearm purchase determinations, ATF enforcement, and court decisions on what the

⁸⁶ See *Hemani*, 146 S. Ct. at 1692–93 (describing the rescheduling of marijuana from Section I to Section III of the CSA in 2026, a DOJ memorandum declaring a policy of not prosecuting possession of marijuana when it was legal under state law, and the complete or partial legalization of marijuana in 40 states in recent years).

⁸⁷ See Stevenson, *supra* note 8, at 217–20; see also JORDAN COHEN & DAVE SIDHU, CONG. RSCH. SERV., IF13195, GUNS AND DRUGS: A BRIEF HISTORY OF 18 U.S.C. § 922(G)(3) (Mar. 27, 2026), <https://www.congress.gov/crs-product/IF13195>.

definition of an unlawful user means,”⁸⁸ and thereby reduce the number of individuals denied approval for a gun purchase during their NICS instant background check.⁸⁹ The Court’s opinion throws all this into disarray.⁹⁰

There are tens of thousands of records in the NICS database of drug users,⁹¹ even though it is one of the most underreported categories in NICS. Most of these records will not indicate which type of drug the individual uses regularly (the Court strains to make clear that *Hemani* applies only to marijuana⁹²) or how dangerous it is. On the one hand, without removing these individuals from the NICS database (a labor-intensive undertaking for the FBI), marijuana users in the database will still fail a background check if they attempt to purchase a firearm from a licensed dealer (a gun store).⁹³ If the entire category were deleted, however, heroin or methamphetamine addicts currently in the system *would* be able to pass background checks and amass a personal arsenal. The Supreme Court does not acknowledge this administrative problem that its decision created, much less offer the DOJ guidance about how to proceed with fixing the NICS database entries.

A problem with the numbers is worth mentioning here. The majority opinion in *Hemani* cites a 2026 Congressional Research Service (CRS) Report,⁹⁴ which says that “there are a total of 23,211 records in the NICS indices for individuals who are considered unlawful users of or addicted to a controlled substance, and, in 2024, NICS denied 10,179 firearms transactions under Section 922(g)(3).”⁹⁵ Today, this number is out of date and completely inaccurate (the CRS Report

⁸⁸ See 91 Fed. Reg. at 2702.

⁸⁹ See *id.*

⁹⁰ *Id.* (“ATF may reassess the definition of unlawful user in a separate notice of proposed rulemaking after the pending case *United States v. Hemani* concludes at the Supreme Court . . .”).

⁹¹ See Stevenson, *supra* note 8, at 212–13, 217–20.

⁹² See *Hemani*, 146 S. Ct. at 1693.

⁹³ Until the responsible administrators in the FBI determine a way to remove marijuana users from the NICS database, individual marijuana users can file a petition to have their names removed, which is called a Voluntary Appeal File. See FBI, *How to File a Voluntary Appeal File*, <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/voluntary-appeal-file>.

⁹⁴ See *Hemani*, 146 S. Ct. at 1684.

⁹⁵ See *supra* note 87.

links to a NICS report from 2015, 11 years prior). In the years since, the NICS Operational Reports had shown that number increasing dramatically up to 67,032 in 2019,⁹⁶ then decreasing to 57,460 in 2022,⁹⁷ then falling precipitously to a mere 6,252 in June 2026.⁹⁸ It appears that thousands of names were purged from the NICS database in the past four years for this category, though I have found no explanation online as to why (perhaps the June 2026 number reflects the impact of the change in regulatory definitions six months earlier through an Interim Final Rule). In any case, this total is a fraction of the outdated number that was in the CRS Report cited by the majority opinion.⁹⁹

The NICS denials based on Section 922(g)(3) have also been falling in recent years, from 15,599 in 2021¹⁰⁰ to 8,326 in 2022.¹⁰¹ The number briefly went back up to 11,070 in 2023,¹⁰² then back down to 10,179 in 2024,¹⁰³ and declined further to 9,722 in 2025.¹⁰⁴ The declining numbers are probably due at least in part to the diminishing number of records (individuals) in this category in the NICS databases, but denials also vary depending on variations in gun sales and permit applications year to year.

⁹⁶ See FBI, *Active Records in the NICS Indices*, https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf/view.

⁹⁷ See FBI, *NICS Operational Report for 2022* at 37 (2022), <https://www.fbi.gov/file-repository/cjis/nics-2022-operations-report.pdf/view>.

⁹⁸ See FBI, *Active Entries in the NICS Indices* (updated June 30, 2026), https://www.fbi.gov/file-repository/active_records_in_the_nics-indices.pdf.

⁹⁹ Sometimes these numbers vary because one report includes state databases and another does not, and it is not always discernible which is which. At the same time, the numbers of reports in different categories (especially unlawfully present immigrants) have fluctuated widely over the years depending on the administration occupying the White House.

¹⁰⁰ See FBI, *NICS Operational Report for 2022* at 32 (2022), <https://www.fbi.gov/file-repository/cjis/nics-2022-operations-report.pdf/view>. The numbers had been steadily climbing in the decade before this, see Stevenson, *supra* note 8, at 218.

¹⁰¹ See *id.*

¹⁰² See FBI, *NICS Operational Report for 2023* at 9 (2023), <https://www.fbi.gov/file-repository/cjis/2023-nics-operational-report.pdf/view>.

¹⁰³ See FBI, *NICS Operational Report for 2024* at 8 (2024), <https://www.fbi.gov/file-repository/cjis/2024-nics-operational-report.pdf/view>.

¹⁰⁴ See FBI, *NICS Operational Report for 2025* at 8 (2025), <https://www.fbi.gov/file-repository/cjis/2025-nics-operational-report.pdf/view>.

Individuals may be disqualified from possessing firearms under § 922(g)(3) even if their names are not in the NICS database—the majority is correct that the law could apply to millions of regular marijuana users,¹⁰⁵ even though their names are not in the NICS system. The federal government has no way of knowing about most of the recreational users of marijuana, so if their names are in the NICS system, some official incident must have occurred that involved reporting to NICS, such as a conviction in a trial court or a federal employee failing a drug test. Thus, most addicts and users of illegal drugs, including dangerous narcotics, will in fact pass a background check, because their names are unlikely to be in the NICS database. At the same time, nothing usually happens to those who fail a background check at a licensed gun dealer—they simply leave the store, and in most states, they can then purchase a gun from a private, unlicensed seller instead, although they could be subject to prosecution if they are somehow caught.¹⁰⁶ In addition, drug users who possess guns are likely to evade detection indefinitely, unless some incident brings them under police scrutiny or surveillance, such as the execution of a search warrant for an unrelated (more serious) crime, as happened with Mr. Hemani.

The problem *Hemani* presents is that it purports to leave in place the part of § 922(g)(3) that applies to addicts, as well as its application to users of other types of drugs besides marijuana.¹⁰⁷ It will be extremely disruptive to redesign the NICS reporting system to include only “addicts,” but not non-addicted marijuana users, while somehow including users of drugs besides marijuana. It is unclear how many of the few thousand entries in NICS for § 922(g)(3) violators must be purged and how many should be preserved, or how to modify the reporting procedures from thousands of state police precincts to sort drug users so precisely. I fear that the natural inclination at DOJ will be to suspend the entire drug-related category of existing names and stop processing new reports, which would make firearms more easily accessible to individuals the Court did not intend to cover under its ruling in *Hemani*.

¹⁰⁵ See *Hemani*, 146 S. Ct. at 1693.

¹⁰⁶ See Stevenson, *supra* note 8, at 215.

¹⁰⁷ See *Hemani*, 146 S. Ct. at 1693.

IV. Applying *Hemani* in the Circuit Courts

Less than a month after *Hemani* was decided, the Eighth Circuit published its opinion in *United States v. Baxter*,¹⁰⁸ another case enforcing § 922(g)(3) against a marijuana user. Baxter was a member of a local street gang and was arrested when police arrived to break up a gang dispute and found Baxter to be carrying a loaded pistol and a bag of marijuana.¹⁰⁹ A urine test at the police station confirmed marijuana metabolites in Baxter's system.¹¹⁰ At trial, the government submitted evidence of photos and videos from Baxter's social media accounts in which he was brandishing a firearm at the camera, along with many others showing Baxter smoking marijuana.¹¹¹ A local law enforcement officer who had known Baxter for years testified to Baxter's daily marijuana use,¹¹² and an expert witness—a pharmacologist and toxicologist called by the government—"testified that there is a strong connection between chronic cannabis use and aggressive and violent behavior."¹¹³

The Eighth Circuit rejected Baxter's as-applied Second Amendment challenge to Section 922(g)(3), applying *Bruen* and relying (solely) on the historical analogue of the Founding-era "criminal prohibition on taking up arms to terrify the people."¹¹⁴ The Eighth Circuit had previously rejected facial challenges to the statute in *United States v. Veasley*¹¹⁵ and had subsequently rejected an as-applied challenge to the statute by a twice-a-week marijuana user in *United States v. Cooper*,¹¹⁶ based on the same historical analogue employed in *Baxter* (i.e., taking up arms to terrify the people).¹¹⁷ Thus, circuit precedent foreclosed Baxter's facial challenge to the statute, and precedent informed the court's decision about which historical analogue would best serve as the basis for rejecting Baxter's as-applied challenge.¹¹⁸

¹⁰⁸ *United States v. Baxter*, 2026 U.S. App. LEXIS 20379 (8th Cir. 2026).

¹⁰⁹ *See id.* at *2.

¹¹⁰ *See id.* at *3.

¹¹¹ *See id.* at *4.

¹¹² *See id.* at *5.

¹¹³ *Id.* at *4.

¹¹⁴ *Id.* at *9.

¹¹⁵ *United States v. Veasley*, 98 F.4th 906 (8th Cir. 2024) (rejecting a facial Second Amendment challenge to § 922 (g)(3)).

¹¹⁶ *United States v. Cooper*, 127 F.4th 1092 (8th Cir. 2025).

¹¹⁷ *See id.* at 1095.

¹¹⁸ *Baxter*, 2026 U.S. App. LEXIS 20379 at *9–10.

In the end, the court noted that the district court had made “an explicit finding that marijuana impaired Baxter’s judgment on the night that he was arrested,” leading Baxter to “threaten the physical safety of civilians, law enforcement, and his adversaries alike.”¹¹⁹ Remarkably, the court distinguished *Hemani* with one sentence: “The Supreme Court’s very recent unanimous decision in *United States v. Hemani* is not to the contrary.”¹²⁰

Two weeks after the *Baxter* decision was published, the Eighth Circuit decided another § 922(g)(3) case, *United States v. Striplin*,¹²¹ this time reversing the conviction and remanding the case to the district court. The same judge, Judge Shepherd, wrote the majority opinion in both *Baxter* and *Striplin*. In *Striplin*, the defendant led police on a high-speed vehicle chase,¹²² and when apprehended, he had a firearm and drug paraphernalia; Striplin confessed to using methamphetamine three or four times per week.¹²³ At trial, however, the prosecution put on no other evidence of dangerousness besides the regular drug use and gun possession. The Eighth Circuit reversed, invoking *Bruen*’s historical analogue test and *Hemani*’s holding that frequent drug use alone was not enough.¹²⁴ Remanding the case for more development, the court held that the Second Amendment prevented the conviction unless the illegal drug use causes the defendant to behave like a person who is “both mentally ill and dangerous,”¹²⁵ or that the drug use causes the defendant to “induce terror, or pose a credible threat to the physical safety of others with a firearm.”¹²⁶ This either/or two-prong test is not exactly what the Supreme Court set forth in *Hemani*, but is not in conflict with *Hemani*, either. *Striplin* also required a causation element that is not present in *Hemani*, but *Baxter* arguably glossed over the causation issue because there was so much evidence of dangerousness.

Baxter and *Striplin* highlight that, in the wake of *Hemani*, the government needs to put on *some* evidence in § 922(g)(3) cases of the individual’s

¹¹⁹ *Id.*

¹²⁰ *Id.* at *13.

¹²¹ *United States v. Striplin*, 2026 U.S. App. LEXIS 22333 (8th Cir. 2026).

¹²² *See id.* at *1.

¹²³ *See id.*

¹²⁴ *See id.* at *2.

¹²⁵ *Id.* at *6–7

¹²⁶ *Id.* at 11.

dangerousness, but that may be all the government will need to do to persuade a court to distinguish *Hemani* and find it inapplicable.¹²⁷ *Baxter* and *Striplin* also suggest another residual takeaway from *Hemani*—that evidence of individual dangerousness bleeds into the “historical analogue” prong of *Bruen*. The existence of (some) evidence in the record of *Baxter*’s dangerousness permitted the court to find an easy analogue in old laws about “terrorizing the people,” and the lack of similar evidence in *Hemani*’s case allowed the Supreme Court to find that none of the proposed historical analogues quite fit. Prosecutors may find in future cases that bolstering the case with evidence of dangerousness¹²⁸ gives them an easy pass on historical analogues.

V. Conclusion

Overall, *Hemani* is a disappointment to those who were hoping for more clarity about how the *Bruen* test should work, and the decision makes it less likely that whatever remains of the statute will operate as Congress intended. Although the opinion attempted to grapple with a pressing issue—society’s changed attitudes toward marijuana use—it did so by focusing solely on distinguishing some Founding-era laws feebly offered by the government as historical analogues. Meanwhile, *Hemani* creates tremendous disruption to the FBI’s NICS background check system and leaves uncertain the status of recent updates to ATF regulations related to both NICS and to enforcement actions. Based on *Hemani*’s application so far in the lower courts, it appears that the long-term legacy of the decision will be to collapse the historical analogue step of *Bruen* into evidentiary findings of a defendant’s individual dangerousness. Instead of scouring archives for potentially analogous laws from the 18th century, it may be more strategic for prosecutors to request a psychological evaluation for the defendant and submit the relevant arrest records.

¹²⁷ For a similar conclusion about the takeaway from *Baxter*, see Hayley Lawrence, *Eighth Circuit Upholds Prosecution of Marijuana User under 922(g)(3)*, DUKE CTR. FOR FIREARMS LAW SECOND THOUGHTS BLOG (July 15, 2026), <https://firearmslaw.duke.edu/2026/07/eighth-circuit-upholds-prosecution-of-marijuana-user-under-922-g-3>.

¹²⁸ For a discussion of the two main frameworks or tools that mental health professionals use to identify and assess risks of dangerousness, and propensity for gun violence in particular, see Dru Stevenson, *Restoration of Gun Rights and Measuring Individual Dangerousness*, DUKE CTR. FOR FIREARMS LAW SECOND THOUGHTS BLOG (Jan. 7, 2026), <https://firearmslaw.duke.edu/2026/01/restoration-of-gun-rights-and-measuring-individual-dangerousness>.