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 U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

Does smoking marijuana on the day of arrest turn an otherwise lawful gun-owner into "an *unlawful user* of . . . [a] controlled substance," 18 U.S.C. § 922(g)(3) (emphasis added), subject to a fifteen-year federal sentence?[1] The Eighth Circuit said yes, upholding the conviction of petitioner Keith Carnes, a registered handgun-owner, based solely on evidence that he had smoked marijuana on the day of his arrest. It did so at the urging of the government, which told the Eighth Circuit that when the defendant's drug use is sufficiently recent, his "prior history of drug use is essentially irrelevant." Gov't C.A. Br. 24. In accepting that argument, the Eighth Circuit acknowledged but "declined to adopt [the] rigorous definition" endorsed by "[its] sister circuits," which "requires proof of regular use

[1] On June 25, 2022, Congress increased the maximum penalty for violating Section 922(g) from ten to fifteen years of imprisonment. See Bipartisan Safer Communities Act, Pub. L. 117-159, div. A, tit. II, § 12004(c), 136 Stat. 1329.

over an extended period." Pet. App. 8a-9a (citing First, Sixth, and Ninth Circuit decisions).

The government now argues that no split exists—that the Eighth Circuit misunderstood its own holding—based on a single word: *regular*. In defining what it means to be an "unlawful user," the government notes, all circuits (including the Eighth) say that the defendant's drug use must be "regular." Yet the circuits employ that word to mean radically different things. For most circuits, regular use means the defendant used drugs repeatedly "over a long period of time." *United States* v. *Tanco-Baez*, 942 F.3d 7, 25 (1st Cir. 2019). But for the Eighth and Eleventh Circuits, it suffices if "the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct." Pet. App. 7a (citation omitted).

This case vividly illustrates the difference between those two standards: Since Mr. Carnes had "just smoked" marijuana prior to his 2013 arrest, the Eighth Circuit concluded that he was "actively engaged" in drug use at the time of his gun possession. *Id.* at 9a. But other circuits have overturned convictions even where the evidence showed "drug use on the day of the offense." *Tanco-Baez*, 942 F.3d at 23. "Regular use" thus means one thing in the majority-rule circuits and something different in others.

The government's remaining arguments against granting review are makeweights. The government faults Mr. Carnes for agreeing to a jury instruction that he does not contest in this sufficiency-of-the-evidence challenge—an instruction that, in any event, is fully consistent with his argument here.

The government also accuses Mr. Carnes of ignoring evidence related to a *different* conviction that he is *not* challenging. The sole focus of Mr. Carnes's petition is his conviction for possessing a gun in connection with the 2013 traffic stop, not his conviction based on the separate 2016 incident. Evidence of his repeated drug use in 2016,

on which the government relies, accordingly has no bearing on the legal question at issue here.

Perhaps most notably of all, the government offers no argument on the merits. It never explains how a defendant who used marijuana one time on the day of arrest could be described in plain English as an "unlawful user" of a controlled substance—or, for that matter, how such a reading could be squared with the defendant's Second and Fifth Amendment rights. As Mr. Carnes's amici explain, these issues are timely, recurring, and important. The Court should grant the petition.

A. The Circuits Are Split on Section 922(g)(3)

Petitioner and the government agree on one thing: All the circuits to consider the issue have stated that, "to qualify as a 'user' of a controlled substance, the defendant must engage in *regular use* of the substance." Br. in Opp. 6 (emphasis added). But some circuits employ that phrase to require use that is "habitual" (*i.e.*, repeated over an extended period), while others treat "active" (*i.e.*, recent) use as sufficient. The difference in standards is dispositive in cases like this one, where the trial evidence showed use that was recent but *not* habitual.

1. When the courts of appeals say that drug use must be "regular," most of them are referring to "regular use *over a long period of time*." *United States* v. *Caparotta*, 676 F.3d 213, 216 (1st Cir. 2012) (emphasis added) (cleaned up). Thus, every decision on the long side of the split equates regularity with habitual and repeated use. See *United States* v. *Augustin* 376 F.3d 135, 139 (3d Cir. 2004) ("regular use over a period of time"); *United States* v. *Hasson*, 26 F.4th 610, 615 (4th Cir. 2022) ("consistent [and] prolonged"); *United States* v. *Patterson*, 431 F.3d 832, 838 (5th Cir. 2005) ("over an extended period of time") (citation omitted); *United States* v. *Bowens*, 938 F.3d 790, 793 (6th 2019) ("over an extended period of time") (citation omitted); *United States* v. *Cook*, 970 F.3d

866, 874 (7th Cir. 2020) ("habitually"); *United States* v. *Purdy*, 264 F.3d 809, 813 (9th Cir. 2001) ("over an extended period of time"); see also *United States* v. *Herrera*, 313 F.3d 882, 885 (5th Cir.2002) (en banc) ("[T]he Government conceded . . . that, for a defendant to be an 'unlawful user' for § 922(g)(3) purposes, his 'drug use would have to be with regularity and over an extended period of time.'").[2]

This requirement of habitual or repeated use is not just semantics. These circuits have overturned Section 922(g)(3) convictions for insufficient proof where the evidence showed only one-time use—often use on the day of conviction. See, *e.g.*, *Tanco-Baez*, 942 F.3d at 23, 25 (proof of "drug use on the day of the offense" was "not adequate" to show "that he had used drugs over a long period of time"); *Augustin*, 376 F.3d at 139 (government's showing "insufficient" where "[t]here was no evidence that [the defendant] had ever used drugs prior to the single use," which occurred just hours before his gun possession); *United States* v. *Sperling*, 400 Fed. App'x 765, 767 (4th Cir. 2010) (defendant's use of drugs years prior to arrest insufficient to show his use was "sufficiently consistent, prolonged, and close in time to his gun possession") (quotation marks and citation omitted). Circuits in the majority have also relied on the "habitual" nature of the defendant's drug use in rejecting constitutional challenges to Section 922(g)(3) under the Second and Fifth Amendments. See Pet. 12-14 (citing cases). The government does not dispute that all of these decisions expressly turned on the obligation to show that the defendant's drug use was repeated over an extended period.

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[2] That most of the circuits employ "regular use" this way is unsurprising: After all, something is "regular" when it is "customary" or occurs at repeated "intervals." *The American Heritage Dictionary* 1041 (2d coll. ed. 1985).

2. The government now asserts (at 6) that the Eighth Circuit is no different because it, too, "requires proof of regular use." Yet the Eighth Circuit has given that term an idiosyncratic meaning—one that encompasses all drug use "occurr[ing] *recently enough* to indicate the individual is *actively engaged* in such conduct." Pet. App. 7a (emphases added and citation omitted). In other words, the Eighth Circuit treats "regular use" as equivalent to "active engagement" (*i.e.*, recent use). That is how the Eleventh Circuit employs the term as well. See *United States* v. *Clanton*, 515 Fed. App'x 826, 829-30 (11th Cir. 2013) ("actively engaged" means that use is "ongoing" at time of gun possession, even if "infrequent").[3]

As Mr. Carnes's petition explains (at 16), active use is quite different than habitual or repeated use: Evidence might show that the defendant used drugs close in time to his gun possession, yet only once. Indeed, that is the fact pattern of this case, as well as in *Tanco-Baez* and *Augustin*. Because the court below required only recent drug use, Mr. Carnes lost; because the First and Third Circuits require habitual or repeated use, those other defendants won. The circuits' interpretations of "unlawful user" under Section 922(g)(3) may once have been "synonymous," Br. in Opp. 9 (quoting *United States* v. *McCowan*, 469 F.3d 386, 392 (5th Cir. 2006))—but no longer are.[4]

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[3] The government notes (at 10) that *Clanton* is unpublished, but it does not dispute that the decision there reflects established law in the circuit. See Pet. 16 (citing other Eleventh Circuit decisions). And the fact that *Clanton* "found [the] Section 922(g)(3) jury instruction inadequate on another ground," Br. in Opp. 10, simply ignores the part of the jury instructions ("actively engaged") that the decision *did* uphold. See 515 Fed. App'x at 830.

[4] The government is thus wrong to fault Mr. Carnes (at 8) because his court of appeals and rehearing briefs argued that Eighth Circuit precedent, like precedent elsewhere, required proof that his drug use was "regular." Until the decision below, *regular* meant *regular*:

The difference between habitual and active use should be familiar to the government. In the court of appeals, its argument *expressly* turned on that distinction. Gov't C.A. Br. 24 ("[W]here, as here, the evidence shows that a defendant was actively using a controlled substance at the time he possessed the firearm, the defendant's prior history of drug use is essentially irrelevant."). And the Eighth Circuit's ruling turned on it as well:

> We reject Carnes'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 decline[] to adopt such a rigorous definition.

Pet. App. 8a-9a.

The government now denies that the distinction even exists, implausibly asserting (at 9) that this passage merely reflects awareness "that courts of appeals have used somewhat different formulations." But the Eighth Circuit said what it meant and meant what it said: Most circuits require proof of use "over an extended period"; but the Eighth Circuit "decline[d] to adopt such a rigorous definition." Pet. App. 8a-9a.[5]

This case appears to be the first time the Eighth Circuit allowed conviction under Section 922(g)(3) based on a single incidence of drug use.

[5] Because the government "succeeded [by] persuading [the] court [of appeals] to accept" its active-engagement argument, and to reject Mr. Carnes's argument that one-time use is insufficient, *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001) (discussing judicial estoppel), there is particular irony in the government's attempt now to defeat certiorari on the supposed ground (at 9) that the distinction "would make [no] difference to the outcome of this case."

B. This Case Is a Good Vehicle for Resolving the Split

The government does not dispute the importance of interpreting "unlawful user" under Section 922(g)(3) correctly. See Drug Policy All. Amicus Br. 13-14 ("the Eighth Circuit's interpretation is particularly pernicious because it lacks any limiting principle"); Cato Inst. Amicus Br. 13 ("the Eighth Circuit's conclusion leads to unconstitutional and absurd results"). Nor does the government identify any reason why this Court would be unable to resolve the question presented if desired. Instead, the government offers a smattering of prudential reasons to wait for another case. None is persuasive.

1. Silliest among these is the government's accusation (at 9) that Mr. Carnes has sought review "solely on the question whether Section 922(g)(3) requires proof of regular use," but that he has *not* asked the Court "to decide whether the use of a controlled substance must occur over an extended period." The question presented is:

> Whether the government, to establish that the defendant is an "unlawful user" of a controlled substance, must show the defendant's *regular or habitual* drug use, or instead may establish that element based on a *single incident* of drug use on the day of arrest.

Pet. i (emphases added). The petition was unmistakably clear that Mr. Carnes is throwing in his lot with the majority of circuits that require proof of "habitual" use—*i.e.*, "consistent use over an extended period," Pet. 2—and is arguing against Section 922(g)(3) liability based on "one-time drug use," *ibid.*

The government's similar suggestion (at 9) that Mr. Carnes "does not offer any argument (Pet. 17-24) that Section 922(g)(3) contains any such [extended-use] requirement" is self-refuting. The cited pages (Pet. 17-24) are *entirely* devoted to proving that the statute "excludes

single-use defendants like Mr. Carnes," and instead requires proof of "repeated" and "habitual" use. Pet. 17 (emphasis omitted); see *ibid.* ("The text, context, structure, and history of Section 922(g)(3) all support the interpretation adopted by the majority of circuits.").

Perhaps the government is positing that a defendant can somehow use drugs repeatedly and habitually, yet *not* over an extended period? If so, it never explains how that could be possible.

2. The government argues (at 10-11) that Mr. Carnes lost his chance to raise a sufficiency challenge when he and the government jointly proposed a jury instruction, which required proof that "the defendant [was] actively engaged in use of a controlled substance during the time he possessed the firearm." Pet. App. 8a (emphases and citation omitted). This argument is doubly erroneous.

First, "[a] reviewing court's limited determination on sufficiency review . . . does not rest on how the jury was instructed." *Musacchio* v. *United States*, 577 U.S. 237, 243 (2016). Either the evidence was sufficient to support all elements of Mr. Carnes's Section 922(g)(3) conviction or it was not. "[F]ailure to object to [a particular] jury instruction thus does not affect the court's review for sufficiency of the evidence." *Id.* at 244; see Br. in Opp. 11 ("[P]etitioner's position on the jury instructions does not itself foreclose a challenge to the sufficiency of the evidence.").

Second, there is no "inconsistency" between the jury instruction to which Mr. Carnes agreed and the argument he is making now. But see Br. in Opp. 11. The agreed-upon instruction told the jury that "active" (*i.e.*, recent) drug use was *necessary* to convict, not that it was *sufficient*. Mr. Carnes has consistently argued that Section 922(g)(3) "requir[es] the government to prove that the defendant: (1) used drugs habitually or regularly; and (2) used drugs close in time to the prohibited gun possession." Pet. 2. His

agreement at trial to a jury instruction on the latter requirement is perfectly consistent with his insistence here on evidence supporting the former requirement.

3. Finally, the government argues (at 11) that "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." Yet this petition raises the purely *legal* question—disputed by the parties below and decided by the Eighth Circuit—whether Section 922(g)(3) requires proof that the defendant used drugs habitually, or instead can be satisfied by a single incidence of drug use on the day of arrest. This Court routinely resolves such interpretive issues in the context of sufficiency-of-the-evidence claims. See, *e.g.*, *Van Buren* v. *United States*, 141 S. Ct. 1648, 1653-54 (2021); *Kelly* v. *United States*, 140 S. Ct. 1565, 1568-69 (2020).

In any event, the evidentiary background only helps illustrate Mr. Carnes's legal argument. All the evidence on which the government relies falls into one of two categories: irrelevant or inadequate.

Irrelevant. The government fails to acknowledge that most of the evidence to which it points (at 7) has nothing to do with Mr. Carnes's conviction based on the 2013 traffic stop—the only conviction at issue here. Rather, it concerns his *separate* conviction based on the 2016 incident.

Thus, Mr. Carnes's statement at trial that he "smoke[s] marijuana," D. Ct. Doc. 144, at 459, came in response to the prosecutor's questions about drug "tests" that were conducted "when you were hospitalized," *ibid.*—that is, when he was hospitalized in connection with the 2016 incident. His statement, a few transcript pages later, about smoking marijuana "frequently," *id.* at 464, responded to questions about whether he "used marijuana on August 30th of 2016," *ibid.* And his statements that police officers "normally" take marijuana "from us," and

that officers once took "a bag of marijuana [from him], pour[ed] it out, and stomp[ed] on it," were made in response to the question: "Back in 2016, you knew it was illegal to use marijuana, true?" *Id.* at 470-71.

Inadequate. The rest of the evidence on which the government relies (at 7) to show that Mr. Carnes used marijuana prior to the 2013 traffic stop is inadequate—almost comically so:

- He referred to smoking "'Kush'" and a "'blunt'" on the day of his arrest, thereby showing "familiarity with street names for marijuana"; and
- he said he "'knew the [drug] tests would come back positive,' . . . suggesting that [he] was familiar with the effects of marijuana."

Br. in Opp. 7 (quoting D. Ct. Doc. 143, at 348; D. Ct. Doc. 144, at 485). If that kind of "familiarity" were sufficient to prove habitual drug use, then much of the country would be in serious legal jeopardy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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