IN THE SUPREME COURT OF THE UNITED STATES

No. 24A___

UNITED STATES OF AMERICA, APPLICANT

v.

LAVANCE LEMARR COOPER

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General -- on behalf of applicant United States of America -- respectfully requests a 30-day extension time, to and including June 5, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The opinion of the court of appeals (App., infra, 1a-10a) is reported at 127 F.4th 1092. The district court's order denying reconsideration (App., infra, 11a-15a) and bench trial order (id. at 16a-29a) are unreported. The district court's memorandum opinion and order denying the motion to dismiss the indictment (id. at 30a-43a) is available at 2023 WL 6441943.

The court of appeals entered its judgment on February 5, 2025. Unless extended, the time within which to file a petition for a writ of certiorari will expire on May 6, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. In June 2023, a grand jury in the Northern District of Iowa charged respondent LaVance Cooper with two counts of possessing a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3). See App., infra, 11a. Respondent moved to dismiss the indictment on the ground that Section 922(g)(3) violated the Second Amendment on its face and as applied to him. See ibid. The district court denied the motion, rejecting the facial challenge and postponing resolution of the as-applied challenge until trial. Id. at 30a-43a. The court invoked the tradition of disarming "categories of people" who pose "a real danger to the community" if armed. Id. at 34a, 37a.

After a bench trial, the district court found respondent guilty on both counts. App., infra, 16a-29a. The court rejected respondent's as-applied challenge, noting that "[n]othing in the application of Section 922(g)(3) to [respondent] is arbitrary." Id. at 28a; see id. at 27a-29a. The court later denied respondent's motion to reconsider that ruling, id. at 11a-15a, and sentenced him to 37 months of imprisonment, to be followed by three years of supervised release, Judgment 2-3.

The Eighth Circuit vacated and remanded. App., infra, 1a-10a. The court concluded that "[n]othing in our tradition allows

disarmament simply because [respondent] belongs to a category of people, drug users, that Congress has categorically deemed dangerous." Id. at 6a. The court instead concluded that the Second Amendment required an "individualized determinatio[n]" about whether drug use caused respondent to "'induce terror'" or "'pose a credible threat to the physical safety of others' with a firearm." Id. at 5a-6a (citation omitted). It stated that "[t]he district court's task on remand is to figure out which side of the Second Amendment line [this] case falls on." Id. at 7a-8a.

2. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to continue consultation within the government and to assess the legal and practical impact of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

APRIL 2025

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 24-1998

United States of America

Plaintiff - Appellee

v.

LaVance LeMarr Cooper

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Eastern

Submitted: January 17, 2025
Filed: February 5, 2025

Before GRASZ, STRAS, and KOBES, Circuit Judges.

STRAS, Circuit Judge.

In *United States v. Veasley*, we concluded that keeping firearms out of the hands of drug users does not "*always* violate[] the Second Amendment." 98 F.4th 906, 908 (8th Cir. 2024). Now the question is whether it *sometimes* can. The answer is yes, so we remand for the district court to determine whether it does for LaVance Cooper.

I.

Cooper consented to a bench trial on stipulated facts. One was that he smoked marijuana three to four times a week. Another was that he had done it two days before officers found a Glock 20 pistol in his car during a traffic stop. Based on those facts and a few others, the district court found Cooper guilty of being a drug user in possession of a firearm, *see* 18 U.S.C. § 922(g)(3), and sentenced him to 37 months in prison.

Although *Veasley* recognized that as-applied challenges to the drug-user-in-possession statute are available, the district court disagreed. It was not open to dismissing the indictment even if, as Cooper argued, he posed no threat to anyone and had last smoked marijuana two days before the traffic stop. *See* Fed. R. Crim. P. 12(b)(1). In its view, once Congress decided that drug users as a "class" had no right to possess a gun, none could possess one, regardless of the who, what, when, where, and why of the drug use and gun possession. Even a frail and elderly grandmother who used marijuana for a chronic medical condition—the example we discussed in *Veasley*—could not be "in possession of a shotgun" to defend her home. *See Veasley*, 98 F.4th at 909, 917–18 (citing this example as a potentially meritorious as-applied challenge); *United States v. Daniels*, 124 F.4th 967, 977 (5th Cir. 2025) (same).

Cooper believes that *Veasley* requires a different answer. He continues to argue that prosecuting him under § 922(g)(3) violated the Second Amendment.[1] Our review is de novo. *See United States v. Turner*, 842 F.3d 602, 604 (8th Cir. 2016).

[1]Cooper also argues that the drug-user-in-possession statute is both facially unconstitutional and overly vague. Neither of those arguments, however, works. *See Veasley*, 98 F.4th at 918; *United States v. Deng*, 104 F.4th 1052, 1055 (8th Cir. 2024) (rejecting vagueness challenges by "frequent[] use[rs]" of marijuana); *see also Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("[O]ne panel is bound by the decision of a prior panel." (citation omitted)).

II.

In every Second Amendment case, the overarching question is whether a limitation on the right to keep and bear arms is "consistent with this Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). Key to answering that question is identifying "analogue[s]": Founding-era regulations that "impose[d] a comparable burden on the right of armed self-defense" with a "comparabl[e] justifi[cation]." *Id.* at 29–30 (emphasis omitted); *see also United States v. Rahimi*, 602 U.S. 680, 692 (2024) (explaining that the modern regulation "need not be a 'dead ringer' or a 'historical twin'" (quoting *Bruen*, 597 U.S. at 30)). If no comparable analogues exist because "disarmament is a [purely] modern solution to a centuries-old problem," *Veasley*, 98 F.4th at 912, or strays too far from the "how and why" of "historical regulations," *Bruen*, 597 U.S. at 29, then the Second Amendment kicks in. *See* U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

A.

Fortunately, much of the background work on the drug-user-in-possession statute has already been done. In *Veasley*, we identified two Founding-era analogues that "make [it] constitutional in [certain] applications": "confinement of the mentally ill" and the "criminal prohibition on taking up arms to terrify the people." 98 F.4th at 912, 916.

Early in this country's history, the "mentally ill and dangerous" ended up in jails, makeshift asylums, and mental hospitals "with straitjackets and chains." *Id.* at 915. Confinement came with a "loss of liberties," including disarmament, "to preserve the peace of the community." *Id.* (quoting Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law Part II: The American Experience*, 43 U. Cin. L. Rev. 781, 787–88 (1974)). "Those who posed no danger,"

by contrast, "stayed at home with their families," with "their civil liberties . . . intact." *Id.* at 913.

The question is whether § 922(g)(3) is "relevantly similar" to this Founding-era analogue. *Bruen*, 597 U.S. at 29. It is, but not for everyone. The "behavioral effects" of mental illness and drug use can "overlap," *Veasley*, 98 F.4th at 912, but only the subset of the mentally ill who were dangerous faced confinement and the loss of arms. *See id.* at 913 ("Life was different . . . for those who were both mentally ill and dangerous."). It follows that, for disarmament of drug users and addicts to be comparably "justifi[ed]," it must be limited to those "who pose a danger to others." *Id.* at 915–16; *see also Rahimi*, 602 U.S. at 698 (reaching a similar conclusion about temporary disarmament of those subject to a domestic-violence restraining order). The analogy is complete, in other words, for someone whose "regular use[] of . . . PCP . . . induce[s] violence," but not for a "frail and elderly grandmother" who "uses marijuana for a chronic medical condition." *Veasley*, 98 F.4th at 909–10; *see also Rahimi*, 602 U.S. at 699–700 (recognizing that the same analogue can cut different ways in different cases). The latter would regulate "arms-bearing . . . to an extent beyond what was done at the [F]ounding." *Rahimi*, 602 U.S. at 692.

Much the same goes for *Veasley*'s other analogue, Terror of the People. *See* 98 F.4th at 916–17; *Rahimi*, 602 U.S. at 697–98. Initially a common-law crime and later codified in some states, these going-armed laws required more than "mere possession" of a weapon. *Veasley*, 98 F.4th at 917. As "a mechanism for punishing those who had menaced others with firearms," *Rahimi*, 602 U.S. at 697, an essential element was "terrorizing behavior . . . accompany[ing] the possession," *Veasley*, 98 F.4th at 917. *See, e.g.*, *State v. Huntly*, 25 N.C. 418, 423, 3 Ired. 311, 315 (1843) (explaining that the "essen[ce]" of the crime was "carry[ing] about . . . [a] weapon of death . . . in such a manner as naturally will terrify and alarm[] a peaceful people"). Punishment included imprisonment and "forfeiture of the arms" used in the crime. *Rahimi*, 602 U.S. at 697 (quoting 4 William Blackstone, Commentaries *149). Sometimes, when aggression was foreseeable, magistrates ordered

individuals to post surety bonds to "prevent[] violence before it occurred," but only after providing "significant procedural protections." *Id.* at 696–97.

The lesson to draw is that this analogy only works "for *some* drug users." *Veasley*, 98 F.4th at 917. When "a court has found that the defendant 'represents a credible threat,'" a ban on firearm possession "fits neatly within the tradition." *Rahimi*, 602 U.S. at 698–99 (quoting 18 U.S.C. § 922(g)(8)(C)(i)). And so does one applied to drug users who engage in "terrifying conduct." *Veasley*, 98 F.4th at 917 (listing examples of how "[c]ontrolled substances can induce terrifying conduct"). For others, like the hypothetical grandmother, threatening violence or causing terror is "exceedingly unlikely," so the justification for disarmament is not comparable. *Id.* at 917–18; *see Rahimi*, 602 U.S. at 699–700 (explaining that "our Nation's tradition of firearm regulation distinguishes" between those who pose a threat and those who do not); *see also id.* at 713 (Gorsuch, J., concurring) (highlighting that the Court "d[id] not decide . . . whether the government may disarm a person without a judicial finding that he poses a 'credible threat' to another's physical safety" (quoting 18 U.S.C. § 922(g)(8)(C)(i))).

These two analogues also frame the relevant questions for resolving Cooper's as-applied challenge. Did using marijuana make Cooper act like someone who is "both mentally ill and dangerous"? *Veasley*, 98 F.4th at 913. Did he "induce terror," *id.* at 918, or "pose a credible threat to the physical safety of others" with a firearm, *Rahimi*, 602 U.S. at 700? Unless one of the answers is yes—or the government identifies a new analogue we missed, *but cf. United States v. Connelly*, 117 F.4th 269, 274–75 (5th Cir. 2024) (coming up with a similar list)—prosecuting him under § 922(g)(3) would be "[in]consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

B.

Nothing in our tradition allows disarmament simply because Cooper belongs to a category of people, drug users, that Congress has categorically deemed dangerous. Neither the confinement of the mentally ill nor the going-armed laws operated on an *irrebuttable* basis.

In fact, each had an individualized assessment built in. Confinement of the mentally ill, for example, occurred at the "discretion" of "[j]ustices of the peace and other officials," but usually only after a finding that there would be some risk of "mischief" without it. *Veasley*, 98 F.4th at 914 (quoting Daniel Davis, *A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions* 41 (Boston, Hilliard, Gray, Little, & Wilkins 2d ed. 1828)); *see Rahimi*, 602 U.S. at 699 (explaining that if imprisonment is permissible, then the lesser sanction of "temporary disarmament" is too). Similarly, going-armed laws applied based on a "judicial determination[] [that] a particular defendant . . . had threatened another with a weapon." *Rahimi*, 602 U.S. at 699; *see id.* (discussing a Massachusetts law that required "'reasonable cause to fear' . . . harm or breach [of] the peace" (quoting Mass. Rev. Stat., ch. 134, §§ 1, 16 (1836))). The aim, if it is not already clear, was to ensure that the risk supported the restrictions in each individual case. Without making room for similar individualized determinations, § 922(g)(3) does not "fit[] neatly within th[is] tradition," *id.* at 698, because it is not "comparably justified," *Bruen*, 597 U.S. at 29. *See Rahimi*, 602 U.S. at 698–99 (emphasizing that the judicial finding required by § 922(g)(8), which disarms certain domestic abusers, "matches the surety and going armed laws").

The only potential analogue that seemed to apply categorically was intoxication, but disarmament was not the remedy for it. *See Veasley*, 98 F.4th at 912. As *Veasley* discussed, intoxication has been prevalent throughout our nation's history, but "earlier generations addressed th[at] societal problem" by restricting when and how firearms could be used, not by taking them away. *Id.* at 911 (quoting

Bruen, 597 U.S. at 26). Only later, in the mid-20th century, did legislative attention turn to the potential danger posed by mixing guns and drugs. *See id.* at 912. These analogues make clear that "disarming *all* drug users," regardless of the individual danger they pose, is not comparable to anything from around the time of the Founding. *Id.*

We recognize that not every group targeted by a disarmament law is the same. Consider felons. In *United States v. Jackson*, a panel of this court surveyed a different set of Founding-era laws and concluded that they supported a categorical ban. *See* 110 F.4th 1120, 1125 (8th Cir. 2024) (holding that "there is no need for felony-by-felony litigation" under § 922(g)(1)); *cf. Connelly*, 117 F.4th at 278 (suggesting that there might be a tradition of disarming groups comparable to "political traitors" and "potential insurrectionists"). *But see United States v. Jackson*, 121 F.4th 656, 656–57 (8th Cir. 2024) (Stras, J., dissenting from denial of reh'g en banc) (disagreeing). Supreme Court dicta singling out felon-dispossession laws as "presumptively" constitutional provided additional support. *Jackson*, 110 F.4th at 1125, 1128–29; *see Rahimi*, 602 U.S. at 698 (leaving open the possibility that some "laws banning the possession of guns by categories of persons" might be constitutional).

We have "no such 'assurances,'" however, about drug users and addicts. *Veasley*, 98 F.4th at 909 n.2 (quoting *United States v. Jackson*, 69 F.4th 495, 501–02 (8th Cir. 2023), *vacated*, 144 S. Ct. 2710 (2024)). Nor has our review of the historical tradition surrounding them, to the extent one exists, turned up any bright-line rules.[2] Sometimes disarming drug users and addicts will line up with the case-

[2]*United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), is of little help here because it addressed a facial Second Amendment challenge before *Bruen* and *Rahimi* made clear that the analysis consisted of "historical work and 'analogical reasoning.'" *Veasley*, 98 F.4th at 918 (quoting *Bruen*, 597 U.S. at 29–30). It did not deal with an as-applied challenge, *see Seay*, 620 F.3d at 922, much less say anything that would help us decide this one.

by-case historical tradition, but other times it will not. *See id.* at 918. The district court's task on remand is to figure out which side of the Second Amendment line Cooper's case falls on.

C.

The district court, for its part, agreed with our analogy to the going-armed laws, but dismissed much of the rest of what we said as dicta. It took issue with our discussion of how § 922(g)(3) might be constitutional in some applications but not in others. *See id.* at 916–18; *cf. Rahimi*, 602 U.S. at 693 (analyzing a facial challenge using "the facts of Rahimi's own case"). Unsurprisingly, the government has backed away from this line of reasoning, which misunderstands how facial and as-applied challenges work. *See Veasley*, 98 F.4th at 909–10 (explaining the difference).

The reason is simple: the "outer bounds" of the Second Amendment are *always* "delimit[ed]" by "historical tradition." *Bruen*, 597 U.S. at 19. From that foundational principle, "the appropriate analysis" necessarily "involves considering whether the challenged regulation . . . is 'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29). The only thing that changes is the height of the hurdle facing the challenger. *See Veasley*, 98 F.4th at 909 (explaining that the "bar goes up" in a facial challenge). The underlying textual and historical analysis remain the same. *See id.* at 910 (explaining that "the same text-and-historical-understanding framework" applies either way); *Rahimi*, 602 U.S. at 690 (rejecting a facial challenge because, "[a]s applied to the facts of th[at] case, Section 922(g)(8) fits comfortably within th[e] [historical] tradition"); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330–31 (2010).

Look at it this way. *See Bruen*, 597 U.S. at 28–30 (explaining how to do "analogical reasoning under the Second Amendment"). It is true that a facial challenge requires a showing that there is "no set of circumstances . . . under which

[§ 922(g)(3)] would be valid," while all that matters for Cooper's as-applied challenge is how the statute affected *him*. *Veasley*, 98 F.4th at 909. Either way, however, the question we ask is the same: is "the regulation . . . consistent with this Nation's historical tradition of firearm regulation"? *Bruen*, 597 U.S. at 17; *see also Jackson*, 110 F.4th at 1125–29 (relying on the same history to resolve both types of challenges). And in both instances, the analogies we identified in *Veasley* will provide the answer. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

D.

Although both sides invite us to resolve Cooper's as-applied challenge, the district court is in the best position to take the first crack at it. The factual record is thin, given that the case proceeded to a bench trial on stipulated facts, so the parties may want to supplement the record with other evidence. In the meantime, we will tie up a loose end to save everyone time on remand.

The government suggests in its briefing that Cooper is too dangerous to have a gun because he "possessed [one] for *protection* after [a] recent shooting at his residence." (Emphasis added). We disagree for two reasons. First, the parties only stipulated that "officers were dispatched to [his] residence . . . in reference to *an individual who had been shot*," not a shooting that happened there. (Emphasis added). And second, "individual self-defense is 'the *central component*' of the Second Amendment right," not an exception to it.[3] *McDonald v. City of Chicago*,

[3]Marijuana use by itself is not an exception either, even if *possessing* it breaks federal law. 21 U.S.C. §§ 802(6), 812(c) sched. I(c)(10), 844(a); *see Worth v. Jacobson*, 108 F.4th 677, 692 (8th Cir. 2024) ("[A] claim that a group is 'irresponsible' or 'dangerous' does not remove them from the definition of the people."); *see also Rahimi*, 602 U.S. at 701 ("reject[ing] the Government's

561 U.S. 742, 767 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)); *see Heller*, 554 U.S. at 628 (emphasizing that "the home [is] where the need for defense of self, family, and property is most acute").

III.

We accordingly vacate the district court's judgment and remand for a reexamination of Cooper's motion to dismiss the indictment.

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contention that Rahimi may be disarmed simply because he is not 'responsible'"). As the analogues show, it takes something more. *See Veasley*, 98 F.4th at 911–12 (describing how "[c]annabis was in use" before the Founding, but there is no evidence that use alone led to disarmament).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LA'VANCE LEMARR COOPER, Defendant.	No. 23-CR-2040-CJW-MAR **ORDER**

I. INTRODUCTION

On May 3, 2024, this matter came on for a hearing on defendant's Motion to Reconsider the Court's prior ruling as to the application of Title 18, United States Code, Section 922(g)(3) to defendant. (Docs. 60 & 67). The government timely resisted. (Doc. 65). The Court found Section 922(g)(3) constitutional as-applied to defendant, and thus, denied his motion. The Court files this opinion to explain its reasoning in writing to aid the parties and the Eighth Circuit Court of Appeals, should defendant appeal the Court's ruling.

II. BACKGROUND

On June 28, 2023, the grand jury returned a two-count Indictment charging defendant with two counts of possession of a firearm by a drug user, in violation of Title 18, United States Code, Section 922(g)(3). (Doc. 3).

On August 25, 2023, defendant filed a motion to dismiss the Indictment, both on its face and as applied to him. (Doc. 27). The Court subsequently denied defendant's facial challenge but held in abeyance the as-applied ruling until the presentation of evidence at trial. (Doc. 34).

The parties waived jury trial (Docs. 37 & 43), and on December 14, 2023, the Court presided over a bench trial (Doc. 43). Then, on December 28, 2023, the Court found defendant guilty as to both counts and denied defendant's as-applied challenge. (Doc. 45).

III. DISCUSSION

Defendant urges the Court to reconsider its order denying defendant's as-applied challenge to his Indictment. (Doc. 60-1). Specifically, defendant asserts that the Eighth Circuit Court of Appeals' recent decision in *United States v. Veasley*, No. 23-1114, 2024 WL 1649267 (8th Cir. Apr. 17, 2024), indicates Section 922(g)(3) might not be constitutional when applied to some drug users. (Doc. 60-1, at 3). Defendant argues *Veasley* suggests the use of a controlled substance has to "induce some sort of 'terrifying' conduct involving the firearm" for application of Section 922(g)(3) to be constitutional when applied to a particular defendant. (*Id.*).

In *Veasley*, the court held Section 922(g)(3) is facially constitutional under the framework announced in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Though the *Veasley* court did not analyze an as-applied challenge to Section 922(g)(3), the court discussed in dicta that the application of Section 922(g)(3) might not be constitutional as to some drug users who possess firearms. The court found that historical analogues, specifically the offense of Terror of the People, required the "offensive use of a firearm in a way that terrorized others" and implied that, consequently, application of Section 922(g)(3) requires "illegal and dangerous" or "terrifying" behavior with a firearm as a result of drug use. *Veasley*, 2024 WL 1649267 at *9 (first quotation cleaned up). The court further noted "not every drug user or addict will terrify others, even with a firearm" when relevant facts are examined in relation to appropriate historical analogues. *Id.*

Defendant's reliance on *Veasley* is in error. First, defendant relies on dicta; *Veasley* did not concern an as-applied challenge. To the extent a two-judge panel[1] implied in dicta that Section 922(g)(3) now only applies to those whose conduct is "illegal and dangerous" or "terrifying"—whatever those terms mean—that was not the court's holding and is thus not the law. As noted in the concurrence, *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), is controlling and was not overruled by the *Bruen* decision, nor was *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Veasley*, 2024 WL 1649267 at *9 (Gruender, J., concurring). The *Seay* court found Section 922(g)(3) facially constitutional as "the type of longstanding prohibition on the possession of firearms that *Heller* declared presumptively lawful" within its non-exhaustive list of "presumptively lawful regulatory measures." *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010) (cleaned up); *Heller*, 554 U.S. at 627 & n.26. Nothing in *Bruen* rendered unconstitutional those presumptively lawful regulatory means.

Second, Congress did not enact Section 922(g)(3) to criminalize a drug user's firearm possession only at the exact moment of intoxication and only if terroristic conduct occurs in that moment. Congress criminalized the behavior described in Section 922(g)(3) to address a specific societal issue—preventing drug users from possessing firearms because that class presents a danger when in possession of firearms; it did not intend for that statute to apply on a case-by-case basis. *See Seay*, 620 F.3d at 925 (further citation omitted).

In enacting Section 922(g)(3), Congress chose to make it unlawful for someone

[1] Although Judge Gruender concurred in the judgment, he expressed in his concurrence belief the court's analysis of historical analogues was superfluous in light of prior, binding caselaw. Notably, Judge Gruender stated "[n]othing in *Bruen* disturbed or cast doubt on the constitutionality of those regulatory measures deemed by *Heller* to be 'presumptively lawful.' *See, e.g.*, *Bruen*, 597 U.S. at 10, 142 S.Ct. 2111 (stating that the Court's holding was 'consistent with *Heller*')." *Veasley*, 2024 WL 1649267 at *9 (Gruender, J., concurring) (further citation omitted).

who is a regular user of controlled substances to possess firearms because of the inherent danger that arises from someone being on drugs while in possession of a firearm. Congress could have limited the prohibition to barring someone from possessing a firearm while under the influence of drugs, much as state legislatures have chosen to make it unlawful to operate a motor vehicle while under the influence of alcohol. In other words, Congress could have enacted a current version of the Terror of the People statute that made it a crime for people under the influence of an illegal drug to possess firearms. Congress chose not to wait until the dangerous situation arose but instead chose to prevent those people illegally using drugs from possessing firearms so as to anticipate the dangerous situation. The majority's dicta in *Veasly* misapprehends the legislative approach to the societal problem and, thus, its reasoning is flawed. Although the reliance on the historic analog is sound—that is, the Terror of the People statute demonstrates that keeping guns out of the hands of unlawful drug users is consistent with the regulation of firearms at the time of the adoption of the Constitution—that does not mean that current legislation must approach the problem in the same manner as the legislature did before. That means that Section 922(g)(3) is constitutional as applied even if, in any given case, the evidence might show that the offender was not simultaneously under the influence of drugs while in possession of a firearm, or not then a danger or terror to society. Indeed, the grandmother in possession of a shotgun while illegally using marijuana is in violation of Section 922(g)(3), and its application to her is constitutional, even though she may not at that moment pose a danger to society.

In short, Section 922(g)(3) is not unconstitutional as-applied to defendant. As this Court previously found,

> Defendant stipulated to facts showing that at the time he possessed the firearms referenced in Counts 1 and 2 of the Indictment, he was an "unlawful user" of a controlled substance, specifically marijuana. His conduct was clearly proscribed. Nothing in the application of Section

> 922(g)(3) to defendant is arbitrary or outside the scope of the conduct the statute covers; defendant's possession of the firearms as an "unlawful user" of a controlled substance is the exact conduct proscribed in the statute. 18 U.S.C. § 922(g)(3) ("It shall be unlawful for any person . . . who is an unlawful user of . . . any controlled substance[.]"). Thus, Section 922(g)(3) is not unconstitutional as-applied to this defendant.

(Doc. 45, at 13). The Court incorporates and adopts its prior reasoning and again finds nothing in the application of this statute to defendant is unconstitutional.

As such, the Court **denies** defendant's motion. (Doc. 60).

IT IS SO ORDERED this 3rd day of May, 2024.

C.J. Williams, Chief Judge
United States District Court
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LA'VANCE LEMARR COOPER, Defendant.	No. 23-CR-2040-CJW-MAR **BENCH TRIAL ORDER, FINDINGS, AND CONCLUSIONS**

I. INTRODUCTION

In a two-count Indictment, the grand jury charged defendant La'Vance LeMarr Cooper with two counts of possession of a firearm by a drug user, in violation of Title 18, United States Code Section 922(g)(3). (Doc. 3). The parties waived jury trial (Docs. 37 & 43), and on December 14, 2023, the Court presided over a bench trial (Doc. 43). Although at trial defendant did not formally motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, he argued that the stipulated facts failed to prove him guilty, and the Court deems that the equivalent to a motion for judgment of acquittal in the context of a bench trial upon a stipulated factual record. Upon consideration of all the evidence, the Court finds defendant **guilty** of Counts 1 and 2 of the Indictment. The Court also **denies** defendant's as-applied challenge to dismiss the Indictment. (Doc. 27).

In compliance with Federal Rule of Criminal Procedure 23(c), the Court states here its specific findings in a written decision.

II. ELEMENTS

Count 1 of the Indictment charges that on September 22, 2022, defendant knew "he was then an unlawful user of a controlled substance as defined in 21 U.S.C. § 802, namely marijuana" and he "knowingly possessed a firearm, specifically, a Glock 20,

10mm Auto caliber pistol." (Doc. 3, at 1). Count 2 of the Indictment charges that on April 3, 2023, defendant knew "he was then an unlawful user of a controlled substance as defined in 21 U.S.C. § 802, namely marijuana" and he "knowingly possessed a firearm, specifically, a Glock 22 Gen 5, 40 S&W caliber pistol." (Doc. 3, at 1-2). Both offenses are alleged to have violated Title 18, United States Code, Section 922(g)(3) and 924(a)(8). Section 922(g)(3) provides that it is unlawful for any person "who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. § 802)" to possess a firearm.

As charged by the government here, to prove defendant guilty of the crime of possession of a firearm by an unlawful drug user, the government must prove three things beyond a reasonable doubt:

> *One*, the defendant was, and knew he was, an unlawful user of a controlled substance, that is, marijuana;
>
> *Two*, the defendant knowingly possessed a firearm while he was an unlawful user of or addicted to marijuana; and
>
> *Three*, the firearm was transported across a state line at some time during or before the defendant's possession of it.

EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.922B. As to Count 1, the government must prove the firearm defendant possessed on or about September 22, 2022, was a Glock 20, 10 mm Auto caliber pistol; Count 2 requires the government to prove the firearm defendant is alleged to have possessed on April 3, 2023, was a Glock 22 Gen 5, .40 S&W caliber pistol. (Doc. 3).

The parties provided seven joint stipulations in lieu of evidence presented at the bench trial. (Doc. 42). Among other things, defendant stipulated that on September 22, 2022, defendant knowingly possessed a Glock 20, 10 mm Auto caliber pistol. (*Id.*, at 1-2). Defendant also stipulated that after officers responded to a September 18, 2022 emergency call regarding a gunshot wound, officers searching defendant's home found

several documents identifying defendant as a resident of the home, defendant's employee ID card, and some of defendant's documents near marijuana on a table. (*Id.*, at 1). Defendant stipulated during a September 22, 2022 interview to occasionally smoking marijuana and to last using marijuana on September 19, 2022, later testing positive for marijuana metabolites. (*Id.*, at 2). Defendant also stipulated that the Glock 20, 10 mm Auto caliber pistol previously traveled in interstate commerce before or during defendant's possession of it and that the firearm is a weapon designed to expel a projectile by action of an explosive. (*Id.*, at 3). Thus, at issue in Count 1 is whether, at that time, defendant was then knowingly an unlawful user of marijuana.

Further, defendant stipulated that after the April 3, 2023 traffic stop of a vehicle in which defendant was a passenger and during the subsequent *Terry* frisk, an officer found a Glock 22 Gen 5, .40 S&W caliber pistol on defendant's person and that defendant knowingly possessed that pistol. (*Id.*, at 2). This pistol, defendant stipulated, had also previously traveled in interstate commerce before or during defendant's possession of it and is a weapon designed to expel a projectile by action of an explosive. (*Id.*, at 3). Defendant also stipulated that after officers obtained a warrant for defendant's urine, defendant's urine sample tested positive for marijuana metabolites, indicative of recent marijuana use. (*Id.*). Defendant stipulated that sometime later, defendant informed officers he began smoking marijuana at age 15 and had continued to use marijuana at least until his April 3, 2023 arrest, smoking marijuana three to four times per week. (*Id.*). Defendant stipulated he last used marijuana on April 1, 2023, but had since ceased that use because he was taking a new medication. (*Id.*, at 3). As such, all that remains at issue in Count 2 is whether, at that time, defendant was then knowingly an unlawful user of marijuana.

III. REASONABLE DOUBT STANDARD

The government bears the burden of proving each element of each charge beyond a reasonable doubt. It is useful to review and consider the standard explanation of

"reasonable doubt" provided to jurors, a standard that is equally binding on the Court as a fact-finder:

> Reasonable doubt is doubt based upon reason and common sense, and not doubt based on speculation. A reasonable doubt may arise from careful and impartial consideration of all the evidence, or from a lack of evidence. Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 3.11.

A motion for judgment of acquittal is governed by Federal Rule of Criminal Procedure 29, which provides: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). "Sufficient evidence exists to support a verdict if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Jiminez-Perez*, 238 F.3d 970, 972 (8th Cir. 2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

IV. THE EVIDENCE

The parties submitted 7 joint stipulations in lieu of evidence at trial, which the Court incorporates and considers here. (Doc. 42).

V. ANALYSIS

Based on the totality of the evidence, the Court is firmly convinced of defendant's guilt as to both Counts 1 and 2 of the Indictment.

A. Count 1

The Court finds the evidence shows beyond a reasonable doubt that on or about

September 22, 2022, defendant was a drug user in possession of a firearm as alleged in Count 1. The sole element at issue is whether on or about September 22, 2022, defendant was knowingly an unlawful user of a controlled substance, that is, marijuana.

Defendant argues he is not guilty of Counts 1 or 2[1] because the language of Section 922(g)(3) does not describe someone in defendant's position. (Doc. 39, at 7-9). Specifically, defendant asserts defendant's conduct is not that described in Section 922(g)(3) because the close association of the terms "user" and "addict" in that section indicate that Congress intended for "user" to apply to persons who are addicts. (*Id.*, at 7). In other words, defendant argues that "user" and "addict" are synonyms to describe the same person and thus the government essentially has to prove that the person was a user of a controlled substance to the point of being an addict. To this point, defendant states the Eighth Circuit Model Jury Instruction used in Section 922(g)(3) cases, Instruction 6.18.922B, uses the phrase "actively engaged in use" to describe the persons to whom Section 922(g)(3) applies. (*Id.*, at 7-8). Using this phrase, defendant asserts that "although [defendant] was a regular user of marijuana," he was not so actively engaged in using marijuana that he was intoxicated or incapacitated and so dangerous that he could not safely bear arms, as shown by the fact officers allowed defendant to drive away during the first traffic stop on September 22, 2022. (*Id.*, at 8-9). There is no evidence, defendant argues, that on September 22, 2022, defendant acted in any manner indicating he lost the power of self-control. (*Id.*, at 9).

The government asserts defendant is guilty of Count 1 of the Indictment, in part because defendant was an unlawful user of a controlled substance and knew he was an unlawful user of a controlled substance during the time of firearm possession. (Doc. 40, at 4-7). Specifically, the government cites to several joint stipulations to assert the facts show defendant was actively engaged in unlawful marijuana use on or about September

[1] Defendant makes the same argument as to both counts. (Doc. 39).

22, 2022, including documents and an employee identification card with a name and photograph belonging to defendant were found near marijuana on a table in his residence. (*Id.*, at 4). The government also argues there is further support that defendant was an unlawful user when in possession of the firearm: in defendant's home were various handguns, including a stolen handgun, multiple kinds of ammunition, narcotics, a gun case for a Glock 45 .45 caliber handgun, and a gun case for a Glock 20 10mm handgun, and defendant admitted to owning both a Glock 45 .45 caliber handgun and a Glock 20 10 mm handgun. (*Id.*). Last, the government points to defendant's admissions that he smoked marijuana on occasion, most recently having done so three days before the September 22, 2022 interview and that his urine tested positive for marijuana metabolite at that time. (*Id.*, at 5-6). The government argues that all these things prove defendant was an unlawful user during the relevant period. (*Id.*, at 5-6). As to knowledge, the government asserts defendant knew he belonged to the category of persons barred from possessing a firearm under the statute. (*Id.*). In the government's telling, defendant's six-year marijuana use on a three to four times per week basis when also possessing the firearm, marijuana use within days of the arrest, and his urine testing positive for marijuana metabolite immediately after arrest all point to defendant's knowledge that he was an unlawful user of a controlled substance at the time and barred from possessing the firearm in question. (*Id.*, at 7).

The crime of possession of a firearm by a drug user requires proof that during the time alleged in the charging document, the defendant was an unlawful user of or addicted to a controlled substance. This "unlawful user" element contains two components: a temporal component and a knowledge component. *Rehaif v. United States*, 139 S.Ct. 2191, 2194, 2200 (2019); *United States v. Carnes*, 22 F.4th 743, 748, 749 (8th Cir. 2022). The temporal component does not require proof that defendant used a controlled substance contemporaneously with his possession of a firearm, but rather, it requires the government "to demonstrate use of a controlled substance 'during the period of time' that

the defendant possessed firearms, not that there was actual use 'at the time that the officers discovered [the defendant] in possession of firearms.'" *Carnes*, 22 F.4th at 748 (quoting *United States v. Rodriguez*, 711 F.3d 928, 937 (8th Cir. 2013)) (alteration and quotation in original). The Eighth Circuit has expressly rejected the requirement that controlled substance use must be proven through evidence of regular use over an extended period of time. *United States v. Boslau*, 632 F.3d 422, 429-31 (8th Cir. 2011). The second component, knowledge, requires proof that the defendant knew he or she fell within the relevant statute's category of persons prohibited from possessing firearms. *Rehaif*, 139 S.Ct. at 2200.

The Court is unpersuaded that "unlawful user" does not provide notice as to what conduct is illegal, and thus, that defendant and other defendants cannot know they fall into the category of prohibited persons under the statute. It is an unfair characterization of the law to state that unlawful user is so undefined that no one would be aware of the term's meaning or assume it only applies to addicts. The Eighth Circuit Model Jury Instructions for the crime drug user in possession of a firearm note that the definition of an "unlawful user of a controlled substance" is based on the Treasury Department's definition. EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.922B; 27 C.F.R. § 478.11. That definition provides, in relevant part, that an unlawful user is:

> Any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.

27 C.F.R. § 478.11; *see also United States v. Turnbull*, 349 F.3d 558, 562 (8th Cir. 2003), *judgment vacated on other grounds*, 543 U.S. 1099 (2005) (finding appropriate and consistent this definition of unlawful user with standard). This definition of unlawful

user directly contradicts that it was impossible for defendant to ever become aware of his status.

Defendant also argues that "unlawful user of or addicted to" is a conjunctive phrase—meaning, in defendant's interpretation, that a reasonable person would believe he had to be an addict to be the kind of user the statute applies to, or in other words that "addicted to" defines "unlawful user." This is not so. Several courts, including this Court, have held that "unlawful user of" and "addicted to" are joined disjunctively by way of "or," not conjunctively by way of "and."[2] *See United States v. Ledvina*, No. 23-CR-2040-CJW-MAR, Doc. 64, at 9; *see also, e.g.*, *Sobolewski v. United States*, 649 F. App'x 706, 710 (11th Cir. 2016); *United States v. Grover*, 364 F. Supp. 1298, 1300 (D. Utah 2005); *United States v. Bennett*, 329 F.3d 769, 776 (10th Cir. 2003); *United States v. Herrera*, 313 F.3d 882, 884 (5th Cir. 2002) (discussing "unlawful user" and "addicted to" as alternative requirements). The terms are not only separately definable, and a person can be an unlawful user without being addicted and vice versa, but most importantly, the term "or" is naturally disjunctive. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not."). The construction of the sentence and its use of "or" indicates a person need only be one of the two categories of persons to satisfy the element. It is not necessary, therefore, that the government prove defendant was or is addicted to a controlled substance if it proves defendant was an unlawful user as alleged.

Nor does the law require an individual to have lost control or be so intoxicated or

[2] Nor did Congress use other language suggesting the terms were synonymous or that one incorporated the other. For example, if Congress intended the meaning defendant asserts, Congress could have said "unlawful user (meaning one who is addicted to) any controlled substance" or "unlawful user (defined as one who is addicted to) any controlled substance," or some other type of clear language. It did not, and the Court will not read into the plain text of the statute a more convoluted definition the defendant urges upon the Court.

incapacitated and dangerous to qualify as an unlawful user. Quite the contrary; the Eighth Circuit Court of Appeals contemplated "lost the power of self-control" only as refers to a "drug addict['s]" addiction. EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.922B; 27 C.F.R. § 478.11. Not only this, but "unlawful user" and "drug addict" are separately defined and discussed. EIGHTH CIRCUIT MODEL CRIMINAL INSTRUCTION 6.18.922B. Further, the Eighth Circuit Court of Appeals has made clear the "lost the power of self-control" language need not be included in jury instructions in reference to use of a controlled substance, indicating that is not a requirement of an unlawful user. *Boslau*, 632 F.3d at 429-31; *Carnes*, 22 F.4th at 748.

Here, the evidence shows defendant was an unlawful user when in possession of the firearm as alleged in Count 1. On September 18, 2022, officers found marijuana in close proximity to documents addressed to defendant and an employee identification card belonging to defendant when searching defendant's home. (Doc. 42, at 1). On September 22, 2022, defendant admitted to using marijuana and that he smoked marijuana on September 19, 2022, which was confirmed by his urine testing positive for marijuana metabolite. (*Id.*, at 2). Knowing possession of marijuana, constructive or actual, though not necessarily dispositive of knowing use, shows access to marijuana and makes accusations of knowing use more likely than without knowing possession. *See United States v. Two Hearts*, 32 F.4th 659, 663 (8th Cir. 2022) (finding evidence consisting of user quantity of controlled substances and items used to consume controlled substances were sufficient for a jury to find that defendant was an unlawful user of those substances). There is no evidence defendant had a lawful prescription, nor does he claim he had a lawful prescription. Defendant's possession of marijuana, admission to knowing use absent prescription, and his positive urine test together show that during the same time period defendant possessed the firearm, he was an unlawful user of marijuana. *See Carnes*, 22 F.4th at 748. Thus, the Court finds defendant was an unlawful user of marijuana during the period alleged in Count 1.

The evidence also shows that defendant knew he belonged to the category of persons barred from firearm possession under Section 922(g)(3). Again, defendant had no prescription for marijuana. And absent a prescription for marijuana, use of marijuana is illegal both under Iowa law and federal law. Defendant was on notice that marijuana is federally illegal. *See United States v. Baez*, 983 F.3d 1029, 1042 (8th Cir. 2020) (stating ignorance of the law is no defense to a criminal charge absent highly technical statute exception). He also knew the substance he was using was marijuana because he admitted to using marijuana specifically. *See McFadden v. United States*, 576 U.S. 186, 192 (2015) (discussing example of ignorance of the law being inexcusable in the realm of controlled substances and willfulness when defendant had knowledge of substance); *Bryan v. United States*, 524 U.S. 184, 195-95 (1998) (discussing ignorance of the law exception). That defendant was on notice that marijuana use is illegal and that he was using marijuana knowingly together show defendant was on notice that marijuana was a controlled substance that he was using without a prescription and therefore unlawfully—*i.e.*, defendant was unlawfully using a controlled substance as proscribed in Section 922(g)(3). The Court finds, thus, that defendant knew he belonged to the category of persons barred from firearm possession.

In short, the Court finds beyond a reasonable doubt that defendant is guilty as charged in Count 1 of the Indictment.

B. Count 2

The Court finds beyond a reasonable doubt that on or about April 3, 2023, defendant was a drug user in possession of a firearm as alleged in Count 2. As noted earlier, the sole remaining issue is whether on or about April 3, 2023, defendant was knowingly an unlawful user of or addicted to a controlled substance, that is, marijuana.

Defendant makes an identical argument here as in Count 1, adding only that there is no evidence that on April 3, 2023, defendant acted in any manner indicating he lost the power of self-control. (Doc. 39, at 9).

The government, too, asserts the same argument as to Count 2 and differs only in its recitation of facts proving up the unlawful user element. As to Count 2, the government argues the evidence shows defendant was an unlawful user during the time alleged: defendant used marijuana from the age of 15 until at least the April 3, 2023 arrest, smoked marijuana three to four times weekly during that time, admitted to an April 1, 2023 marijuana use, and a sample of defendant's urine obtained after the April 3, 2023 arrest tested positive for marijuana metabolites indicating recent use. (Doc. 40, at 5). Further, the government asserts the facts show defendant knew he belonged to the category of persons barred from possessing a firearm under the statute. (*Id.*, at 5-6). To this point, the government argues that (a) defendant's six-year marijuana use on a three to four times per week basis when also possessing the firearm, (b) his marijuana use within two days of the arrest, and (c) his urine testing positive for marijuana metabolite indicative of consumption immediately after arrest, all point to defendant's knowledge that he was an unlawful user of a controlled substance at the time and barred from possessing the firearm in question. (*Id.*, at 7).

Here, the evidence shows that on or about April 3, 2023, defendant was an unlawful user of a controlled substance, specifically marijuana. Officers obtained a warrant for defendant's urine shortly after the April 3, 2023 stop; defendant's urine sample tested positive for marijuana metabolites, indicative of recent marijuana use. (Doc. 42, at 2). Defendant began smoking marijuana at age 15 and had continued to use marijuana at least until his April 3, 2023 arrest, smoking marijuana three to four times per week. (*Id.*). Defendant last used marijuana on April 1, 2023. (*Id.*, at 3). Together, the evidence shows a pattern of use and possession of marijuana during the period alleged. Because defendant did not have a prescription for marijuana during this period of use, defendant had committed unlawful use of marijuana. 27 C.F.R. § 478.11. The government has established, therefore, that defendant's unlawful use of a controlled substance—marijuana—occurred during the same period as his firearm possession.

The evidence also shows that defendant knew he belonged to the category of persons barred from firearm possession under Section 922(g)(3). Again, defendant is charged with knowing what the law is. *See Baez*, 983 F.3d at 1042. Unlawful user is defined under federal law. It would be apparent to defendant that using marijuana without a prescription from a licensed physician made him an unlawful user who cannot bear firearms. The government has established, therefore, that defendant was, and knew he was, an unlawful user of controlled substances at the time he possessed the firearm.

The Court finds beyond a reasonable doubt, therefore, that defendant is guilty as charged in Count 2 of the Indictment.

C. Defendant's As-Applied Challenge

Last, defendant challenges his Indictment on a motion to dismiss, stating that Section 922(g)(3) is unconstitutional as-applied to him. This Court has previously ruled on a facial challenge to Section 922(g)(3) in this case and incorporates all findings and analysis here. (Doc. 34).

An as-applied void for vagueness challenge to a statute looks to "whether the statute gave adequate warning, under a specific set of facts, that the defendant's behavior was a criminal offense." *United States v. Washam*, 312 F.3d 926, 931 (8th Cir. 2002).

The Court finds Section 922(g)(3) is constitutional as-applied to defendant. As stated in its analysis of Counts 1 and 2, the Court finds the government has proven all elements of Counts 1 and 2, including that defendant was then an unlawful user. Defendant argues Section 922(g)(3) is unconstitutionally vague as-applied to him because "unlawful user" does not provide notice to defendant because he was not intoxicated or violent on either date of firearm possession alleged in the Indictment. (Doc. 39, at 5-6). In other words, citing *United States v. Daniels*, 77 F.4th 337 (5th Cir 2023), defendant argues without explicitly stating that application of the law as to him is arbitrary. (Doc. 39, at 5-6).

The government asserts Section 922(g)(3) is not unconstitutional as-applied to defendant. (Doc. 41). The government argues the Court should adopt the same reasoning as it did in defendant's facial challenge (Doc. 34) and reject *Daniels* here just as it did in rejecting defendant's facial challenge. (*Id.*, at 1). The government also argues Section 922(g)(3), as this Court recently found in *Ledvina*, No. 23-CR-2040-CJW-MAR, Doc. 64, uses "or" disjunctively, meaning one can be an unlawful user or an addict for the statute to apply. (*Id.*, at 2-3). Further, the government discusses the definition of "unlawful user" as provided in the Eighth Circuit Model Jury Instructions and Eighth Circuit precedent stating a court need not include the clause "has lost the power of self-control with reference to the use of controlled substance" and asserts defendant's emphasis on the government being required to prove loss of control is ill-placed. (*Id.*, at 3). To this point, the government argues defendant was charged as an unlawful user, not an addict, and that all the government need prove and has proven is that defendant was actively engaged in marijuana use. (*Id.*, at 4).

The application of this statute is not unconstitutional as applied to this defendant.[3] Defendant stipulated to facts showing that at the time he possessed the firearms referenced in Counts 1 and 2 of the Indictment, he was an "unlawful user" of a controlled substance, specifically marijuana. His conduct was clearly proscribed. Nothing in the application of Section 922(g)(3) to defendant is arbitrary or outside the scope of the conduct the statute covers; defendant's possession of the firearms as an "unlawful user" of a controlled substance is the exact conduct proscribed in the statute. 18 U.S.C. § 922(g)(3) ("It shall be unlawful for any person . . . who is an unlawful user of . . . any controlled substance[.]"). Thus, Section 922(g)(3) is not unconstitutional as-applied to this defendant.

[3] The Court has previously addressed the parties' arguments in its discussion and findings of guilt for Counts 1 and 2 and need not repeat its statements here. Further, this Court rejected *Daniels* in defendant's facial challenge and adopts its prior reasoning here. (Doc. 34).

Thus, the Court **denies** defendant's motion on this ground.

VI. CONCLUSION

Based on the totality of the evidence, the Court finds beyond a reasonable doubt that defendant is guilty of the crime of possession of a firearm by a drug user, in violation of Title 18, United States Code, Section 922(g)(3), as charged in Counts 1 and 2 of the Indictment. Defendant's as-applied motion to dismiss the Indictment is **denied**. (Doc. 27).

The Court will set this case for sentencing on a later date by separate order. The Court orders the preparation of a presentence investigation report. Defendant will remain in custody of the United States Marshal pending sentencing.

IT IS SO ORDERED this 28th day of December, 2023.

C.J. Williams
United States District Judge
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LA'VANCE LEMARR COOPER, Defendant.	No. 23-CR-2040-CJW-MAR **MEMORANDUM OPINION AND ORDER**

I. INTRODUCTION

This matter is before the Court on defendant's Motion to Dismiss the Indictment. (Doc. 27). The government filed a timely resistance. (Doc. 29). On September 28, 2023, the Court held a non-evidentiary hearing on this motion. (Doc. 33). For the following reasons, the Court **denies** defendant's motion to dismiss the Indictment as facially unconstitutional. The Court **holds in abeyance** defendant's as-applied challenges until trial.

II. RELEVANT BACKGROUND

On June 28, 2023, a grand jury indicted defendant in a two-count Indictment charging him with two counts of possession of a firearm by a drug user in violation of Title 18, United States Code, Sections 922(g)(3) and 924(a)(8). (Doc. 3). Count 1 of the Indictment alleges that on or about September 22, 2022, defendant, knowing he was an unlawful user of marijuana, knowingly possessed firearms, specifically a Glock 20, 10mm Auto caliber pistol, in and affecting commerce. (*Id.*). Count 2 alleges that on or about April 3, 2023, defendant, knowing he was an unlawful user of marijuana, knowingly possessed firearms, specifically a Glock 22 Gen 5, .40 S&W caliber pistol, in and affecting commerce. (*Id.*).

III. DISCUSSION

Defendant argues the Court should dismiss the Indictment based on two separate constitutional arguments. (Doc. 27-1). First, defendant asserts 922(g)(3) is inconsistent with this Nation's historical tradition of firearm regulation, as required by *Bruen*. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). (*Id.*, at 5). Second, defendant argues Section 922(g)(3) is unconstitutionally vague on its face and as-applied, and thus, violates the Due Process Clause of the Fifth Amendment. (*Id.*, at 10-15).

The Court finds that Section 922(g)(3) does not violate the Second Amendment on its face and therefore denies defendant's motion to dismiss. In arriving at this conclusion, the Court first finds that Section 922(g)(3) implicates conduct protected by the Second Amendment. Second, the Court concludes that Section 922(g)(3) is consistent with this Nation's traditional regulation of possession of firearms by criminals. In addition, the Court finds Section 922(g)(3) is not unconstitutionally vague on its faces and therefore denies the motion to dismiss on that ground.

*A. Post-*Bruen *Facial Challenge*

Defendant asserts Section 922(g)(3) violates the Second Amendment right to bear arms. (Doc. 27-1). Among other things, defendant argues that the Second Amendment's plain text covers conduct regulated in Section 922(g)(3). (*Id.*, at 5). Second, defendant asserts the government cannot and has not met its burden to show that the regulation of the conduct in the statute—possession of a firearm by an unlawful drug user—is consistent with this Nation's historical tradition of firearm regulation as required in *Bruen*. (*Id.*, at 5-9). For the reasons that follow, the Court denies the motion to dismiss on this ground.

1. Implication of the Second Amendment

The Second Amendment to the United States Constitution provides "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Title 18, United States Code, Section 922(g), however, provides that "[i]t shall be unlawful for any person

. . . (3) who is an unlawful user of or addicted to any controlled substance . . . to . . . possess in or affecting commerce, any firearm or ammunition . . ..." The question here is whether Section 922(g)(3) unconstitutionally infringes upon defendant's right to keep and bear arms guaranteed to persons under the Second Amendment.

In *Bruen*, the United States Supreme Court explained that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2129-30. Only after the government makes that showing "may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* at 2130 (internal quotation marks and further citation omitted). In *Bruen*, the Supreme Court held unconstitutional a State of New York's penal code provision making it a crime to possess a firearm outside the home without a license, when licensing required applicants to satisfy a "proper cause" for possessing a firearm by "demonstrat[ing] a special need for self-protection distinguishable from that of the general community." 142 S. Ct. at 2123 (further citation omitted). The Supreme Court determined that all lower courts had erred in applying means-end scrutiny of statutes regulating firearms, finding that statutes regulating conduct protected by the Second Amendment are presumptively unconstitutional unless the government can show that "it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. Because the State of New York only issued public-carry licenses when an applicant demonstrated a special need for self-defense, the *Bruen* Court found "the State's licensing regime violates the Constitution." *Id.* at 2122. "*Bruen* transformed and left uncharted much of the legal landscape" of Second Amendment jurisprudence. *United States v. Charles*, 22-CR-00154-DC, 2022 WL 4913900, at *1 (W.D. Tex. Oct. 3, 2022).

Under *Bruen*, the threshold question a court must address is whether the statute in question regulates conduct protected by the Second Amendment. Here, Section 922(g)(3)

criminalizes possession of a firearm, which is conduct expressly protected by the Second Amendment. The text of the Second Amendment does not qualify who may possess firearms, but rather uses the word "people." Thus, as a textual matter, the plain reading of the Second Amendment covers defendant who is a person under the Constitution. *See United States v. Perez-Gallan*, 22-CR-00427-DC, 2022 WL 16858516, at *8-9 (W.D. Tex. Nov. 10, 2022) (finding the Second Amendment applies to members of the political community and is not limited to law-abiding citizens). Thus, the Court answers the threshold question in the affirmative.

2. Section 922(g)(3) is Consistent with the Nation's Tradition of Firearm Regulation

Having found that Section 922(g)(3) implicates conduct protected by the Second Amendment, the next question is whether it is consistent with the Nation's historical tradition of firearm regulation. The second prong of *Bruen* requires the Court to determine "if there is a history and tradition of keeping guns from those engaged in criminal conduct"; if so, then the law is constitutional "whether the Second Amendment right belongs to all Americans or just to ordinary, law-abiding citizens." *Fried v. Garland*, Case No. 4:22-cv-164-AW-MAF, 2022 WL 16731233, at *5 (N.D. Fla. Nov. 4, 2022) (quoting *Heller*, 554 U.S. at 581; *Bruen*, 142 S. Ct. at 2122) (internal quotation marks and citations omitted). This Court has found several times that Section 922(g)(3) is constitutional. *See United States v. Garcia*, Case No. 23-CR-2018-CJW-MAR, at Doc. 25; *United States v. Springer*, Case No. 23-CR-1013-CJW-MAR, at Doc. 44; *United States v. Wuchter*, Case No. 23-CR-2024-CJW-MAR, at Doc. 33; *United States v. Ledvina*, Case No. 23-CR-36-CJW-MAR; *United States v. Grubb*, Case No. 23-CR-1014-CJW-MAR, at Doc. 29. The Court makes the same finding here for the same reasons, which it will repeat here.

The Supreme Court's holding in *Bruen* did not overturn *District of Columbia v. Heller*, in which the Court recognized the importance of "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. 570, 627 (2008)

(citations omitted). In fact, the *Bruen* Court expressly stated that its opinion was "consistent with *Heller* and *McDonald* [*v. City of Chicago*, 561 U.S. 742 (2010)]." 142 S. Ct at 2122. As in *Heller* and *McDonald*, the issue in *Bruen* concerned "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. The *Bruen* Court noted that it was undisputed that the petitioners were "two ordinary, law-abiding, adult citizens" who are "part of 'the people' whom the Second Amendment protects." *Id.* at 2134. In the first paragraph of the *Bruen* opinion, the Court framed the issue as follows:

> In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.

Id. at 2122 (parallel citations omitted). In the concluding paragraph of the majority opinion, the Court repeated that the right to bear and keep arms belonged to "law-abiding citizens with ordinary self-defense needs." *Id.* at 2156.

Thus, it is abundantly clear that the *Bruen* Court did not disturb the conclusions in *Heller* and *McDonald* in which the Justices made it plain that it left undisturbed government regulations prohibiting felons from possessing firearms. *Id.* at 2162 (Kavanaugh, J., concurring). It follows that, since *Bruen*, lower courts have consistently held as constitutional Section 922(g)(1) which makes it an offense for felons to possess firearms. *See United States v. Price*, No. 2:22-cr-00097, 2022 WL 6968457, at *8 (S.D. W.Va. Oct. 12, 2022) (collecting cases). The broader question the Supreme Court left open is the extent to which statutes prohibiting other categories of people from possessing firearms is supported by the historic regulation of firearm possession.

In *Heller*, the Supreme Court emphasized that despite its holding that the Second Amendment conferred an individual right to bear arms, it was not undertaking "an exhaustive historical analysis . . . of the full scope of the Second Amendment, [and that] nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. The *Heller* Court explained: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." 554 U.S. at 627 n.26. Later, in *McDonald*, 561 U.S. at 785-87, the Supreme Court reaffirmed the sentiment that *Heller* was not meant to create doubt about the regulations that prohibited firearm possession by certain groups of people or in certain places.

After *Heller*, but prior to *Bruen*, the Eighth Circuit Court of Appeals held that Section 922(g)(3) was a lawful exception to the Second Amendment—an exception consistent with the historical understanding of the amendment's protections. In *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010), the Eighth Circuit rejected a facial constitutional challenge to Section 922(g)(3). The Eighth Circuit explained:

> Nothing in Seay's argument convinces us that we should depart company from every other court to examine § 922(g)(3) following *Heller*. Further, § 922(g)(3) has the same historical pedigree as other portions of § 922(g) which are repeatedly upheld by numerous courts since *Heller*. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Moreover, in passing § 922(g)(3), Congress expressed its intention to "keep firearms out of the possession of drug abusers, a dangerous class of individuals." *United States v. Cheeseman*, 600 F.3d 270, 280 (3d Cir. 2010), *pet. for cert. filed*, 78 U.S.L.W. 3731 (U.S. June 1, 2010) (No. 09-1470). As such, we find that § 922(g)(3) is the type of 'longstanding prohibition[ ] on the possession of firearms' that *Heller* declared presumptively lawful. *See* 128 S. Ct. at 2816–17. Accordingly, we reject Seay's facial challenge to § 922(g)(1).

Id. (alteration in original).

The *Seay* Court did not conduct the type of historic analysis the Supreme Court contemplated in *Bruen*. Still, the Court does not find persuasive defendant's argument. (Doc. 39-1, at 2 (citing *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023)). As the Honorable Stephen H. Locher, United States District Court Judge for the Southern District of Iowa, reasoned:

> All the same, nothing in *Bruen* expressly repudiates the holding of *Seay*. To the contrary, in a concurring opinion in *Bruen*, Justice Kavanaugh (joined by Chief Justice Roberts) reiterated the earlier admonitions of Justices Scalia (in *Heller*) and Alito (in *McDonald*) that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . ." *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring (quoting *Heller*, 554 U.S. at 626, 128 S.Ct. 2783)). As *Seay* relied heavily on the same "longstanding prohibition" language in affirming the facial constitutionality of § 922(g)(3), *see* 620 F.3d at 925, it is difficult for this Court to conclude *Seay* is no longer good law. Instead, the proper course is to treat *Seay* as binding and "leav[e] to [the Eighth Circuit] the prerogative of overruling its own decisions." *United States v. Coonce*, 932 F.3d 623, 641 (8th Cir. 2019) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); *see also United States v. Wendt*, --- F. Supp. 3d ----, ----, 2023 WL 166461, at *5 (S.D. Iowa Jan. 11, 2023) (declining to interpret *Bruen* as having invalidated firearm restrictions under the Bail Reform Act absent "much clearer guidance from higher courts").

United States v. Le, No. 4:23-cr-00014-SHL-HCA, 2023 WL 3016297, at *2 (S.D. Iowa Apr. 11, 2023).

Here, the Court agrees with Judge Locher's reasoning. Absent the Eighth Circuit itself finding that *Bruen* overturned its holding in *Seay*, this Court must treat *Seay* as binding precedent. For that reason, the Court would deny defendant's motion to dismiss on the ground that Section 922(g)(3) violates the Second Amendment. *See also Gilpin v. United States*, Civil No. 22-04158-CV-C-RK-P, 2023 WL 387049, at *4 (W.D. Mo. Jan. 3, 2023) (rejecting a post-*Bruen* challenge to Section 922(g)(3), finding that *Bruen* did not overturn binding precedent in *Seay*).

Regardless, even if the Court did not find *Seay* binding, under the more robust historic analysis demanded by *Bruen*, the Court is persuaded that Section 922(g)(3) withstands a constitutional attack. In *United States v. Bena*, 664 F.3d 1180, 1183-84 (8th Cir. 2011), the Eighth Circuit conducted a more thorough historic analysis of the regulation of firearms as it relates to dangerous people during the Founding era in rejecting a constitutional challenge to Section 922(g)(8), which criminalizes firearm possession by persons subject to a court order of protection for domestic abuse. There, the Eighth Circuit concluded there was "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible." *Bena*, 664 F.3d at 1183. Further, as Justice Barrett, who was then sitting as a judge on the Seventh Circuit Court of Appeals, noted, there is ample evidence from the Founding era that firearms were restricted from those who were deemed dangerous to society. *See Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) ("The historical evidence does, however, support a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness."). Congress considered drug abusers to be a "dangerous class of individuals." *Seay*, 620 F.3d at 925. Congress made it illegal for unlawful drug users to possess firearms for the common sense and obvious reason that someone using illegal drugs, in possession of a firearm, poses a real danger to the community. *See United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) ("[H]abitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms."). It follows, then, that barring unlawful drug users who pose a danger to society is consistent with the history of firearm regulation at the time the Second Amendment was adopted.

This Court is not alone in reaching the conclusion that Section 922(g)(3) does not violate the Second Amendment. Numerous other district courts have reaffirmed the conclusion that Section 922(g)(3) is constitutional after *Bruen*. *See, e.g.*, *United States v. Walker*, 8:22-CR-291, 2023 WL 3932224, at *5 (D. Neb. June 9, 2023) (rejecting post-*Bruen* challenge to Section 922(g)(3), finding the *Seay* case controlling); *Le*, 2023 WL 3016297, at *5 (rejecting a post-*Bruen* constitutional challenge to Section 922(g)(3)); *United States v. Posey*, Case No. 2:22-CR-83 JD, 2023 WL 1869095, at *9-10 (N.D. Ind. Feb. 9, 2023) (denying as applied and facial post-*Bruen* challenge to Section 922(g)(3)); *United States v. Lewis*, Case No. CR-22-368-F, Case No. CR-22-395-F, 2023 WL 187582, at *4 (W.D. Okla. Jan. 13, 2023) (rejecting a post-*Bruen* constitutional challenge to Section 922(g)(3)); *United States v. Sanchez*, W-21-CR-00213-ADA, 2022 WL 17815116, at *3 (W.D. Tex. Dec. 19, 2022) (holding that Section 922(g)(3) is "consistent with this Nation's historical tradition of firearm regulation"); *Fried*, 2022 WL 16731233, at *7 ("At bottom, the historical tradition of keeping guns from those the government fairly views as dangerous—like alcoholics and the mentally ill—is sufficiently analogous to modern laws keeping guns from habitual users of controlled substances . . .. The challenged laws are consistent with the history and tradition of this Nations' [sic] firearm regulation."); *United States v. Seiwert*, Case No. 20 CR 443, 2022 WL 4534605, at *2 (N.D. Ill. Sept. 28, 2022) (holding that Section "922(g)(3) is relevantly similar to regulations aimed at preventing dangerous or untrustworthy persons from possessing and using firearms, such as individuals convicted of felonies or suffering from mental illness"); *United States v. Daniels*, 610 F.Supp.3d 892, 897 (S.D. Miss. 2022) (finding Section 922(g)(3) constitutional after determining that "analogous statutes which purport to disarm persons considered a risk to society—whether felons or alcoholics—were known to the American legal tradition").

True, some other district courts have found Section 922(g)(3) violates the Second Amendment. *See, e.g.*, *United States v. Connelly*, Cause No. EP-22-CR-229(2)-KC,

2023 WL 2806324, at *12 (W.D. Tex. Apr. 6, 2023); *United States v. Harrison*, Case No. CR-22-00328-PRW, 2023 WL 1771138, at *24 (W.D. Okla. Feb. 3, 2023).[1] The Court has reviewed these non-binding decisions and, with respect, simply disagrees with the narrow view these courts took of the historic precedent of regulating firearm possession by dangerous and unlawful citizenry. The Court is persuaded that Section 922(g)(3) is a constitutional restriction consistent with historical tradition.

Thus, the Court denies defendant's motion to dismiss, finding Section 922(g)(3) does not violate the Second Amendment on its face.

B. Post*-Bruen *As Applied Challenge

Defendant also challenges Section 922(g)(3) as unconstitutional as-applied to him—a marijuana user—and requested an evidentiary hearing, citing no authority for such a hearing. (Doc. 27). As discussed at the non-evidentiary hearing, an as-applied challenge is premature at this point and will remain premature absent a bench or jury trial. (Doc. 33). *United States v. Turner*, 842 F.3d 602, 605 (8th Cir. 2016) (stating a district court cannot adjudicate an as-applied challenge without first resolving factual issues related to the alleged offense, and thus, must wait to do so until trial).

The Court notes there is no summary judgment procedure in federal criminal cases. *See United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996); *United States v. Viskup*, No. 1:12–CR–263–ODE–JFK, 2013 WL 6858906, at *9 (N.D. Ga. Dec. 30, 2013); *United States v. Williams*, No. 1:10–CR–150–TCB–AJB, 2010 WL 3488131, at *3 (N.D.Ga. Aug. 2, 2010). Although Rule 12 allows a defendant to move to dismiss

[1] The Fifth Circuit Court of Appeals recently held Section 922(g)(3) unconstitutional in *United States v. Daniels*, Case No. 1:22-CR-58-1, 2023 U.S. App. LEXIS 20870 (5th Cir. Aug. 9, 2023). This decision is not only not binding on this Court, but the Court also respectfully disagrees with that court's reasoning and treatment of analogues in that case. This narrow reading and demand for near perfect analogues—despite acknowledging *Bruen*'s pronouncement analogues need not be perfect—is too severe and places too great an emphasis on the specific controlled substance Daniels used—marijuana—when Section 922(g)(3) regulates unlawful users and addicts of any controlled substance, not specific controlled substances. 18 U.S.C. § 922(g)(3).

an indictment prior to trial on the basis of improper venue, it requires that "the motion can be determined without a trial on the merits." The sufficiency of a criminal indictment is determined from its face. *See Jensen*, 93 F.3d at 669; *Williams*, 2010 WL 3488131, at *3. The allegations of the indictment must be taken as true. *See United States v. Razo*, No. 1:11–CR–00184–JAW, 2012 WL 5874667, at *5 (D. Me. Nov. 20, 2012); *United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir 1997). "If there is a facially sufficient indictment, the Court cannot make venue determinations based on extrinsic evidence in deciding a pre-trial motion . . .. This is particularly true where, as here, the Defendant's factual contentions on venue are interwoven with the evidence in the case itself." *Razo*, 2012 WL 5874667, at *5 (citation omitted).

Here, the law does not support the suggestion that this Court is permitted to hold an evidentiary hearing where the government puts forth the evidence it would present at trial after which defendant would ask the Court to determine the as-applied challenge. There is no authority for such a hearing. It would amount to a form of unauthorized discovery and the equivalent of a summary judgment proceeding. Defendant's remedy lies with trial. If defendant desires to maintain an as-applied challenge to the constitutionality of Section 922(g)(3), then he must await presentation of evidence at trial. Defendant is then free to renew the motion after the complete presentation of evidence at trial. Until that time, the Court must hold in abeyance its ruling on defendant's as-applied challenge.

C. Facial Vagueness Challenge

Defendant alleges Section 922(g)(3) is unconstitutionally vague because the terms "user" and "addict" are vague. (Doc. 27-1, at 11-15). Defendant suggests that he must know that his conduct made him a user or addict, and it was possible that a person could be confused in determining whether his use was serious enough to qualify as a user covered by the statute. (*Id.*).

Until recently, a challenger raising "[a] facial challenge to a legislative Act" was required to "establish that no set of circumstances exists under which the Act would be valid." *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987). But in *Johnson v. United States*, the Supreme Court clarified that a vague criminal statute is not constitutional "merely because there is some conduct that falls within the provision's grasp." 576 U.S. 591, 602 (2015). Then, in *United States v. Bramer*, the Eighth Circuit Court of Appeals further clarified that a challenger raising a facial challenge must "show that the statute is vague as applied to h[er] particular conduct." 832 F.3d 908, 909 (8th Cir. 2016) (finding the defendant, who signed a plea agreement admitting guilt to Section 922(g)(3) violation, could not show vagueness when he argued Section 922(g)(3) was facially unconstitutional based on the allegedly vague terms "unlawful user" and "addicted to").

The cumulative effect of *Johnson* and *Bramer* is somewhat confusing. Reading these decisions together, it is difficult to tell when and why a defendant would argue that a statute is unconstitutional on its face as opposed to unconstitutional as applied to her, specifically. *See United States v. Stupka*, 418 F. Supp. 3d 402, 407 (N.D. Iowa 2019) ("If a defendant is able to show that a law is unconstitutionally vague as applied—as required by *Bramer*—there would be no need for that defendant to show, or a court to decide, that the law is unconstitutional on its face. But if a defendant could not show that the law is unconstitutional as applied, then he or she would always be prohibited from challenging a law as being void for vagueness on its face."). It is also unclear whether the Court should address defendant's facial challenge now. *See id.*, at 408 ("What distinguishes the cases in which a facial challenge is appropriate without regard to an as-applied challenge from those cases in which a defendant may make only an as-applied challenge? If there is a discernible and articulable distinction, on which side does this case fall? If Stupka's facial challenge is appropriate without regard to an as-applied challenge, then *Bramer* is not controlling and the facial challenge should be addressed

now. If Stupka must show that the law is unconstitutional as applied, then *Bramer* controls and any facial review must await the results of the pending as-applied challenge.").

Nevertheless, this Court has previously rejected a constitutional challenge to Section 922(g)(3) on grounds of facial vagueness under circumstances similar to those presented here. *See Stupka*, 418 F. Supp. 3d at 412-13 (denying motion to dismiss indictment on Section 922(g)(3) charge as facially unconstitutional); *see also United States v. Gantt*, Case No. 20-cr-2020-CJW, 2020 WL 6821020, at *13-14 (N.D. Iowa, Sept. 2, 2020), *report and recommendation adopted*, 2020 WL 5653983 (N.D. Iowa Sept. 23, 2020) (adopting reasoning in *Stupka* and denying motion to dismiss indictment on Section 922(g)(3) charge as facially unconstitutional).

In *Stupka*, the Court found there were certain situations in which facial challenges were permissible "regardless of whether the law would be found unconstitutional as applied"; specifically, when the law infringes on fundamental rights and when the law lacks sufficiently clear guidelines or is vague in a manner that poses a high risk of arbitrary enforcement. 418 F. Supp. 3d at 411-12. The Court then found the defendant's arguments did not warrant a facial review. First, the Court found Section 922(g)(3) did not infringe upon a fundamental right, because "possession of firearms by certain parties, such as felons, has been found to be outside the Constitution's protections." *Id.* at 412. Second, the Court found the defendant argued the language of Section 922(g)(3) was imprecise, not that its enforcement was arbitrary, and did not attack the statute's process. *Id.* Thus, the Court found a facial challenge was not appropriate in *Stupka*. *Id.* at 413.

The circumstances here are virtually identical to those in *Stupka*. Again, Section 922(g)(3) does not infringe upon a fundamental right, and defendant's argument focuses on allegedly arbitrary language, not process or arbitrary enforcement. (Doc. 27-1, at 11-15). Thus, for the reasons explained in *Stupka*, the Court again rejects a facial challenge to Section 922(g)(3).

Thus, the Court denies defendant's motion to dismiss on this ground.

D. As-Applied Vagueness Challenge

Last, defendant argues Section 922(g)(3) is unconstitutionally vague as applied to him but provides no basis for this claim—only that the parties might be able to stipulate the relevant evidence necessary to adjudicate this claim before trial. (Doc. 27-1, at 15). Defendant acknowledges that his as-applied challenge must await presentation of evidence at trial.[2] (*Id.*). He is correct. *See Turner*, 842 F.3d at 605 (finding an as-applied challenge must await trial); *Stupka*, 418 F. Supp. 3d at 405 (same).

Thus, the Court holds in abeyance its ruling on defendant's motion to dismiss on this ground.

IV. CONCLUSION

For these reasons, defendant's Motion to Dismiss the Indictment (Doc. 27) is **denied** as to the grounds Section 922(g)(3) is facially unconstitutional under the Second Amendment and that it is unconstitutionally vague. The Court **holds in abeyance** until trial defendant's as-applied challenge that the statute is unconstitutional as-applied to him under both the Second and Fifth Amendments.

IT IS SO ORDERED this 29th day of September, 2023.

C.J. Williams
United States District Judge
Northern District of Iowa

[2] Defendant also asserts, however, that the parties might reach a stipulation of facts so the Court can address this claim prior to trial. (Doc. 27-1, at 15).