No. 22-76

In the Supreme Court of the United States

KEITH L. CARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* DRUG POLICY ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

Amicus is the Drug Policy Alliance ("DPA"), a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in science, compassion, and human rights.[1] Established in 1994, DPA is a nonpartisan organization with tens of thousands of members nationwide. DPA is dedicated to advancing policies that reduce the harms of drug use and drug prohibition while seeking solutions that promote public health and public safety. DPA is actively involved in the legislative process across the country and strives to roll back the excesses of the drug war in favor of sensible drug policy reforms. DPA regularly files legal briefs as *amicus curiae,* including in cases involving the criminalization of people who use drugs. *See*, *e.g.*, *Gonzales v. Raich*, 545 U. S. 1, 5 (2005).

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[1] All parties received timely notice of *amicus*'s intent to file this brief. All parties have consented to the filing of this brief. *Amicus* is not a publicly held corporation, nor does *amicus* have any parent corporation that is a publicly held corporation. No counsel for any party authored any part of this brief, and no person other than *amicus*, its members, or its counsel made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Constitution's prohibition of vague laws protects the separation of powers by ensuring that Congress, rather than police officers, prosecutors, or judges, determines what conduct is criminal. And it protects individuals from unwittingly becoming subject to prosecution by requiring a criminal law to be sufficiently definite to put ordinary people on notice of what the law prohibits. The statute at issue in this case, 18 U.S.C. § 922(g)(3), violates this precept by prohibiting any "unlawful user" of a controlled substance from possessing a firearm without defining the set of unlawful users or providing any guidance whatsoever as to whom that set includes. The Eighth Circuit gave the statute a liberal construction, sweeping in anyone whose use of a controlled substance "has occurred recently enough to indicate that the individual is actively engaged in such conduct" at the time of otherwise-lawful firearm possession.

The result is that even those who use cannabis *on a single occasion* under the imprimatur of state law, or who take a friend's prescription medicine, for instance, are plausibly at risk of imprisonment for up to fifteen years for possessing a firearm in an otherwise lawful manner. In this manner, the statute serves principally as a criminalization of drug use rather than a firearm regulation. This statute potentially implicates tens of millions of Americans, and it fails to provide them fair notice of the consequences of their consumption of cannabis or

another controlled substance.

Moreover, the Eighth Circuit's interpretation of the statute provides no limiting principle to cure its vagueness, increasing the extent to which police officers, prosecutors, and judges will selectively decide how and when the statute applies to a one-time or occasional consumer of a controlled substance. This in turn furthers an inequitable, selective criminalization of certain categories of drug use. This Court should grant *certiorari*.

ARGUMENT

I. THE STATUTE, AS INTERPRETED BY THE EIGHTH CIRCUIT, IS UNCONSTITUTIONALLY VAGUE.

"Vague laws invite arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). The Constitution's prohibition of vague laws serves at least two vital functions: *First*, it protects the separation of powers by ensuring that Congress, rather than judges or law-enforcement officers, will bear responsibility for determining what conduct is punished criminally. When a law is too vague to delineate clearly the contours of prohibited conduct, then the responsibility falls either to judges to guess what Congress might have intended, or to law-enforcement officers to decide when a borderline case deserves punishment. *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (holding a prohibition on treating the flag "contemptuously" void for vagueness: "Standardless" laws invite "policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.").

In *Johnson v. United States*, 576 U.S. 591 (2015), for instance, this Court held that the definition of "violent felony" in the Armed Career Criminal Act was unconstitutionally vague because Congress chose language that left judges to puzzle through whether a given felony, in its ordinary case, involved "conduct that presents a serious potential risk of physical injury" and thus counted as violent. 576 U.S. at 596;

see also id. at 597 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'") (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). Two years later, in *Dimaya*, this Court held that a similar definition of "crime of violence" in 18 U.S.C. § 16 was likewise void for vagueness because it left judges to "estimate" when a felony, "by its nature, involve[d] a substantial risk" of the use of physical force. 138 S. Ct. 1204, 1211-13.

And most recently, in *United States v. Davis*, 139 S. Ct. 2319 (2018), this Court invalidated yet another "crime of violence" definition with a substantial-risk standard—this time, the residual clause of 18 U.S.C. § 924(c)(3)—notwithstanding decades of its application, because it "provide[d] no reliable way to determine which offenses qualify as crimes of violence." 139 S. Ct. at 2324 ("Were we to adopt" the Government's "new and alternative reading designed to save" the statute, "we would be effectively stepping outside our role as judges and writing a new law rather than applying the one Congress adopted.").

Second, the void-for-vagueness doctrine helps to ensure that individuals have fair notice of what conduct is criminal. Due process "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357

(1983) (holding unconstitutionally vague a state statute that required individuals to present "credible and reliable" identification, or else face arrest, upon being subjected to a *Terry* stop). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process." *Johnson*, 576 U.S. at 595-96 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

To be sure, due process does not require that everyone have actual notice of a legal prohibition. But it does require that people have a "sure way to know what consequences will attach to their conduct." *Davis*, 139 S. Ct. at 2323.

The void-for-vagueness doctrine imposes a severe remedy: invalidation of a statute, typically accompanied by the reversal of one or even many criminal convictions. *See, e.g.*, *Welch v. United States*, 578 U.S. 120, 130 (2016) (applying *Johnson* retroactively to cases on collateral review). But the remedy is severe because what is at stake is severe: in this case, the right to live one's life without unwittingly engaging in conduct that an ordinary person would have "no sure way" to know might bring a federal prison sentence. *Davis*, 139 S. Ct. at 2323.

As discussed below, *amicus* Drug Policy Alliance ("DPA") contends that Congress, in regulating access to firearms, overreached in this case by subjecting an untenably vague class of "unlawful users" of drugs to potential fifteen-year prison sentences. 18

U.S.C. § 922(g)(3) ("the Statute").[2,3] As the Petition for Writ of *Certiorari* sets forth, the Statute prohibits any "unlawful user" of a controlled substance from possessing a firearm. *See* Petition for Cert. at 2. But the Statute fails to define the set of "unlawful" drug users, unconstitutionally leaving judges, police officers, and prosecutors to decide who counts, and leaving individuals—including even those who use cannabis *on a single occasion* under the imprimatur of state law—at risk of imprisonment for possessing a firearm in an otherwise lawful manner. Rather than providing a clear limitation on gun possession, the statute serves principally as an overcriminalization of *drug use*.

At the very least, the Statute as interpreted by the Eighth Circuit (that is, without the majority of circuits' judicially imposed limiting principle that only those with "regular use over an extended period" qualify as unlawful users) is unconstitutionally vague. *See* Shon R. Hopwood, Clarity in Criminal Law, 54

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[2] *Amicus* does not address whether it is permissible or appropriate for Congress to prohibit classes of persons from possessing a firearm, including persons who have engaged in violent or threatening behavior or have otherwise exhibited an inability to exert self-control. It writes instead to substantiate the practical implication of the Statute's vagueness, which is that otherwise lawful possessors of firearms may now be subjected to federal felony prosecutions *because of* one-time or occasional drug use, misuse of otherwise authorized substances, or consumption of substances decriminalized or made lawful by state law.

[3] Congress recently increased the maximum penalty for violating the Statute from ten to fifteen years of imprisonment. *See* Pub. L. 117–159, div. A, title II, § 12004(c), 136 Stat. 1329 (June 25, 2022).

Am. Crim. L. Rev. 695, 746-47 (2017) (arguing that the Statute is unconstitutionally vague because it "fail[s] to provide any ascertainable standard to guide prosecutors"). But the circuit split itself illustrates the problem: how are individuals supposed to know whether an "unlawful user" of a drug is one who has engaged in habitual or regular use over an extended period of time (as in the First, Third, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits) or instead includes a one-time or occasional consumer who happened to be "actively engaged" in its use around the time he possessed a firearm, as is now the case in the Eighth Circuit? This problem is not trivial in scope: Tens of millions of Americans are potentially at risk of falling victim to the vagueness of the Statute. This Court should grant *certiorari*.

A. The Statute Does Not Provide Fair Notice That It Potentially Applies to Tens of Millions of Americans.

As members of this Court have recognized, "the Federal Government's current approach" to cannabis regulation is "a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana," an approach which "strains basic principles of federalism and conceals traps for the unwary." *Standing Akimbo, LLC v. United States*, 141 S. Ct. 2236, 2236-37 (2021) (Thomas, J., respecting the denial of certiorari); *see also* Erwin Chemerinsky *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 74 (2015) (describing

cannabis regulation as "one of the most important federalism conflicts in a generation").

Section 922(g)(3) is just such a trap for the unwary, subjecting any one-time cannabis user—even in a state that permits its recreational or medicinal use—to a potential fifteen-year prison sentence. *Standing Akimbo*, 141 S. Ct. at 2238 ("A marijuana user similarly can find himself a federal felon if he just possesses a firearm."); *see also* Helen Sudhoff, Policy Brief: Federal law unconstitutionally prohibits medical marijuana users from possessing firearms, Reason Foundation (Oct. 19, 2021), https://reason.org/policy-brief/federal-law-unconstitutionally-prohibits-medical-marijuana-users-from-possessing-firearms/ (explaining that anyone who procures a medical marijuana card is automatically thereby disqualified from legal firearm ownership). It is a trap because the criminalized activity is not really the gun possession that the Statute purports to punish; the gun possession itself is lawful up until the minute that the possessor decides to use cannabis, even medicinally. So, in substance, the *conduct* criminalized (and criminalized severely, particularly given the federal government's current policy of deprioritizing cannabis prosecution) is the cannabis use, not the gun possession. This trap is potentially cavernous: presently nineteen states authorize recreational cannabis use, while thirty-seven states plus the District of Columbia authorize medicinal use (the District of Columbia having done so with Congress's acquiescence). *See* Cannabis Overview, National Conference of State Legislatures

(May 31, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.[4]

According to the National Survey on Drug Use and Health published in January 2022, at least 49.6 million Americans over age twelve used cannabis in the year 2020.[5] Americans, of course, include veterans: among veterans aged eighteen to forty-four, at least 20% report cannabis use within the past six months.[6] For all these individuals, the federal government may not prosecute the cannabis use *per se*. But all are at risk of a felony conviction and up to a fifteen-year prison sentence if, in addition to using cannabis, they possessed a firearm even in an

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[4] *See* Substance Abuse and Mental Health Services Administration ("SAMHSA"), Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings (Vol. NSDUH Series H-48, HHS Publication No. (SMA) 13-4795), https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf; SAMHSA, Key substance use and mental health indicators in the United States: Results from the 2018 National Survey on Drug Use and Health (HHS Publication No. PEP19-5068, NSDUH Series H-54), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.pdf.

[5] SAMHSA, National Survey on Drug Use and Health, Detailed Tables (Jan. 11, 2022), http://www.samhsa.gov/data/report/2020-nsduh-detailed-tables, https://www.samhsa.gov/data/sites/default/files/reports/rpt35323/NSDUHDetailedTabs2020v25/NSDUHDetailedTabs2020v25/NSDUHDetTabsSect1pe2020.htm.

[6] Melanie L. Hill *et al.*, Prevalence of cannabis use, disorder, and medical card possession in U.S. military veterans: Results from the 2019-2020 National Health and Resilience in Veterans Study (Sep. 2021), 120 Addictive Behaviors 106963, https://pubmed.ncbi.nlm.nih.gov/33964583/.

otherwise-lawful manner.

The trap is not limited to cannabis users. As the Petition for *Certiorari* sets forth, even a single instance of taking a prescription drug such as a sleeping pill or a pain reliever—if not in compliance with the prescription or if obtained from a family member or friend—is enough to render one an unlawful user under the Eighth Circuit's interpretation of the statute. *See* Petition for Cert. at 22-23. Again, this implicates *at least* tens of millions of Americans: 48.6% of Americans report using at least one prescription drug in the past thirty days,[7] 20.4% of adults report chronic pain,[8] and over sixteen million Americans misused prescription psychotherapeutics (*e.g.*, pain relievers, stimulants or sedatives) in the past year.[9] Even if the risk of the Statute's application to a one-time consumer of a controlled substance is low, the Statute (as interpreted below) applies equally, for instance, to an

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[7] Centers for Disease Control and Prevention ("CDC") National Center for Health Statistics Data, Therapeutic Drug Use, https://www.cdc.gov/nchs/fastats/drug-use-therapeutic.htm.

[8] Carla E. Zelaya *et al.*, Chronic Pain and High-impact Chronic Pain Among U.S. Adults, CDC National Center for Health Statistics Data Brief No. 390 (Nov. 2020), https://www.cdc.gov/nchs/products/databriefs/db390.htm.

[9] SAMHSA, Key substance use and mental health indicators in the United States: Results from the 2020 National Survey on Drug Use and Health (HHS Publication No. PEP21-07-01-003, NSDUH Series H-56) at 16-17, https://www.samhsa.gov/data/sites/default/files/reports/rpt35325/NSDUHFFRPDFWHTMLFiles2020/2020NSDUHFFR1PDFW102121.pdf.

individual who rarely but occasionally consumes cannabis or takes a friend's prescription medicine. Millions of Americans fit that description but have no way to know whether their occasional use renders them unlawful users under the Eighth Circuit's interpretation of the statute.

Together with the fact that an estimated 30% of Americans report that they own a gun (and an additional 11% report that they live in a household with someone who does),[10] it is no stretch to conclude that tens of millions of Americans are potentially unlawful users—and, thus, prohibited possessors—under the Eighth Circuit's interpretation of the Statute.

Of course, not all—or even many—of these potentially unlawful users who possess a firearm will face federal felony charges. But the Statute does not provide notice of who could be subject to investigation, arrest, or prosecution upon the basis of such an allegation: even if, say, only a few hundred individuals are convicted annually with the Statute serving as the lead charge, the constitutional travesty is that their punishment will come by operation of executive and judicial-branch functions rather than by will of Congress. *See, e.g.*, United States Sentencing Commission, *What Do Firearms Offenses Really Look*

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[10] Ted Van Green, Pew Research Center, Wide differences on most gun policies between gun owners and non-owners, but also some agreement (Aug. 4, 2021), https://www.pewresearch.org/fact-tank/2021/08/04/wide-differences-on-most-gun-policies-between-gun-owners-and-non-owners-but-also-some-agreement/.

Like? (July 2022), at 30 (Classification of Firearms Offenders), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf (noting that 5.3% of the 6,549 defendants convicted under § 922(g) were convicted "because they were illegal drug users or addicted to controlled substances"); *see also* Drury D. Stevenson, The Complex Interplay Between the Controlled Substances Act and the Gun Control Act, Ohio State Journal of Criminal Law (forthcoming; posted Feb. 9, 2020), https://ssrn.com/abstract=3535068.

In other statutes, Congress has criminalized gun possession in a way that does not run afoul of due process, such as by enumerating specific circumstances by which a person may be deemed a prohibited possessor. *See, e.g.*, 18 U.S.C. § 922(g)(8)(C)(i) (prohibiting a person who is subject to a court order finding that such person represents a credible threat to the physical safety of an intimate partner or child). It has neither the power nor the need to criminalize a vague class of unlawful drug users in regulating firearm possession.

B. The Eighth Circuit's Ruling Provides No Limiting Principle to Cure the Statute's Vagueness, Inviting Abuse of Prosecutorial Discretion.

The Statute itself is vague. But the Eighth Circuit's interpretation is particularly pernicious

because it lacks any limiting principle to protect even a person who ingests medical cannabis on one occasion from being deemed an unlawful user and thus facing a fifteen-year sentence for otherwise-lawful gun possession. As discussed below, the Statute invites unprincipled selective enforcement, and it arbitrarily increases the criminalization of certain categories of drug use.

1. Vague Statutory Language Invites Arbitrary Interpretation and Enforcement.

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), this Court affirmed the Illinois Supreme Court's decision invalidating as vague a city ordinance that prohibited gang members from "loitering." 527 U.S. at 51. One of the defects in the ordinance was that it lacked a "limiting construction," meaning that it granted "*absolute* discretion to police officers" to determine when an apparent loiterer might or might not have a permissible purpose for remaining in an area. *Id.* at 65-66 (O'Connor, J., concurring).

Likewise, prior to this Court's decision in *Dimaya*, the Third Circuit struck down the clause at issue in that case in part because the "indeterminacy of the analysis" (of when a felony risks violence in the ordinary case) meant that judges could not carry out the analysis "in a principled way." *Baptiste v. Attorney Gen.*, 841 F.3d 601, 620 (3d Cir. 2011).

The point is that the less principled a statutory term is, the greater the extent will be to which law-

enforcement officers and judges alike necessarily exercise their own discretion in deciding when the term applies. Here, the Eighth Circuit's interpretation of unlawful user—one whose "use has occurred recently enough to indicate that the individual is actively engaged in such conduct," Pet. App. 8a—is essentially unbounded. How close in time is recent enough? Is the mere detection of cannabis metabolites in a drug test sufficient? When does a first-time user of cannabis or psilocybin consumed for a therapeutic purpose, or a person taking a family member's sleep aid, become actively engaged? Who decides the limits of the Statute?

Consider an example. Assume a recent law school graduate is studying feverishly for the Virginia Bar Exam. She typically takes prescription Adderall to treat her attention deficit hyperactivity disorder, but her prescription has been expired for a few weeks. Nevertheless, she has a few pills remaining and brings them along to Roanoke. On her drive back home after the exam, an officer pulls her over for a routine traffic stop. She truthfully discloses that she is in lawful possession of a handgun for her own self-defense. The officer sees the expired vial of prescription drugs in the vehicle, and the driver also truthfully admits that she took one of the pills prior to that morning's exam session. The officer, perhaps in collaboration with a state and federal joint task force, arrests her for violating the Statute.

In this example, the gun possession is clearly ancillary to the drug use; the drug use is what results in the potential federal felony conviction subject to a

possible fifteen-year sentence. And, while some may be inclined to think that no police officer would arrest a law school graduate for such a petty use of this particular substance, that presumption itself highlights the arbitrary and selective nature of such a vague statute's enforcement.

The Ninth Circuit's decision in *Weissman v. United States*, 373 F.2d 799 (9th Cir. 1967), is also instructive. There, the court struck down a statute that punished a "user" of "narcotic drugs" for failing to register with a customs official upon leaving or entering the country—a statute substantially similar in its defect to the one at issue here. *Weissman*, 373 F.2d at 800. The court reasoned that, in contrast to the phrase "addicted to," "user" "has no definite meaning, either technically or at common law." *Id.* Moreover, "nothing in the text of the statute or in the subject matter with which it deals, provides a standard of any kind for the guidance of individuals seeking to comply with the statute," meaning that only by means of "the most inexcusable kind of judicial legislation" could a court purport to define who a "user" is. *Id.* at 802-03. The same is true of the Statute here: nothing in its text provides guidance as to who an unlawful user is, leaving law enforcement officers and judges unbridled discretion to decide when the Statute applies.

The vagueness problem here is at least as clear as it was in *Johnson*, *Dimaya*, and *Davis*: despite various proposed or adopted glosses on what "violent felony" or "crime of violence" might have meant, those definitions, at the end of the day, left judges in a

position to guess at who Congress did or did not mean to sweep into their reach. Indeed, the Statute's "unlawful user" language is even more clearly problematic than the "substantial risk" provision that was at issue in *Davis*. As Justice Kavanaugh wrote in his dissent in *Davis*, "substantial-risk standards like the one in §924(c)(3)(B) are a traditional and common feature of criminal statutes." *Davis*, 139 S. Ct. at 2341 (Kavanaugh, J., dissenting). But "drug user" is neither a traditional nor a common concept in the criminal law, which is precisely why the *Weissman* Court found such language unconstitutionally vague in that case. *Weissman*, 373 F.2d at 800. Likewise, here, the circuit split illustrates the puzzle that judges have faced: *some* nesxus between drug use and gun possession must be read into the statute, but where should that line be drawn? *See, e.g.*, *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2005) (recognizing that "courts generally agree that [the Statute] runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use"); *cf. Ruan v. United States*, 142 S. Ct. 2370, 2384 (2022) (Alito, J., concurring) ("In our constitutional system, it is Congress that has the power to define the elements of criminal offenses, not the federal courts.") (citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

2. The Statute Arbitrarily Increases the Criminalization of Certain Categories of Drug Use.

An underlying defect in the Statute is it takes the worst aspects of the criminalization of drug use—its arbitrariness and its basis on unfounded fears and pseudo-science—and grafts them onto otherwise lawful conduct. Grouping together all people who use various types of drugs, under wide-ranging circumstances and for vastly different purposes, magnifies this arbitrariness.

People use drugs for many reasons, including spirituality, cultural practices, healing, and recreation. The Controlled Substances Act, despite its stated intent to create a scheduling system to promote safety, established a scheme for restricting access to substances that may be ingested, classifying such substances according to loosely defined categories grouped by "potential for abuse" and the known utility of substances for medical purposes. 21 U.S.C. § 811(a)(1)(A). The actual distinction, however, between an individual using a substance under the direction of a physician and one using a substance without medical authorization, is ultimately an arbitrary one.

Drugs are used for wide-ranging behavioral effects. Some drugs, such as caffeine and amphetamines, may be consumed to enhance productivity, while others, such as Adderall or Ritalin, may be used to enhance focus. Other substances—benzodiazepines such as alprazolam (Xanax), clonazepam (Klonopin), and diazepam (Valium)—may provide relief from

generalized anxiety disorder.[11] Many opioid drugs and stimulants, which are widely characterized as inherently dangerous, including fentanyl and amphetamines, are regularly prescribed by physicians and are used safely. Whether a person uses such medications on a single occasion, sporadically, or routinely—with or without medical authorization—does not itself reflect meaningfully on one's capacity for self-control.

The majority of people who ever try any drug do not use them problematically and do not develop a substance abuse disorder or physical dependence.[12] According to the Substance Abuse and Mental Health Services Administration, half of all people above the age of twelve years in the United States report using some form of "illicit drugs" within their lifetimes, while 21.4% of those aged twelve or older in 2020 (nearly 59.3 million people) used illicit drugs in the past year.[13] As described above, the most commonly used illicit drug in 2020 was cannabis, which was used by 49.6 million people. The second most common type of illicit drug use in 2020 was the misuse of prescription pain relievers, which were reportedly

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[11] Ingrid Walker, *High: Drugs, Desire, and a Nation of User*s (Univ. of Wash. Press, 2017).

[12] James C. Anthony *et al.*, Comparative epidemiology of dependence on tobacco, alcohol, controlled substances, and inhalants: Basic findings from the National Comorbidity Survey, 2(3) Experimental and Clinical Psychopharmacology 244-68 (Aug. 1994).

[13] *See* Detailed Tables, *supra*, n.5.

misused by 9.3 million people.[14] In general, "the majority of drug use is episodic, transient and generally non-problematic."[15]

Despite the statutory contemplation of abuse potential for each substance, the system has not been effective in categorizing drugs strictly to promote safety. "In the United States . . . the very distinction between illicit and legal use depends on politics and power more than a drug's specific risk profile."[16] That dynamic is most on display in the politicized regulation of drugs such as cannabis and LSD. As one scholar recently stated in describing the "moral panic" driving drug policy, "[s]eldom has anti-drug policy been based on good science. Policymakers have used blunt instruments; for example, despite promise from drugs like LSD, the government's response was a total ban."[17]

Generalized drug prohibition-based policies are not deeply embedded in the historical tradition of the United States. While there were early attempts by some states and localities to restrict access to certain drugs, primarily for specifically targeted classes of

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[14] *Id.*

[15] Anne Katrin Schlag, Percentages of problem drug use and their implications for policy making: A review of the literature, 6 Drug Sci., Pol'y & L. 1, 1 (2020).

[16] Teneille R. Brown, The Role of Dehumanization in Our Response to People with Substance Use Disorders, Front Psychiatry (May 15, 2020), https://doi.org/10.3389/fpsyt.2020.00372.

[17] Michael Vitiello, The War on Drugs: Moral Panic and Excessive Sentences, 69 Clev. St. L. Rev. 441, 455 (2021), https://engagedscholarship.csuohio.edu/clevstlrev/vol69/iss2/8.

people, there were no significant legal restrictions on the distribution of narcotics until around the beginning of the twentieth century.[18] Throughout the twentieth and twenty-first centuries, political and economic motivations, often rooted in racial animus, have driven the classification of certain drugs.[19] While some substances have been made accessible through the medical system—largely to more socioeconomically privileged consumers—other substances have been prohibited, stigmatized, and criminalized. *See* David Herzberg, *White Market Drugs: Big Pharma and the Hidden History of Addiction in America* (2020).

The contribution of overcriminalization of drug use to mass incarceration and economic disenfranchisement, with vastly disparate impacts on communities of color, have all been well documented. *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Human Rights Watch, US: Disastrous Toll of Criminalizing Drug Use (Oct. 12, 2016), https://www.hrw.org/news/2016/10/12/us-disastrous-toll-criminalizing-drug-use.

For over five decades since the enactment of the Controlled Substances Act, punitive drug policies have "subjected millions to criminali[z]ation,

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[18] Richard C. Boldt, Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom, 62 S.C. L. Rev. 261, 263 (2011).

[19] *See* Vitiello, *supra*, n.17; *see also* Craig Reinarman & Harry G. Levine, *Crack in America: Demon Drugs and Social Justice* (1997).

incarceration, and lifelong criminal records, disrupting or altogether eliminating access to adequate resources and supports to live healthy lives."[20] Drug offenses remain the leading cause of arrest in the nation. Over 1.1 million drug-related arrests were made in 2020, and the majority were for personal possession.[21] The enforcement of drug possession and use laws has been inequitable and has most impacted communities of color. As described by the Director of the National Institute on Drug Abuse, "(a)bundant data show that Black people and other communities of color have been disproportionately harmed by decades of addressing drug use as a crime rather than as a matter of public health." Nora Volkow, National Institute on Drug Abuse, Addiction Should Be Treated, Not Penalized (May 7, 2021), https://nida.nih.gov/about-nida/noras-blog/2021/05/addiction-should-be-treated-not-penalized. And "(a)lthough statistics vary by drug type, overall, White and Black people do not significantly differ in their use of drugs, yet the legal consequences they face are often very different. Even though they use cannabis at similar rates, for instance, Black people were nearly four times more likely to be arrested for cannabis possession than White people in 2018." *Id.*

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[20] Aliza Cohen *et al.*, How the war on drugs impacts social determinants of health beyond the criminal legal system, 54:1 Annals of Medicine 2024-2038 (2022).

[21] FBI Uniform Crime Reporting Program, Crime Data Explorer (2020), https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/arrest.

Given that the underlying system of drug control and its enforcement result in such dramatic disparities, it is unsurprising that a statute relying on its classifications of licit and illicit drug use would itself be prone to arbitrary application. That problem is compounded by the unclear terms of the Statute, inviting arbitrary and selective enforcement, with profound consequences for those to whom it is applied.

The notion that a person may be vaguely labeled as an (illicit) "drug user" and subsequently deprived of a fundamental liberty—whether in relation to firearm possession or even the custody of a child[22]—is itself irrational. It is not evidence-based. And it is not rooted in any equitable historical tradition of the United States. The Statute's unbounded, indiscriminate deprivation of fundamental liberties cannot be tolerated.

CONCLUSION

For all the reasons recited above, the statute is unconstitutionally vague.

Dated: August 25, 2022

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[22] Loren Siegel, Drug Policy Alliance, Report: The War on Drugs Meets Child Welfare, at 4 (2021), https://uprootingthedrugwar.org/wp-content/uploads/2021/02/uprooting_report_PDF_childwelfare_02.04.21.pdf.

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