No._____

In the Supreme Court of the United States

JONATHAN ALEXANDER MORALES-LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether 18 U.S.C. § 922(g)(3), prohibiting an unlawful user from possessing a firearm, is unconstitutionally vague.

Related Proceedings

United States v. Morales-Lopez, 92 F.4th 936 (10th Cir. 2024)

United States v. Morales-Lopez, No. 2:20-cr-00027, 2022 WL 2355920 (D. Utah June 30, 2022)

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Petition for Writ of Certiorai

Petitioner Jonathan Alexander Morales-Lopez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

Opinions Below

The opinion of the court of appeals is reported at 92 F.4th 936 and reprinted in the Appendix to the Petition (App.) 2a-18a. The opinion of the district court is unpublished and is reprinted at App. 19a-46a.

Jurisdiction

The court of appeals issued its decision on February 9, 2024. App. 2a-18a. On May 3, 2024, the Court extended the time to file a petition for a writ of certiorari to June 8, 2024. *See* No. 23-A-985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

Relevant Constitutional and Statutory Provisions

The relevant statutory provision, Section 922(g)(3) of Title 18 of the U.S. Code, is reproduced at App. 24a.

Introduction

An element of proving a violation of 18 U.S.C. §922(g)(3) is that the defendant "is an unlawful user of…any controlled substance."[1] Another element is that this person must possess a firearm at some time relevant to being an unlawful user. But these elements lack statutory definition and defy any coherent, ordinary

[1] Section 922(g)(3) also prohibits an addict from possessing a firearm. Petitioner does not challenge the constitutionality of this portion of the statute.

definition. *Minor v. Mechanics' Bank of Alexandria*, 26 U.S. 46, 64 (1828) (the ordinary meaning of language is presumed). A statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law[.]" *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

This petition illustrates how these two elements—being an unlawful user and possessing a firearm within some time uncertain of being an unlawful user—consistently defy uniform interpretation and application throughout the country. In the ordinary course, a Petitioner asks this Court to pick a side when resolving a circuit split. To be sure, a circuit split exists. However, the circuit split is evidence of the unconstitutional vagueness that plagues § 922(g)(3). Accordingly, Petitioner is asking this Court to declare § 922(g)(3) unconstitutionally vague.

Petitioner was indicted in Utah for being an unlawful user of a controlled substance who possessed a firearm and for possessing a stolen firearm. Petitioner admitted to using controlled substances approximately five weeks prior to being found in possession of a firearm; Petitioner denied being under the influence at the time of his arrest. Throughout the trial, Petitioner maintained he was not an unlawful user at the time he possessed the gun.

The jury was instructed that an "unlawful user of a controlled substance is one who has been using a controlled substance on a regular and ongoing basis at the

time he was found to be in possession of a firearm." During deliberations, the jury submitted a question to the court:

> In reference to "regular and ongoing basis" can we get clarity on the time frame in which you would no longer be considered "regular and ongoing basis" [sic]?

App. 38a. Ultimately, the jury returned a guilty verdict on both counts. The district court, after the verdict and upon Petitioner's motion, vacated the §922(g)(3) conviction, finding the statute unconstitutionally vague on its face and as applied to Petitioner. App. 19a-46a. The Tenth Circuit disagreed. It held that precedent foreclosed Petitioner from bringing a facial vagueness challenge without a prior successful as-applied challenge, and that he loses the as-applied challenge. App. 2a-18a.

Had Petitioner's case been brought in the Third Circuit, the outcome would have been different; Petitioner would have been acquitted at trial of the § 922(g)(3) charge as the jury would have been instructed to apply a stricter standard. *United States v. Augustin* held that any qualifying drug use must be "at or about the time of possession of the firearm, …not remote in time or an isolated occurrence." 376 F.3d 135, 138 (3rd Cir. 2004). There, the defendant had smoked pot early in the evening and by midnight (of the same day), a crime spree of noteworthy magnitude was underway. *Id.*, 136-37. *Augustin* held that using drugs on the same night as possessing a gun is insufficient to convict someone of violating § 922(g)(3).

That a person can be found guilty in the Tenth Circuit and acquitted in the Third Circuit is evidence of the unconstitutional indeterminacy of § 922(g)(3). But the split is broader and more varied than the two positions staked out by the Tenth and Third Circuits. The remaining circuits fall into one of two definitional camps, further evidence of the ambiguity as to the statute's reach. The lack of circuit unanimity illustrates the unconstitutional vagueness of § 922(g)(3); the statute fails to provide adequate notice of what conduct is prohibited and in the breach, courts have improvidently "ma[d]e a new law, not[] enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875).

This Court should grant certiorari and hold that § 922(g)(3) is unconstitutionally vague. There is no uniform definition of unlawful user among the circuits because the statutory language is, by its nature, too vague for constitutional application. And while all circuits agree that a temporal nexus is essential, there is no uniform or even ascertainable standard as to the reach of said temporality. This issue is significant; the vagueness of § 922(g)(3) leaves uncertain what is required for conviction and has allowed courts to rewrite the statute to make it workable. The Tenth Circuit's position is wrong. It reinforces the uncertainty surrounding § 922(g)(3) and does so by contravening this Court's long-standing tradition of allowing facial challenges.

Statement of the Case

A. Factual Background

On January 10, 2020, Petitioner Mr. Morales-Lopez and a co-defendant stole guns and ammunition from a Sportsman's Warehouse store. ROA Vol. I, 252-53.[2] They used the co-defendant's car in the robbery. *Id*. Petitioner was arrested upon leaving the business, searched twice by law enforcement, and then placed in backseat of a patrol car. ROA Vol. II, 155-56, 160. The first search produced only a firearm; the second search produced nothing. *Id*. Officers failed to inspect the rear of the vehicle before placing Petitioner inside. *Id*., 160. Police discovered a user-amount of methamphetamine in the car after removing Petitioner from it. ROA Vol. I, 253; ROA Vol. II, 225.

During a custodial interview, Petitioner admitted to buying meth and using it in early December 2019. At trial, there was no evidence that Petitioner used drugs any time in the five weeks preceding his arrest. ROA Vol. I, 254, 285-89.

B. Procedural History

1. The government charged Petitioner with possession of a stolen firearm, a violation of 18 U.S.C. § 922(j), and possession of a firearm by an unlawful user of a controlled substance, a violation of 18 U.S.C. § 922(g)(3). One element of § 922(g)(3) is that the defendant is an unlawful user of any controlled substance. Another

[2] "ROA Vol. I" and "ROA Vol. II" refer the record on appeal in the Tenth Circuit.

element is that a defendant is an unlawful user when possessing a firearm. Petitioner continues to insist that these elements were not satisfied.

The evidence at trial showed Petitioner using drugs approximately five weeks prior to his arrest in January 2020. ROA Vol. I, 254, 285-89; Vol. II, 208. The government also introduced evidence that police found a user-amount of drugs in the patrol car where Petitioner had been sitting (despite Petitioner having been searched by law enforcement, twice over). ROA Vol. II, 153,155-56, 160, 225. There was no evidence that Petitioner used drugs at any point during the five weeks leading up to his arrest. And the government's expert witness testified that the user amount of drugs discovered in the back of the patrol car doesn't indicate *when* a person last used drugs, *when* the person obtained the drugs, nor could it establish anything pertaining to or revealing about a person's drug use history or pattern of use. ROA, Vol. II, 231.

2. At the close of the case and before it was submitted to the jury, Petitioner moved for a directed verdict on both counts. Petitioner also moved to dismiss the § 922(g)(3) count on the grounds that statute was unconstitutionally vague, both as applied and on its face. Petitioner argued the statute failed to define unlawful user, as well as failing to provide a temporal nexus between possessing a firearm and being an unlawful user. The trial court reserved the decision and allowed the case to go to the jury. App. 48a-59a.

3. The jury was instructed, in relevant part, that an "unlawful user of a controlled substance is one who has been using a controlled substance on a regular and ongoing basis at the time he was found to be in possession of a firearm." App. 38a. During deliberations, the jury submitted the following question:

> In reference to "regular and ongoing basis" can we get clarity on the time frame in which you would no longer be considered "regular and ongoing basis" [sic]?

App. 38a.

The district court and counsel for both parties "spent significant time" trying to craft "an appropriate response to the jury's question with no success[.]" *Id.* The jury returned a guilty verdict on both counts before the court and counsel determined how to answer the question. App. 38a-39a.

4. After the verdict was returned, Petitioner renewed his motion for judgment of acquittal and moved to dismiss the § 922(g)(3) charge on the grounds it is unconstitutionally vague, both facially and as applied. Dist. Ct. Dkts. 155 and 156.[3] The district court denied Petitioner's motion for acquittal but granted his motion to dismiss the § 922(g)(3) charge on the grounds that the statute is unconstitutionally vague, both facially and as applied. App. 19a-46a.

[3] "Dist. Ct. Dkt." refers to the docket in *United States v. Morales-Lopez* (D. Utah No. 2:20-cr-00027-JNP-1).

5. The government appealed the dismissal of the § 922(g)(3) count to the Tenth Circuit. There, Petitioner renewed his argument that the statute was vague both on its face and as applied to him.

The Tenth Circuit rejected Petitioner's arguments, first reasoning that mounting a successful as-applied challenge is an absolute prerequisite to bringing a facial challenge, and that since Petitioner could not survive an as-applied challenge, he was barred from raising a facial challenge. App. 2a-18a. The circuit court suggested that because the statute only required the government to "introduce[] sufficient evidence of a temporal nexus between the drug use and firearm possession," it could not be vague. App. 15a (*quoting United States v. Edwards*, 540 F.3d 1156, 1162 (10th Cir. 2008)). Finally, the circuit used the following data points to support the conclusion that Petitioner's "drug use appear[ed] to have been still regular and ongoing" as of his arrest: Petitioner admitted using drugs five weeks prior to his arrest, Petitioner committed a crime with someone who *was* an unlawful user, and the inferences that the drugs in the back seat of the patrol car were for personal use and likely belonged to Petitioner. App. 17a-18a.

Reasons for Granting the Writ

A. Inconsistent definitions throughout the circuits illustrate the statute's hopeless indeterminacy.

In the Tenth Circuit, a person is guilty of violating § 922(g)(3) if they've used drugs within at least five weeks of possessing a gun. But in the Third Circuit, that

same person would not be guilty. These approaches generate opposite outcomes—guilt or innocence—and myriad approaches taken by the other circuits only expand the impossibility of knowing what conduct is actually prohibited.

1. The Third Circuit in *Augustin* held that the plain language of § 922(g)(3) requires proof of unlawful drug use at or near the time of possession, and an isolated occurrence of drug use does not transform a person into an unlawful user. 376 F.3d at 138. The statute's "use of the present tense" clearly demonstrates Congress' intent to "cover unlawful drug use at or about the time of possession," not drug use "remote in time or an isolated occurrence." *Id*. There, the defendant smoked pot early in the evening, and then later that same night, went on a violent crime spree. This evidence was insufficient to support a § 922(g)(3) conviction.

Courts within the Third Circuit continue to enforce this position. In *United States v. Williams*, the district court gave the following instruction, which resulted in a *not-guilty* verdict for the § 922(g)(3) count:

> The term "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. Mr. Williams must have been actively engaged in use of a controlled substance during the period of time he possessed the firearm or ammunition, but the law does not require that he used the controlled substance at the precise time he possessed the firearm or ammunition.

Transcript of Criminal Jury Trial Day 3, at 225, No. 1:10-cr-00341 (M.D. Pa. filed June 17, 2013), ECF No. 166.

2. The Tenth Circuit, by contrast, holds that a person is an unlawful user for purposes of § 922(g)(3) when the government "introduce[s] sufficient evidence of a temporal nexus between the drug use and firearm possession." App. 15a. So long as the defendant's use of a controlled substance is "regular and ongoing" during the "same time" as his firearm possession, the §922(g)(3) conviction stands. *Id*. (*quoting United States v. Bennett*, 329 F.3d 769, 778 (10th Cir. 2003)).

With the concepts of regular and ongoing drug use at the same time of firearm possession in mind, the Tenth Circuit looked at the following facts in assessing Petitioner's case:

- Petitioner's admitted drug use some five weeks prior to possessing a gun

- a personal-use quantity of drugs found in the back seat of a patrol car where Petitioner had been sitting

- Petitioner committed a crime with someone who was actively using drugs

App. 17a.

The Tenth Circuit concluded that it could not "ignore the reasonable inferences to be drawn from the circumstantial evidence presented—inferences that could well lead a reasonable person to conclude [Petitioner's] drug use was regular and ongoing at the time he possessed a … firearm." App. 17a. The circuit reinforced its position with this rhetorical query: "If [Petitioner's] regular and ongoing use of methamphetamine in December 2019 was no longer regular and ongoing at the time of his arrest, why did he arrive to rob a gun store in a vehicle with a man he had

used drugs with just the previous month and that contained not only methamphetamine and a lighter, but, sitting in the center console in plain view, a pipe with methamphetamine residue?" *Id*.

3. The circuits apply different judicial glosses to § 922(g)(3) and define "unlawful user" with varied and indeterminate phrases.

"User" is a status based upon an act. One "uses" a drug on a particular occasion, and if a factfinder is going to describe a person as a user, it must employ some inner sense of a relationship between an act and a status that is essentially a feeling about language. How many uses, over what period of time, are required in order to change one who has used drugs into a user of drugs? At what point does that status begin or end? We simply don't know, and the varied and indeterminate phrases used by courts to describe this relationship fail to offer consistent or even clarifying guidance, as they are simply vague ways to describe an inherently vague concept.

At the end of each section, Petitioner includes summary charts of the circuits' various approaches for ease of reference.

a. The Eighth, Eleventh and Second Circuits use both the indeterminate phrases of "actively engage" and "ongoing drug use" to define an unlawful user.

In *United States v. Boslau*, the Eighth Circuit affirmed an instruction that defined the requisite unlawful use of a controlled substance as "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." 632 F.3d 422, 429 (8th Cir. 2011); *see also United States v. Carnes*, 22 F.4th 743, 748-49 (8th Cir. 2022) (rejecting a definition that requires proof of regular drug use over an extended period).

Relying on its Guidelines jurisprudence, the Eleventh Circuit demands proof that a "defendant's use must be ongoing[.]" *United States v. Clanton*, 515 Fed.Appx. 826, 830 (11th Cir. 2013) (approving jury instruction that an unlawful user is "actively engaged" in the use of a controlled substance); *cf. United States v. Bernadine*, 73 F.3d 1078, 1082 (11th Cir. 1996) (although defendant "did at one time smoke pot," it was clear that he had quit, and proffers of witnesses who would say defendant smoked pot with them "at some unspecified time in the past" were insufficient to apply the label of unlawful user) (cleaned up).

The Second Circuit recognizes that "illicit drug use falls on a continuum: some may use drugs with great regularity over time while others may try an illegal substance one time only. … [W]herever a defendant may fall on this continuum, prohibited drug use is illegal." *United States v. Nevarez*, 251 F.3d 28, 30 (2d Cir. 2001) (per curiam). Notwithstanding, someone becomes an 'unlawful user' for purposes of § 922(g)(3) if there is a "pattern of use" or "ongoing" drug use. *United States v. Yepez*, 456 Fed.Appx. 52, 54-55 (2d Cir. 2012).

United States v. Carnes, 22 F.4th 743, 748 (**8th Cir. 2022**)	the unlawful use has occurred recently enough to indicate that the individual is **actively engaged** in such conduct

United States v. Clanton, 515 Fed.Appx. 826, 830 (**11th** Cir. 2013)	**actively engaged** in the use of a controlled substance
United States v. Yepez, 456 Fed.Appx. 52, 54 (**2d Cir**. 2012)	**engaged** in a pattern of use of controlled substances

b. The First, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits deem someone to be an unlawful user if they use drugs habitually or regularly without identifying even the outer limits of what that means.

The Seventh Circuit deems the phrase "unlawful user" synonymous with "habitual drug abuser," does not differentiate this from an addict, and offers no further clarification. *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010).

United States v. Yancey, 621 F.3d 681, 684 (**7th** Cir. 2010)	unlawful user is a **habitual** drug user

The Sixth Circuit says an "unlawful user" is someone who "took drugs with regularity, over an extended period of time," and then fails to define both "regularity" and "extended period of time." *United States v. Bowens*, 938 F.3d 790, 793 (6th Cir. 2019). The First and Ninth Circuits' definitions are equally toothless: an unlawful user is someone who "engages in (1) regular use (2) over a long period of time[.]" *United States v. Caparotta*, 676 F.3d 213, 216 (1st Cir. 2012) (cleaned up and internal quotation omitted); *United States v. Purdy*, 264 F.3d 809, 813 (9th Cir. 2001) (same). The Fifth Circuit ultimately reaches the same conclusion, that to be an unlawful user requires drug use that is regular and over an extended period of

time. *United States v. Patterson*, 431 F.3d 832, 838 (5th Cir. 2005). A critical data point in coming to this conclusion for the Fifth Circuit is the government's statement at "en banc oral argument: 'We certainly wouldn't charge one time use. It would have to be over a period of time.' " *United States v. Herrera*, 313 F.3d 882, 885 (5th Cir. 2002) (en banc),

United States v. Caparotta, 676 F.3d 213, 216 (**1st** Cir. 2012)	an 'unlawful user' is one who engages in (1) **regular use** (2) over a long period of time
United States v. Bowens, 938 F.3d 790, 793 (**6th** Cir. 2019)	the government must prove that the defendant took drugs with **regularity**, over an extended period of time
United States v. Purdy, 264 F.3d 809, 813 (**9th** Cir. 2001)	the government must prove the defendant took drugs with **regularity**, over an extended period of time
United States v. Patterson, 431 F.3d 832, 838 (**5th** Cir. 2005)	the government must prove the defendant took drugs with **regularity**, over an extended period of time

Intra-circuit confusion is common. For example, the Ninth Circuit also holds that "unlawful user" be given the "common sense meaning of the phrase," fails to identify the commonsense meaning, but then suggests the statute is satisfied when the drug use is prolonged. *United States v. Ocegueda*, 564 F.2d 1363, 1365-66 (9th Cir. 1977). *Oceguada* decides the question of whether someone is an unlawful user by noting what *would not* fit a common sense meaning of the phrase: if the defendant "used a drug that may be used legally by laymen in some circumstances,

or had his use of heroin been infrequent and in the distant past," he might not be liable under § 922(g)(3). *Id.*, 1366. The Fourth Circuit uses the same amorphous term as the Ninth, prolonged, also without any clarification, but adds the word consistent. *United States v. Hasson*, 26 F.4th 610, 615 (4th Cir. 2022) (a person is an unlawful user if their drug use is "consistent, prolonged[.]"). What it takes to be an unlawful user is still unclear.

United States v. Ocegueda, 564 F.2d 1363, 1365-66 (**9th** Cir. 1977)	a defendant's use must be **prolonged**
United States v. Hasson, 26 F.4th 610, 615 (**4th** Cir. 2022)	a defendant's use must be **consistent, prolonged**

4. The circuits agree that a temporal nexus is essential, but there is no consensus on *what* that nexus is; instead, the circuits use various words with undefined boundaries to establish the requisite nexus.

a. Using different linguistic cues, the First, Sixth, Seventh, Ninth, and Eleventh Circuits all require the unlawful user to possess the firearm contemporaneously with being an unlawful user.

The Sixth Circuit phrases the qualifying drug use as being "contemporaneous[] with his…possession of a firearm," *Bowens*, 938 F.3d at 793 (*quoting United States v. Burchard*, 580 F.3d 341, 350 (6th Cir. 2009)), as do the Seventh and Ninth Circuits. *Yancey*, 621 F.3d at 687, *Purdy*, 264 F.3d at 812. The Eleventh Circuit also uses contemporaneous for the temporal nexus and has found error when district courts attempt to clarify contemporaneous. *Clanton*, 515 Fed.Appx. at 830 (error for district court to add that "[s]uch use is not limited to the

use of drugs on a particular day or within a matter of days or weeks before"); *United States v. Edmonds*, 348 F.3d 950, 953 (11th Cir. 2003) (must be unlawful user "during the same time period as the firearm possession").

These positions fail to identify limits to the temporal nexus implicit in the statute. The ordinary meaning of the word 'contemporaneous' is "existing, occurring, or originating during the same time." https://www.merriam-webster.com/dictionary/contemporaneous. The example provided by the Cambridge Dictionary exposes the vagueness of having 'contemporaneous' define the temporal nexus: "The two events were more or less contemporaneous, with only months between them." https://dictionary.cambridge.org/dictionary/english/contemporaneous. If contemporaneous is measured in months, where does the relevant time-period end? How many months is enough months for conviction under the statute? It is impossible to know *when* the gun possession becomes legal (or illegal) when the combination of being an unlawful user and possession within months of each other *might* be prohibited.

The First Circuit takes a slightly broader approach, defining the requisite temporal nexus as drug use "proximate to or contemporaneous with the possession of the firearm." *Caparotta*, 676 F.3d at 216. Proximate is "immediately preceding or following (as in a chain of events, causes, or effects)," https://www.merriam-webster.com/dictionary/proximate, or "closest in time, place, relationship, etc. to

something." https://dictionary.cambridge.org/dictionary/english/proximate. Then the question is, in the First Circuit, does the unlawful user status immediately precede or follow possessing a gun, *or* be within some number of months of said possession? Again, that is no standard at all.

United States v. Caparotta, 676 F.3d 213, 216 (**1st** Cir. 2012)	proximate to or contemporaneous with the possession of the firearm
United States v. Bowens, 938 F.3d 790, 793 (**6th** Cir. 2019)	contemporaneously with his purchase or possession of a firearm
United States v. Purdy, 264 F.3d 809, 812 (**9th** Cir. 2001)	contemporaneous with his firearms purchases
United States v. Nevarez, 251 F.3d 28, 30 (**2d Cir.** 2001) (per curiam)	contemporaneous with the commission of the offense
United States v. Yancey, 621 F.3d 681, 687 (**7th Cir.** 2010) (per curiam)	contemporaneous with the gun possession
United States v. Clanton, 515 Fed. Appx. 826, 830 (**11th** Cir. 2013)	contemporaneous with the gun possession

b. The Second and Fourth Circuits require that the gun possession be close in time to someone being an unlawful user.

To sustain a § 922(g)(3) conviction in the Fourth Circuit, the government must prove the qualifying drug use was "close in time" to the defendant's possession of the gun. *Hasson*, 26 F.4th at 615-16. Close only has meaning when compared to something else—and in this instance, the comparator is unknown. Close is relative and lacks knowable boundaries.

The Second Circuit fares no better. The requisite temporal nexus required in the Second Circuit is that a defendant was engaged in the requisite pattern of drug use "that reasonably covers the time of the events charged[.]" *Yepez*, 456 Fed.Appx. at 54. The term 'reasonably' is an adverb that modifies the verb 'cover,' but to no end. Reasonably is a judgment, one without boundaries, and just as with the word 'close,' it has meaning only by referencing something else. Terms that take shape by reference to an unknown cannot be the basis for imposing criminal liability.

United States v. Yepez, 456 Fed Appx 52, 54 (**2d Cir**. 2012)	reasonably covers the time of the events charged
United States v. Hassan, 26 F.4th 610, 615-16 (**4th** Cir. 2022)	close in time to his firearm possession

c. The Eighth Circuit acknowledges the need for a temporal nexus and refuses to attempt to define it.

The Eighth Circuit agrees with other circuits that a temporal nexus is required to sustain a § 922(g)(3) conviction, but fails to do more than say possession must be at the same time as active drug use. *Carnes*, 22 F.4th at 748. Rejecting the requirement that the drug use and gun possession be simultaneous and refusing to say possession must be contemporaneous with being an unlawful user, the Eighth Circuit says so long as a defendant was "actively engaged in use of a controlled substance during the time he possessed the firearm," the temporal nexus is satisfied. *Id. See also Boslau*, 632 F.3d at 429 ("such use [of a controlled substance] 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.").

5. The confusion about § 922(g)(3) is entrenched.

Depending on the circuit, the phrase "unlawful user" means anything ranging from someone who once sampled an illegal drug many years ago to someone who has been daily using such drugs, and possibly for many years. The dictionary definitions of "user" provide no help—the term is indeterminate by its nature and defined in the dictionary only in a circular manner: a user is one who uses. When courts try to narrow the scope of what the word "user" means, they cannot merely choose from among available definitions, or even a commonsense understanding. Consequently, the courts have added modifying words that are hardly less vague than the phrase they seek to clarify.

The imposition of a judicially-created temporal nexus fails to save the statute from being unconstitutionally vague. Just as with the phrase "unlawful user," there is no prevailing understanding of the necessary timing between possessing the gun and being an unlawful user. Courts' efforts to create a sufficiently narrow definition for the temporal nexus have resulted in vague phrases with undefined boundaries. The additive effect of the vagueness of both 'unlawful user' and indeterminate temporal nexus leaves little room to doubt that §922(g)(3) is unconstitutionally vague.

Courts across the country have expressed concern about the validity of § 922(g)(3). *See United States v. Reed*, 114 F.3d 1067, 1071 (10th Cir. 1997) ("application of the statute … still less than ideally clear, because of the undefined term "user" and … that the term must connote some temporal element.); *United States v. Claybrook*, 90 F.4th 248, 253 (4th Cir. 2024) ("Admittedly, the legal contours of "unlawful user" of a controlled substance are not well defined within the statute."); *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003), vacated, 543 U.S. 1099 (2005), reinstated, 414 F.3d 942 (8th Cir. 2005) (per curiam) (§922(g)(3) risks "being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use."); *United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002) ("the exact reach of the statute is not easy to define"); *United States v. Buchard*, 580 F.3d 341, 347-48 (6th Cir. 2009) (citing *Turnbull*, 349 F.3d at 561, and other circuits for proposition that statute would be unconstitutionally vague without judicially-created temporal nexus); *United States v. Richard*, 350 Fed.Appx. 252, 262-63 (10th Cir. 2009) (recognizing other circuits' statements that § 922(g)(3) "runs the risk of being unconstitutionally vague without a judicially created temporal nexus between the gun possession and regular use"); *United States v. Holmes*, No. 15-cr-129 (E.D. Wisc. 2016), ECF No. 35, slip op. at 5 ("the term "unlawful user" may lack the concreteness of some of the other prohibited person definitions in § 922(g)"). But the same courts continue to reject vagueness challenges.

There is no reason to believe that any circuit will reconsider its interpretation of § 922(g)(3). Indeed, several circuits have reaffirmed their position many times over. *United States v. Cook*, 970 F.3d 866, 874 (7th Cir. 2020) (relying on *Yancey*, 621 F.3d 681, for definition of unlawful user and judicially-created temporal nexus); *United States v. Lundy*, 2021 WL 5190899 (6th Cir. Nov. 9, 2021) (unpubl) (relying on *Buchard* that unlawful user used drugs with regularity over an extended period of time, and contemporaneous with firearm possession); *United States v. Dugan*, 450 Fed.Appx. 633, 637 (9th Cir. 2011) (relying on *Purdy* for definition of unlawful user and judicially-created temporal nexus); *United States v. Espinoza-Roque*, 26 F.4th 32, 35 (1st Cir. 2022) (relying on *Caparotta* for definition of unlawful user and judicially-created temporal nexus).

Only this Court can resolve this enduring uncertainty as to the validity of § 922(g)(3).

B. There is a pressing need to resolve the uncertainty as to constitutionality of § 922(g)(3).

1. Section 922(g)(3) "offers no standard of conduct that is possible to know." *Int'l Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914); *United States v. Ragen*, 314 U.S. 513, 522 (1942) (a statute is "violative of the defendant's constitutional rights" when the standard by which a defendant's guilt is assessed is determined by the trier of fact and will be void); *cf. Gorin v. United States*, 312 U.S. 19, 26 (1941) (recognizing history of invalidating laws that that force a person, "at his peril, to

speculate as to whether certain actions violate[] the statute") and at 27 n.12 (collecting Supreme Court cases of criminal statutes found unconstitutionally vague). It leaves unknown both what the qualifying use of a controlled substances is and the requisite temporal nexus for possessing a weapon vis-a-vis the drug use. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.") and n.2 (collecting cases saying the same). The persistent uncertainty about what conduct is actually prohibited by § 922(g)(3) is manifestly unjust.

2. The statute contains two variables. The first, unlawful user, eludes both statutory and common-sense definitions. There is a marked absence of consistency among the circuits to provide sufficient notice of *what* conduct is prohibited. The second is the judicially-created temporal nexus of possessing a gun in relation to the unlawful use. While Congress used the present tense vis-à-vis unlawful user, it was wholly silent as to *when* this unlawful user could or could not possess a gun. The interaction of these two unknowns produces more uncertainty than is tolerable under "the guarantee of due process." *Sessions v. Dimaya*, 584 U.S. 148, 159 and n.3 (2018).

3. The circuits' unwillingness to entertain facial challenges to § 922(g)(3) also has significant implications in other contexts. The ability to bring a facial vagueness challenge has a substantial impact on preserving separation of powers and ensuring

sufficient notice of what is prohibited conduct. Allowing vagueness challenges protects both of these foundational principles: prior notice of prohibited conduct and separation of powers.

Statutory clarity is a bedrock requirement of criminal jurisprudence. Vagueness is the reverse, a problem regularly corrected by this Court's long tradition of invalidating laws that fail to provide notice of prohibited conduct. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (collecting cases that hold "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.").

"Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect." *United States v. Davis*, 588 U.S. 445, 451 (2019). While only elected representatives can criminalize conduct, "[v]ague statutes threaten to hand responsibility for defining crimes to relatively unaccountable" officials in the judicial and executive branches, which "erod[es] the people's ability to oversee the creation of the laws they are expected to abide." *Id.* Allowing vague statutes to persist risks moving the legislative process from "an open and public debate" to the "comparatively obscure confines of cases and controversies." *Dimaya*, 584 U.S. at 182 (Gorsuch, J., concurring). "For just these reasons, Hamilton warned, while "liberty can have nothing to fear from the

judiciary alone," it has "every thing to fear from" the union of the judicial and legislative powers." " *Id*. (*quoting* The Federalist No. 78, at 466).

C. This case is an excellent vehicle to evaluate the constitutionality of 922(g)(3).

This case presents a clean vehicle to resolve the question presented.

Petitioner preserved the vagueness issue by first challenging the statute's validity at the district court. Dist. Ct. Dkt. 156. The district court's ruling engaged this Court's vagueness jurisprudence, and determined § 922(g)(3) to be unconstitutionally vague, as it both failed to provide notice and invited "courts, rather than the legislature, to decide what constitutes a crime." App. 32a-33a. The district court also found the statute vague *as applied*; the trial court was unable to "identify a core of conduct" clearly covered by § 922(g)(3), and in any event, possessing a weapon five weeks after admitting to using drugs was not clearly prohibited conduct. App. 21a-42a.

The case arises on direct appeal. No jurisdictional problems exist, no preservation problems exist, and facts are similarly undisputed. The record is limited and the question presented is outcome-determinative.

This case also has the benefit of involving both factors contributing to the vagueness of § 922(g)(3): is someone an unlawful user because s/he admitted to drug use once in the past five weeks, and even if so, does the judicially-created temporal nexus reach far enough to include possession of the firearm?

D. The Tenth Circuit's analysis is wrong.

The Tenth Circuit's vagueness analysis is wrong on two counts. First, it uses judicially-created definitions to limit the reach of the statute in determining if Petitioner's conduct was prohibited. *See* App. 15a. Second, the Tenth Circuit refuses to engage with the ultimate issue—that § 922(g)(3) is unconstitutionally vague—and the offered explanation of *why* it cannot address the facial challenge runs counter to historical principles of statutory construction, is unduly rigid, and transgresses the separation between the judiciary and the legislature.

1. The Tenth Circuit rejects the ordinary tools of statutory construction, ignoring the obvious facts that the plain text of § 922(g)(3) defines unlawful user only with reference to what they are not (addicts) and lacks any indicia of a temporal nexus.

"The ordinary meaning rule is the most fundamental semantic rule of interpretation." Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 69 (2012). *See also Lamie v. U.S. Tr.,* 540 U.S. 526, 534 (2004) ("when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms"). "[W]ords will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). "We assume that legislators use words in their ordinary, everyday senses[.]" *Arave v. Creech*, 507 U.S. 463, 472 (1993). *See also Smith v. United States,* 508 U.S. 223, 228 (1993) ("When a

word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning").

Consulting a dictionary for a definition of user does not help—the ordinary definition of "user" fails to provide any limits on the reach of § 922(g)(3). Indeed, a user is "one that uses." https://www.merriam-webster.com/dictionary/user. Black's Law Dictionary supplies a similarly expansive definition: a user is "[s]omeone who uses a thing." Black's Law Dictionary (10th ed. 2014). Based on those definitions, an unlawful user could be anyone who uses, at any point in their life, any of the myriad substances on the federal schedule. Even if "user" implicitly refers to present use, *see e.g., Augustin*, 376 F.3d at 138, *Espinoza-Roque*, 26 F.4th at 35, what it takes to become a member of the prohibited class remains unclear: How does one define use in the present tense? Is a single instance of drug use sufficient? Two uses? Fifty? Is anyone who has used in the past and may use again a present user? If not, when does "use" begin and end? The statute offers no clues.

Context can also provide guidance when attempting to interpret a statute. Per the statute, an unlawful user is someone different than an addict. Congress defines addict as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1). Further confusion arises as Congress limits the reach of 'addict' to only those "so far addicted" as to have lost self-control. Implicit in

this definition is the notion that addiction covers a range of behavior, but Congress chose only to criminalize those addicts who have lost self-control, or those whose conduct threatens public morality or safety. But what type of addiction doesn't threaten public safety? And public morality is an evolving concept that lacks limits until after the fact of transgression—and then will likely change over time. Since an unlawful user is someone who is not an addict, and the word 'addict' is not without definition problems itself, attempting to gauge what is and isn't an 'unlawful user' by a constantly shifting standard is a fool's errand.

In addition to the vagaries about how often, regularly, and/or intensely someone must use drugs to belong to the class of "unlawful users," there is uncertainty as to how the status of being an unlawful user correlates with the timing of possessing a gun. Courts have inconsistently described the requisite temporal nexus between being an unlawful user and possessing a firearm, oftentimes working backwards from the premise that there must be some temporal nexus but never defining that nexus. This indeterminacy stems from courts trying to save what is likely an unconstitutional statute. *See, e.g.,* App. 15a (explaining that a judicially-created temporal nexus remedies any potential vagueness problem); *Turnbull*, 349 F.3d at 561 ("[t]he term 'unlawful user' is not otherwise defined in the statute, but courts generally agree the law runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use."). Those efforts are for naught. Beyond

identifying the necessity of *some* chronological connection between being an unlawful user and possessing the firearm, the range of conduct prohibited is still unknown—and to be certain, varies between the circuits.

Attempting to weave the pieces of § 922(g)(3) together, the statute's inadequacies and variable meanings are obvious. The term 'unlawful user' defies definition. The temporal nexus varies from circuit to circuit, and is often defined after the fact, by an appellate court reviewing evidence in a light most favorable to the verdict. There is no notice, just post-hoc affirmation of guilt. It is clear that § 922(g)(3) fails to "express its will in language that need not deceive the common mind." *Reese,* 92 U.S. at 220. In other words, § 922(g)(3) is unconstitutionally vague.

2. The Tenth Circuit's myopic approach to statutory challenges ignores this Court's rich tradition of allowing facial vagueness challenges and results in a bright-line rule foreclosing facial challenges altogether.

The Tenth Circuit incorrectly holds that facial challenges are categorically barred unless either in the context of the First Amendment or the petitioner succeeds on an as-applied challenge. This Court has long permitted facial challenges without first requiring litigants to demonstrate that "no set of circumstances exists under which [the challenged statute] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the "statute lacks any "plainly legitimate sweep." " *United States v. Stevens*, 559 U.S. 460, 472 (2010) (*quoting Wash. v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgment)).

In *Reese*, this Court considered whether to permit enforcement of a federal law that had both constitutional and unconstitutional applications: "We are… called upon to decide whether a penal statute enacted by Congress … which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish." 92 U.S. at 221. *Reese* does not end the analysis with whether there are constitutional applications of the statute. The question instead is "whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only." *Id*.

Citing *Reese,* this Court entertained a facial challenge to a criminal statute prohibiting a person from "willfully…[] mak[ing] any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" in *United States v. L. Cohen Grocery*, 255 U.S. 81, 86 (1921). *Cohen Grocery* declined to adopt a piece-meal, as-applied approach, and instead resolved the matter by determining if the statutory denunciation of unjust and unreasonable rates "constituted a fixing by Congress of an ascertainable standard of guilt … adequate to inform persons accused … of the nature and cause of the accusation against them." *Id*., 89. Because the statute employed only general terms, "forbid[ding] no specific or definite act[,]" it impermissibly authorized a sweeping investigation "the scope of which no one can

foresee and the result of which no one can foreshadow or adequately guard against." *Id.*

Lanzetta relied on *Reese* to hold that the "details of the offense" that are central to an as-applied challenge can do nothing to save a vague statute from a facial challenge:

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.

306 U.S. at 453 (citations omitted). *Lanzetta* reaffirmed that

> the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Id. (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). *See also Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (considering the breadth of the law and concluding that it "cannot be squared with our constitutional standards and is plainly unconstitutional.").

In *City of Chicago v. Morales*, the Court reaffirmed its position that "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." 527 U.S. 41, 55 (1999). Rebuffing the dissent's attack on facial challenges generally, the

Court notes—in a footnote—that dicta from *United States v. Salerno* "has never been the decisive factor in any decision of this Court, including *Salerno* itself[.]" *Id.*, 55 n.22.

3. The Tenth Circuit's rule prohibiting facial challenges to vague statutes is incorrect and serves to undermine crucial constitutional principles.

Facial vagueness challenges further three critical constitutional goals. First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See also City of Chicago,* 527 U.S. at 56 ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits."); *Reese*, 92 U.S. at 220 ("If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."); *Dimaya*, 584 U.S. at 176-180 (Gorsuch. J., concurring) (recounting history of due process requiring notice, and noting that "John Rutledge, our second Chief Justice, explained that Coke's teachings were carefully studied and widely adopted by the framers, becoming 'almost the foundations of our law.' ") (quoting *Klopfer v. North Carolina,* 386 U.S. 213, 225 (1967)).

Second, vagueness challenges allow courts to consider whether a statute allows for arbitrary or discriminatory enforcement. The lack of "minimal guidelines to govern law enforcement" may be more important to due process than notice. *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)). Vague statues "permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.,* (quoting *Goguen,* 415 U.S. at 575)).

Third and perhaps most important, vagueness jurisprudence protects the essential separation of powers among the three branches of government. "[T]he *more important* aspect of vagueness doctrine is not actual notice, but … the requirement that a legislature establish minimal guidelines to govern law enforcement and keep the separate branches within their proper spheres." *Dimaya*, 584 U.S. at 183 (Gorsuch, J., concurring (emphasis in original). *Reese* recognized that

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

92 U.S. at 221. For a court to limit such a statute so as to be subject to constitutional metes and bounds "would be [to] make a new law, not to enforce an old one." *Id*.

Building upon *Reese*, some fifteen years later this Court described the already long-standing doctrine of strict construction as being based, in part "on the sound principle that it is for the legislature, not the court, to define a crime and ordain its punishment." *United States v. Lacher,* 134 U.S. 624, 629 (1890). This basic principle remains undiminished in strength and importance today. *See United States v. Lanier,* 520 U.S. 259, 265 n.5 (1997) ("The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment."); *Davis*, 588 U.S. at 448 (vague laws "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges."). "[A]t some point, a statute could be so devoid of content that a court tasked with interpreting it would simply be making up a law—that is, exercising legislative power." *Dimaya*, 584 U.S. at 218 (Thomas, J., dissenting). Robert Frost and Justice Scalia agree: "Good fences make good neighbors." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995).

The Tenth Circuit's misguided rule prohibiting facial challenges undercuts these basic principles that motivate *every* vagueness challenge in *three* ways.

First, imposing a requirement that a defendant first identify some core at the center of a vague statute, and then compare his conduct to that core eliminates a court's ability to address *any* of the three principles motivating vagueness jurisprudence. Whether or not particular conduct falls within the core of a prohibition says nothing about whether there is adequate notice of the prohibition's

sweep, of whether it permits arbitrary enforcement, or whether it allows judges to define the crime. Indeed, a judicial definition of a supposed core of what Congress might have meant (although didn't say) demonstrates the separation of powers problem. If a defendant's understanding that his conduct would be prohibited is only based on a judicial interpretation of a vague statute, as is true with regard to 922(g)(3), the problem of fair notice is inextricably entwined with the separation of powers problem.

Second, a vagueness challenge to a statute requires consideration of its validity as applied to anyone. If a statute is unconstitutionally vague, it is a nullity: "a vague law is no law at all." *Davis*, 588 U.S. at 447. As such, it makes no sense to first require a defendant to make an as-applied challenge, since under the argument, the statute is a nullity which cannot be constitutionally applied to anyone, regardless of the facts of a defendant's particular case.

Third, the Tenth Circuit's approach encourages courts to rewrite criminal statutes, which raises serious separation of powers concerns. Per the circuit, so long as a court can manufacture limits that fit the particularities of a given case, thus eliminating an as-applied challenge, the statute is not unconstitutionally vague. This contradicts the maxim that courts "will not rewrite a … law to conform it to constitutional requirements." *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997). To do so would be a "serious invasion of the legislative domain." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 n.26 (1995).

"[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). " "[T]he greatest security," wrote Madison, "against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." " *Id.*, 381 (quoting The Federalist No. 51, p. 349 (J. Cooke ed. 1961)). *See also Dept. of Trans. v. Ass'n of Am. RRs*, 575 U.S. 43, 74-77 (2015) (Thomas, J, concurring) (noting the "Framer's dedication to the separation of powers has been well-documented," and the Court has "held that the Constitution categorically forbids Congress to delegate its legislative power to any other body[.]"); *Gundy v. United States*, 588 U.S. 128, 153 (2019) (Gorsuch, J., dissenting) (the Framers understood the legislative power to be "the power to prescribe general rules for the government of society" and "it would frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.") (internal quotations and citations omitted).

A hard-line rule against facial vagueness challenges is grossly unfair. It eliminates a vital check on separation of powers at the same time eviscerating one of the rudimentary tenets of due process, notice of prohibited conduct. Lower courts

should not be allowed to fill in critical blanks in criminal laws—the government should not be allowed to exploit vague laws to deprive individuals of that which the Founders hold most dear: liberty.

4. In addition, the prohibition in § 922(g)(3) directly affects an explicit fundamental right that this Court recognized in *New York State Pistol & Rifle Ass'n v. Bruen*, 597 U.S. 1 (2022). The outline of who can and cannot exercise this right needs special clarity. *Cf. Smith v. Goguen*, 415 U.S. 566, 573 (1974) (when a "statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts") and n.10.

Conclusion

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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