No. 22-76

In the Supreme Court of the United States

KEITH L. CARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ANDREW C. NOLL
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported the jury's finding that petitioner possessed a firearm while "an unlawful user of * * * any controlled substance," in violation of 18 U.S.C. 922(g)(3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

In the Supreme Court of the United States

No. 22-76

KEITH L. CARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 22 F.4th 743.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2022. A petition for rehearing was denied on February 23, 2022 (Pet. App. 31a). On April 12, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including July 22, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on one count of possessing a firearm

following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(a)(2) (2012), and two counts of possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3) and 18 U.S.C. 924(a)(2) (2012). Pet. App. 16a-17a. Petitioner was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. *Id.* at 19a-21a. The court of appeals affirmed petitioner's convictions, but vacated his sentence in part. *Id.* at 1a-15a.

1. Petitioner has been involved in multiple incidents involving firearms, drugs, or both. On February 8, 2013, police officers in Missouri stopped petitioner's car. 11/5/19 Tr. 371-375. During the stop, the officers found a handgun under the driver's seat. *Id.* at 376.

Two days later, two police officers stopped petitioner for speeding. 11/5/19 Tr. 317-318. As they approached petitioner's car, they smelled marijuana. *Id.* at 321, 342. Petitioner told the officers that he had "just smoked at the house" and "just got done smoking." *Id.* at 321, 326. Petitioner also told the officers that he had a gun, and the officers recovered a handgun from his waistband. *Id.* at 322-323. A third officer then arrived at the scene and detected a "strong odor of marijuana." *Id.* at 347. Petitioner stated that he had smoked a "blunt" and smoked "[k]ush," *id.* at 348—references to marijuana. After the officers took him to the police station, petitioner stated that he "ain't that high" and refused to submit to a blood test or urinalysis. *Id.* at 370.

Three years later, on August 16, 2016, petitioner fired a gun from his car. 11/5/19 Tr. 239. He struck another car but missed its driver. *Id.* at 246-250.

Finally, on August 30, 2016, while driving at more than 100 miles per hour, petitioner ran a red light and collided with a pickup truck, causing a three-car accident and

killing the truck's driver. Presentence Investigation Report (PSR) ¶¶ 10-11. Petitioner had marijuana, cocaine, and phencyclidine (PCP) in his system at the time of the crash. PSR ¶ 9; 11/5/19 Tr. 229-230. The police recovered a gun and a bag containing more than 28 grams of marijuana from the area of the driver's seat in petitioner's car. *Ibid.*

2. A federal grand jury in the Western District of Missouri indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(a)(2) (2012), and two counts of possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3) and 18 U.S.C. 924(a)(2) (2012). Superseding Indictment 1-2. The Section 922(g)(1) count and one of the Section 922(g)(3) counts were based on the 2016 incidents, and the remaining Section 922(g)(3) count was based on the 2013 incidents. *Ibid.*

Before trial, petitioner and the government jointly proposed a jury instruction regarding the Section 922(g)(3) charges. See D. Ct. Doc. 79, at 39 (Oct. 23, 2019); D. Ct. Doc. 84, at 1 (Oct. 27, 2019). The agreed-upon instruction stated:

> The phrase 'unlawful user of a controlled substance' means a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The defendant must have been actively engaged in use of a controlled substance during the time he possessed the firearm, but the law does not require that he used the controlled substance at the precise time he possessed the firearm. 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. An inference that a person was a user of a controlled substance may be drawn from evidence of a pattern of use or possession of a controlled substance that reasonably covers the time the firearm was possessed.

D. Ct. Doc. 79, at 39. The district court later gave the instruction requested by the parties. 11/6/19 Tr. 533-535; see also D. Ct. Doc. 100, at 28 (Nov. 6, 2019).

At trial, officers testified about the 2013 and 2016 incidents. See, *e.g.*, 11/5/19 Tr. 315-338, 340-344, 345-370. The government also introduced video evidence of the 2013 traffic stop. See Gov't Exs. 32-40. Petitioner testified in his defense, and admitted that he used marijuana "frequently." 11/6/19 Tr. 464; see also *id.* at 459 ("I smoke marijuana, I'll admit that."). He also admitted that he smoked marijuana specifically on the dates of the 2013 traffic stop and 2016 accident. *Id.* at 459, 464, 467, 469-470, 481-482. Petitioner explained that he refused to consent to a blood or urine test after his 2013 traffic stop because he "already told [the officers] [he] smoked marijuana" and "knew [the tests] would come back positive." *Id.* at 484-485. Petitioner also testified that "normally, like, people—officers pull you over, they see a bag of marijuana, they take it from us. I had officers take a bag of marijuana, pour it out, stomp on it." *Id.* at 470-471.

The district court denied petitioner's motion for judgment of acquittal, rejecting his contention that the government had introduced insufficient evidence to support a guilty verdict. 11/6/19 Tr. 437-438, 564. The jury found petitioner guilty on all counts. D. Ct. Doc. 99, at 1-3 (Nov. 6, 2018). The court sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release. Pet. App. 19a-21a.

3. The court of appeals affirmed petitioner's convictions and vacated his sentence in part. Pet. App. 1a-15a.

As relevant here, the court of appeals rejected petitioner's contention that insufficient evidence supported his convictions for possessing a firearm as an unlawful user of a controlled substance. Pet. App. 6a-10a. The court explained that its precedents had "interpreted § 922's 'unlawful user' element to require * * * regular drug use." *Id.* at 7a; see *United States* v. *Figueroa-Serrano*, 971 F.3d 806, 812 (8th Cir. 2020), cert. denied, 141 F.3d 2865 (2021); *United States* v. *Turner*, 842 F.3d 602, 605 (8th Cir. 2016); *United States* v. *Boslau*, 632 F.3d 422, 430 (8th Cir. 2011). The court, however, rejected petitioner's "expansive interpretation of 'regular drug use,'" which would have "require[d] evidence of use over an extended period." Pet. App. 8a. The court then found sufficient evidence that petitioner was a regular drug user. *Id.* at 9a. It observed that petitioner "was actively engaged in the use of a controlled substance during the time he possessed firearms in 2013 and 2016"; that "[i]n 2013, law enforcement smelled the odor of marijuana on [him]"; that petitioner "repeatedly admitted" to the police "that he had smoked marijuana"; and that petitioner had testified at trial that "he used marijuana frequently." *Id.* at 4a, 9a.

ARGUMENT

Petitioner contends that the decision below permits a finding that a defendant is an "'unlawful user'" of a controlled substance even if the defendant did not engage in the "regular" use of a controlled substance. Pet. 7, 15-16 (citation omitted). That contention misinterprets the court of appeals' decision. The court expressly acknowledged that "§ 922's 'unlawful user' element" requires "regular drug use." Pet. App. 7a (citations

omitted). And this case would be a particularly unsuitable vehicle for addressing the question presented. The petition for a writ of certiorari should be denied.

1. Section 922(g)(3) prohibits "an unlawful user of * * * any controlled substance" from possessing a firearm. 18 U.S.C. 922(g)(3). The courts of appeals that have considered the issue uniformly agree that, to qualify as a "user" of a controlled substance, the defendant must engage in regular use of the substance. See *United States* v. *Marceau*, 554 F.3d 24, 30 (1st Cir.), cert. denied, 556 U.S. 1275 (2009); *United States* v. *Augustin*, 376 F.3d 135, 138-139 (3d Cir. 2004); *United States* v. *McCowan*, 469 F.3d 386, 392 (5th Cir. 2006); *United States* v. *Bowens*, 938 F.3d 790, 793-794 (6th Cir. 2019), cert. denied, 140 S. Ct. 2572, and 140 S. Ct. 814 (2020); *United States* v. *Cook*, 970 F.3d 866, 874 (7th Cir. 2020); *United States* v. *Purdy*, 264 F.3d 809, 812 (9th Cir. 2001); see also *United States* v. *Yepez*, 456 Fed. Appx. 52, 54-55 (2d Cir.), cert. denied, 568 U.S. 887 (2012) (unpublished opinion); *United States* v. *Sperling*, 400 Fed. Appx. 765, 767 (4th Cir. 2010) (same); *United States* v. *Bennett*, 329 F.3d 769, 776-778 (10th Cir. 2003) (interpreting a provision of the Sentencing Guidelines that incorporates Section 922(g)(3)); *United States* v. *Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003) (per curiam) (same).

Like other courts of appeals, the Eighth Circuit has repeatedly explained that Section 922(g)(3) requires proof of regular drug use. See *United States* v. *Figueroa-Serrano*, 971 F.3d 806, 812 (8th Cir. 2020) ("regular drug use") (citation omitted), cert. denied, 141 S. Ct. 2865 (2021); *United States* v. *Turner*, 842 F.3d 602, 605 (8th Cir. 2016) ("regular drug use") (citation omitted); *United States* v. *Turnbull*, 349 F.3d 558, 562

(8th Cir. 2003) ("regular drug use"), vacated by, 543 U.S. 1099 (2005), reinstated by, 414 F.3d 942 (8th Cir. 2005). In the decision below, the court cited those decisions favorably and explained that "§ 922's 'unlawful user' element * * * require[s] * * * regular drug use." Pet. App. 7a (citations omitted).

In this case, the court of appeals correctly found that sufficient evidence supported the jury's finding that petitioner had engaged in "regular drug use" as "required under § 922(g)(3)." Pet. App. 9a. For example, petitioner testified at his trial that he used marijuana "frequently." 11/6/19 Tr. 464. Petitioner also stated during his 2013 stop that he had smoked a "blunt" and smoked "[k]ush," 11/5/19 Tr. 348—indicating his familiarity with street names for marijuana. Petitioner further stated after the 2013 stop, "[I] ain't that high," *id.* at 370, and testified at trial that he had refused to consent to a blood or urine test during the 2013 stop because he "knew [the tests] would come back positive," 11/6/19 Tr. 485—statements suggesting that petitioner was familiar with the effects of marijuana. Finally, petitioner testified that the police "normally" take marijuana "from us" and that he had previously "had officers take a bag of marijuana, pour it out, stomp on it." *Id.* at 470-471. Taken together, that evidence amply supported the jury's finding that petitioner regularly used a controlled substance—and undermines petitioner's assertion (Pet. 15) that his conviction for the 2013 incidents rested "solely on evidence that he had used marijuana earlier on the same day as his 2013 arrest."

In any event, the factbound question whether sufficient evidence supported petitioner's conviction does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when

the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so here, given that the court of appeals and the district court both found sufficient evidence of petitioner's guilt. See *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

2. Contrary to petitioner's contention (Pet. 7-17), the court of appeals' decision does not conflict with decisions of other courts of appeals by accepting a definition of "user" of a controlled substance for purposes of Section 922(g)(3) that eliminates a need to show regular drug use. As discussed above, the court below explained in earlier cases, and reaffirmed in this case, that Section 922(g)(3) requires proof of "regular drug use." Pet. App. 7a; see pp. 6-7, *supra*. Petitioner also expressly acknowledged in his court of appeals brief and his rehearing petition that the court of appeals' reading of Section 922(g)(3) accords with the decisions of other circuits on that point. See C.A. Pet. for Reh'g 6 (stating that "established Eighth Circuit precedent" requires proof of "'regular drug use'") (citation and emphasis omitted); Pet. C.A. Br. 17 ("Every United States Court of Appeals that has considered the question has agreed with [the Eighth Circuit's] construction of the statute.").

Petitioner's assertion of a circuit conflict rests on a misreading (Pet. 15) of the following sentences from the

court of appeals' opinion: "We reject [petitioner's] expansive interpretation of 'regular drug use' that would require evidence of use over an extended period. While some of our sister circuits require proof that a defendant used controlled substances regularly over an extended[] period, * * * we [have] declined to adopt such a rigorous definition." Pet. App. 8a-9a (citations omitted). As the quoted passage shows, the court of appeals did not (as petitioner suggests) hold that Section 922(g)(3) does not require proof of regular drug use. Rather, it stated only that the regular drug use need not occur "over an extended period." *Ibid.*

The sentences quoted above do reflect that courts of appeals have used somewhat different formulations in defining the term "unlawful user." See, *e.g.*, Pet. App. 9a ("regular drug use"); *Augustin*, 376 F.3d at 139 ("regular use over a period of time"); *McCowan*, 469 F.3d at 392 ("pattern of use over an extended period of time"). But the formulations, including the Eighth Circuit's, have been treated as "synonymous." *McCowan*, 469 F.3d at 392. Petitioner has not shown that the decision below will disrupt the circuits' general accord—let alone in a significant enough way to warrant this Court's review. Indeed, the petition for a writ of certiorari seeks review (Pet. i) solely on the question whether Section 922(g)(3) requires proof of regular use, which the court below agreed it does. The petition does not ask (*ibid.*) this Court to decide whether the use of a controlled substance must occur over an extended period; does not offer any argument (Pet. 17-24) that Section 922(g)(3) contains any such requirement; and does not establish (Pet. 7-17) that such a requirement would make a difference to the outcome of this case or that any

other court of appeals would have overturned a conviction on the facts of this case.

Petitioner also errs in suggesting (Pet. 15) that the Eleventh Circuit has allowed the government to obtain convictions under Section 922(g)(3) without showing regular use of a controlled substance. In fact, the Eleventh Circuit has expressly "agree[d]" with other courts of appeals that the term "'unlawful user'" connotes the "regular and ongoing use of a controlled substance." *Edmonds*, 348 F.3d at 953. Petitioner cites *United States* v. *Clanton*, 515 Fed. Appx. 826 (11th Cir. 2013), but the court in that case found a Section 922(g)(3) jury instruction inadequate on another ground and had no occasion to consider whether the statute requires proof of regular drug use. See *id.* at 830. That decision was also unpublished and thus does not bind future panels of the Eleventh Circuit. And in all events, the decision below would not implicate any conflict between the Eleventh Circuit and other circuits.

3. This case would, moreover, be a poor vehicle for resolving the question presented. Petitioner and the government jointly proposed the instruction that the district court gave regarding Section 922(g)(3)'s "unlawful user" element. See pp. 3-4, *supra*. Petitioner's current arguments are inconsistent with that instruction. For example, the requested instruction stated that "[t]he defendant must have been actively engaged in use of a controlled substance during the time he possessed the firearm," and that "the unlawful use [must] ha[ve] occurred recently enough to indicate that the individual is actively engaged in such conduct." Pet. App. 8a (citation and emphasis omitted). Petitioner now argues that "'active' use is not the same as 'regular' use," Pet. 15, and that the court of appeals erred by

considering whether the "defendant's drug use occurred 'recently,'" *ibid.* (citation omitted), even though he agreed to the instruction under circuit precedent that required "regular" use. See *Figueroa-Serrano*, 971 F.3d at 812; *Turner*, 842 F.3d at 605.

A number of doctrines foreclose petitioner from challenging instructions that the district court gave at his urging and that he did not challenge in the court of appeals. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (preclusion of contentions that were not pressed or passed upon below); *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (invited error); *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (waiver, forfeiture, and plain error). And although petitioner's position on the jury instructions does not itself foreclose a challenge to the sufficiency of the evidence, see *Musacchio* v. *United States*, 577 U.S. 237, 243-244 (2016), it does make this case an unsuitable vehicle for considering such a challenge. This Court has "treated an inconsistency between a party's request for a jury instruction and its position before this Court" as a relevant "consideration[] bearing on" whether to grant a writ of certiorari, *Wells*, 519 U.S. at 488. "[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). And the need to review this case through the lens of a factbound challenge to the sufficiency of the evidence, rather than a purely legal challenge to the instructions, would complicate the Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ANDREW C. NOLL
Attorney

SEPTEMBER 2022