No. 24-1234

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

ALI DANIEL HEMANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PROFESSOR JOEL S. JOHNSON AS AMICUS CURIAE SUPPORTING RESPONDENT

JOEL S. JOHNSON
Counsel of Record
PEPPERDINE UNIVERSITY
CARUSO SCHOOL OF LAW
24255 E. Pacific Coast Hwy,
Malibu, CA 90263
310-506-7531
Joel.Johnson@pepperdine.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Page

Cases—continued:

Constitution, statutes, and regulation:

Miscellaneous:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 24-1234

UNITED STATES, PETITIONER

v.

ALI DANIEL HEMANI

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PROFESSOR JOEL S. JOHNSON
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

Joel S. Johnson is an Associate Professor of Law at Pepperdine Caruso School of Law. His interest as amicus curiae is the sound construction of federal penal statutes. This brief draws on amicus's articles, *Major-Questions Lenity*, 110 Minn. L. Rev. 617 (2025) (*Major-Questions Lenity*); *Ad Hoc Constructions of Penal Statutes*, 100 Notre Dame L. Rev. 73 (2024) (*Ad Hoc Constructions*); and *Vagueness Avoidance*, 110 Va. L. Rev. 71 (2024) (*Vagueness Avoidance*). Amicus has also written about this case. See *An off-ramp for the court's next big gun case*, SCOTUSblog (Dec. 18, 2025), <tinyurl.com/gunofframp>.[1]

[1] No counsel for a party authored any part of this brief. Nor did anyone, other than amicus and his academic institution, financially contribute to preparing or submitting it. The brief reflects only amicus's views, not those of his academic institution.

SUMMARY OF ARGUMENT

This case has been framed as a vehicle for resolving a significant Second Amendment conflict. But it need not be decided on a constitutional ground. Instead, this Court should affirm the judgment below by narrowly construing 18 U.S.C. 922(g)(3).

The statutory phrase "unlawful user," the basis for the Section 922(g)(3) charge against respondent, is undefined and inherently indeterminate. Because it is a vague phrase, it requires judicial construction.

The government's own shifting positions highlight the statute's lack of clear boundary. For decades, a federal regulation has expansively construed "unlawful user" to include those who have used a controlled substance just once within the past year. That sweeping construction potentially criminalizes tens of millions of Americans. In this case, the Solicitor General has pivoted to a newly minted habitual-user test. Yet that new construction fails to resolve the statute's indeterminacy; it leaves undefined what constitutes a habit or when a habit has ceased. Nor can the habitual-user construction be squared with a statutory definition for the separate category of "addict," which expressly invokes the concept of habitual use. The habitual-user construction also creates an absurd result, excluding from Section 922(g)(3)'s coverage first-time drug users who possess a gun while actively under the influence.

Rather than adopting either of these deficient and ad hoc constructions, the Court should employ a principled framework for construing penal statutes that respects the separation of powers and legislative primacy in defining crimes. Two alternative and independent approaches are available.

First, the Court could embrace a rule of "major-questions lenity." Just as the major questions doctrine in administrative law requires a clear statement from Congress before an agency may exercise authority over matters of vast economic and political significance, major-questions lenity would require a clear statement before a penal statute is construed to turn millions of citizens into felons. Explication of that rule would revitalize the historic principle of strict construction, which ensured that the legislature—not the judiciary or the executive—defines criminal conduct.

Second, the Court could rely on "vagueness avoidance" to adopt a narrow construction limited to the statute's identifiable core. That would restrict the statute's application to conduct it clearly covers, thereby avoiding constitutional vagueness concerns presented by the statute's indeterminate text.

Both paths lead to the same result in this case: a construction of "unlawful user" limited to those impaired while armed. By adopting that narrow reading based on a generic principle rather than an ad hoc rationale, the Court can provide stable and enduring guidance for lower courts faced with open-ended language in other federal criminal statutes. A narrow reading also allows the Court to affirm the judgment below solely on a statutory ground, because respondent was charged under a theory more expansive than what the narrow construction supports.

ARGUMENT

This case has been billed as the Court's next big Second Amendment battle. But it need not be. The Court should resolve it on a statutory ground. It should affirm the judgment below on the basis of a narrow construction of Section 922(g)(3).

Section 922(g)(3) makes it a felony, subject to up to fifteen years of imprisonment, for anyone "who is an unlawful user of or addicted to any controlled substance" to "possess * * * any firearm or ammunition." 18 U.S.C. 922(g)(3); see 18 U.S.C. 924(a)(8). The government charged respondent as an "unlawful user" under the statute. Indictment 1. The district court dismissed the indictment. Pet. App. 3a-4a. The court of appeals summarily affirmed, Pet. App. 1a-2a, relying on its own precedent that the Second Amendment prevents unlawful-user prosecutions of those not impaired at the time of gun possession because "there is no historical justification for disarming a sober citizen not presently under an impairing influence." *United States* v. *Connelly*, 117 F.4th 269, 275-276 (5th Cir. 2024). The government is now asking the Court to reverse the court of appeals, arguing that a more sweeping ban on drug users has historical support, including Founding-era restrictions on "habitual drunkards." Pet. Br. 17-35.

But before considering the constitutionality of Section 922(g)(3), the Court must first determine its purported legal effect as a statutory matter. Although the relevant language of Section 922(g)(3) has been on the books since the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, the Court has never before had occasion to construe it. Statutory analysis will be crucial to the resolution of this case and to the guidance the Court gives lower courts.

If the Court narrowly construes the statute—so that "unlawful user" status applies only to those armed while intoxicated—the Second Amendment concerns will vanish. There is stronger historical support for disarming someone who is high than there is for disarming someone who happened to smoke a joint

a few times in the last month but is no longer impaired. See *Connelly*, 117 F.4th at 275-282. And because respondent was charged under a more expansive reading of the statute, see Pet. Br. 7 ("The prosecution rests on respondent's habitual use of marijuana."), a narrow reading would allow the Court to affirm the judgment below without engaging in Second Amendment analysis at all.

The government's shifting attempts to construe "unlawful user"—ranging from a sweeping ban based on a single use in the past year to a newly minted habitual-user test—demonstrate the inherent indeterminacy of the statutory text. Neither construction is rooted in clear congressional authorization.

In construing Section 922(g)(3), the Court should follow a principled framework—one that respects the separation of powers and legislative primacy in crime definition. The Court should embrace a rule of "major-questions lenity" that requires a clear statement from Congress before adopting a construction that would turn millions of Americans into felons. In the alternative, the Court could employ vagueness avoidance. Both frameworks lead to a construction of "unlawful user" that limits its application to the core category of those who are impaired while armed. By adopting that reading based on a generic rule of narrow construction, the Court can provide stable, enduring guidance for lower courts faced with open-ended text in other federal criminal statutes.

I. SECTION 922(g)(3) REQUIRES JUDICIAL CONSTRUCTION

Before addressing the Second Amendment challenge to Section 922(g)(3), the Court must first determine the statute's purported legal effect. The vague term "unlawful user" requires judicial construction.

A. The Phrase "Unlawful User" Is Vague

Section 922(g)(3) makes it a federal crime for anyone "who is an unlawful user of or addicted to any controlled substance" to "possess" a firearm. 18 U.S.C. 922(g)(3).[2] Another statute expressly defines the term "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).[3] But no statute defines "unlawful user," the prohibited category at issue here.

The phrase "unlawful user" is vague because it does not clearly draw a line between who along the spectrum of drug users is covered and who is not. Does unlawful-user status apply to anyone who has

---

[2] As originally enacted, the statute did not use "controlled substance" terminology. Instead, the statute covered anyone who was "an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)[.]" Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1220.

[3] Congress provided the definition of "addict" as part of the Controlled Substances Act, which was Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. That statute was passed just two years after Section 922(g)(3) was originally enacted.

ever used the drugs illegally, even if only once or only occasionally? Does it apply only to someone holding a gun while impaired? Or is the line somewhere in between? See *Vagueness Avoidance* 82 ("A word or phrase is vague when there are difficult borderline cases to which the term may or may not apply, with the result that it is open to practically 'innumerable possible meanings' or applications." (quoting Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation 38-39 (2010))); cf. *Dubin* v. *United States*, 143 S. Ct. 1557, 1572 (2023) (describing similar concerns arising from the vague term "uses" in an aggravated identity theft statute).[4]

Because the phrase is vague, the Court will be engaging in statutory construction, not merely interpretation,[5] when deciding where to draw the line on unlawful-user status.

---

[4] Although the Court's opinion in *Dubin* did not explicitly label the statutory term "uses" as vague, four separate Justices correctly raised vagueness concerns during oral argument. See *Vagueness Avoidance* 128-129 (identifying Justices Sotomayor, Gorsuch, Kavanaugh, and Jackson as raising vagueness concerns during oral argument).

[5] Vagueness cannot usually be resolved through mere *interpretation*—the process of recovering the "semantic content of the legal text." Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 96 (2010). Rather, resolution of vagueness typically requires *construction*, the process of "giv[ing] a text legal effect * * * [b]y translating the linguistic meaning into legal doctrine." *Ibid.*; see *Vagueness Avoidance* 80; William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1085-1086 (2017) (recognizing the distinction between interpretation and construction). By contrast, an ambiguous term—one that can be used in "more than one sense," Solum 97, such that it is open to a "discrete number of possible

B. The Government's Constructions Are Deficient

The government has proposed two different constructions of "unlawful user." Both are deficient.

1. For decades, a federal regulation has taken the position that a person can be labeled an "unlawful user" under the statute based on a single use of a controlled substance within the past year, as demonstrated by a positive drug test or drug-offense conviction. See 27 C.F.R. 478.11. That regulation has the effect of turning the statute into a sweeping ban, given that roughly one in four Americans ages twelve and over have unlawfully used a controlled substance within the past year. See *Drug Abuse Statistics*, National Center for Drug Abuse Statistics (Jan. 15, 2026) < tinyurl.com/drugabstats> (Drug Abuse Statistics).

Notably, the government's brief completely ignores the longstanding regulation. Instead, the Solicitor General now asserts that Section 922(g)(3) "applies only to *habitual* drug users, and imposes only temporary disarmament while that habitual use persists." Pet. Br. 11. That reading will come as news to the FBI—whose background-check guidance continues to state that proof of a single use within the past year renders one an "unlawful user" unable to buy a gun. See *Federal Categories of Persons Prohibited from Receiving Firearms*, FBI: How We Can Help You (Jan. 15, 2026) <tinyurl.com/fedcatsprohibited>.

Neither of the government's constructions is adequate. The longstanding federal regulation resolves the statute's indeterminacy, but it does so in favor of

---

meanings," Solan 38-39—can typically be resolved through interpretation with reference to "statutory context, rules of grammar, dictionaries, and usage norms embodied in descriptive canons of statutory interpretation." *Vagueness Avoidance* 88.

extraordinary breadth not clearly authorized by the statute's text. The Solicitor General's newly proposed habitual-user construction is narrower, but it fails to resolve the indeterminacy. How much drug use constitutes a habit? And when exactly has one's habit ended? The government's brief does not say.

2. The government's two constructions are further flawed because they cannot be squared with Section 922(g)(3)'s separate ban on gun possession for those who fall into the "addict" category.

a. The regulation's single-use construction of "unlawful user" renders the "addict" category superfluous. This Court's "practice" is "to 'give effect, if possible, to every clause and word of a statute.'" *Advocate Health Care Network* v. *Stapleton*, 581 U.S. 468, 478 (2017) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000)). Yet if anyone who has used a drug within the past year counts as an "unlawful user," then the separate "addict" category would serve no function. The government cannot coherently insist that "addict" would still cover those whose unlawful use occurred more than a year earlier, because its view is that "a person regains his ability to possess arms as soon as he stops habitually using drugs." Pet. Br. 3.

b. The Solicitor General's habitual-user construction is even more out of sync with the "addict" category. Congress expressly defined "addict" as including someone "who *habitually* uses any narcotic drug so as to endanger the public morals, health, safety, or welfare." 21 U.S.C. 802(1) (emphasis added). The Solicitor General apparently believes that, by separately including an "unlawful user" category, Congress meant to capture *all* habitual users, regardless of whether they pose a danger. See Pet. Br. 39-40 (insisting that it need not "make[] an individualized

showing of dangerousness" to prove an unlawful-user violation). But if that were so, the "unlawful user" category would nearly swallow the habitual-user definition of "addict."[6]

The Solicitor General's reading requires accepting the proposition that, even though Congress expressly used the term "habitual[] use[]" when defining "addict," it also meant for the separate term "unlawful user" to be understood as synonymous with habitual user. That reading violates the "meaningful-variation canon," *Southwest Airlines* v. *Saxon*, 142 S. Ct. 1783, 1789 (2022), and it defies common sense. See Antonin Scalia & Bryan A. Garner, Reading Law 170 (2012) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). The presence of "habitual[] use[]" in the definition of "addict" is strong textual evidence against the Solicitor General's reading.

---

[6] Technically, the category of habitual-user addicts would not be entirely swallowed if it is understood to reach *lawful* habitual users—such as individuals using prescribed narcotics who nonetheless pose a danger to society. But it is nonsensical to assume that Congress intended the category of habitual-user addicts to serve primarily as a narrow catch-all for legal prescription-holders while rendering it entirely redundant of "unlawful user" for the significantly larger set of cases involving illegal habitual use. That is especially true given that "addict" is a term of art restricted to "narcotic drug[s]," 21 U.S.C. 802(1); see also 21 U.S.C. 802(17) (defining "narcotic drug"); only the "unlawful user" category is capable of reaching the broad universe of non-narcotic controlled substances, such as marijuana or methamphetamine. The more natural reading of Section 922(g)(3) is that "unlawful user" and "addict" distinguish between levels of frequency, with the former reaching those who use unlawfully but not habitually.

Finally, the Solicitor General's proposed construction leads to an absurd result, creating a dangerous exclusion in Section 922(g)(3)'s coverage. If both the "unlawful user" prong and the "addict" prong required habitual use, see Pet. Br. 36 (arguing that "[t]he statute does not disarm someone who uses drugs once, or even someone who uses them occasionally"), then Section 922(g)(3) would fail to cover instances in which a first-time drug user possesses a gun while actively under the influence. Yet that may be the most dangerous situation of all. It is highly improbable that, in an Act designed to keep firearms out of the hands of those who might use them irresponsibly, Congress intended to immunize actively intoxicated persons simply because they lack a documented history of use.

II. THE PHRASE "UNLAWFUL USER" SHOULD BE NARROWLY CONSTRUED BASED ON MAJOR-QUESTIONS LENITY

Rather than adopting either of the government's deficient constructions, the Court should construe "unlawful user" by adhering to a more principled framework that permits only prosecutions clearly authorized by statutory text.

The rule of lenity instructs courts to construe indeterminate language in a criminal statute in favor of the defendant. Historically, lenity played a central role in construing criminal statutes. Yet the modern Court has treated it as a rule of last resort applicable only when intractable indeterminacy remains after all other interpretive tools have been exhausted. The result is predictable: the Court rarely, if ever, relies on lenity as a firm basis for narrowly construing criminal statutes. See pp. 15, *infra*.

When this Court does narrowly construe criminal statutes, it tends to do so without relying on any generic rule at all, opting instead for ad hoc statute-specific ordinary-meaning analysis. See pp. 15-16, *infra*. That approach produces narrow results in the short term but instability in the long term, leaving no enduring principle to guide how Congress, lower courts, and prosecutors should apply other criminal statutes with indeterminate language.

This case offers an opportunity to employ a more principled framework. When construing "unlawful user" under Section 922(g)(3), the Court should revitalize lenity—by embracing "major-questions lenity." *Major-Questions Lenity* 630. In the context of administrative law, the court uses the major questions doctrine to stop federal agencies from making massive economic or political changes without clear permission from Congress. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022). The logic is that Congress—not executive agencies—must make the big policy choices. The same logic should apply to criminal law. If Congress wants to turn millions of Americans into felons, it needs to say so clearly.

A. The Historic Rule Of Strict Construction Has Been Replaced By An Ad Hoc Approach To Construing Penal Statutes

1. Major-questions lenity is consistent with the historic rule of strict construction, a more robust predecessor to the modern rule of lenity.

When the Court first applied strict construction to federal penal statutes, Chief Justice Marshall justified it on a separation-of-powers basis, explaining that the "legislature, not the Court," is "to define a crime" and "ordain its punishment" because "the power of

punishment is vested in the legislative, not in the judicial department." *Wiltberger* v. *United States*, 18 U.S. (5 Wheat.) 76, 95 (1820). That principle of legislative primacy in crime definition "meant not just that Congress was entitled to take the lead in defining criminal law, but also that Congress was obliged to do so however inconvenient the consequences might be." Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 361 (1994).

That understanding of strict construction as a separation-of-powers constraint on the judiciary aligned the doctrine with another early tenet of federal criminal law rooted in separation-of-powers and federalism concerns—that federal courts did not have the power to create common law crimes. See *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."). Strict construction ensured that the judiciary did not accept prosecutors' efforts to expand federal criminal law by engaging in common law crime definition under the guise of statutory interpretation. *Major-Questions Lenity* 622. It required that, in order for courts "[t]o determine that a case is within" the scope of a federal penal statute, "its language must authorise [courts] to say so." *Wiltberger*, 18 U.S. (5 Wheat.) at 96.

Throughout the nineteenth century, this Court led the judiciary in applying the rule of strict construction to federal penal statutes. See, *e.g.*, *Ballew* v. *United States*, 160 U.S. 187, 197 (1895); *Sarlls* v. *United States*, 152 U.S. 570, 576-577 (1894); *United States* v. *Reese*, 92 U.S. 214, 219 (1875); *United States* v. *Hartwell*, 73 U.S. 385, 396-397 (1867); *Harrison* v. *Vose*, 50 U.S. 372, 378 (1850). During that period, the Court

understood it to be "well settled * * * that all reasonable doubts concerning" a penal statute's "meaning ought to operate in favor of the [accused]," *Harrison*, 50 U.S. at 378, and that the Court was "not at liberty to extend [a penal statute's] meaning beyond its exact literal sense," *Sarlls*, 152 U.S. at 576.

2. But in the twentieth century, the Court deliberately weakened the rule of strict construction to the point of near irrelevance. That effort was part of a larger methodological shift towards purposivism, an approach to interpretation aimed at implementing the spirit of a legislative enactment by looking to a wide range of materials to determine legislative intent. *Major-Questions Lenity* 641-644. Viewing strict construction as an impediment to legislative intent, the purposivist Court "sapped it of its strength, renaming it 'the rule of lenity' and relegating it to the to 'the end of the interpretive process,'" as something to be considered "only if ambiguity remained after considering all other indicia of legislative intent that could be gathered from all legal materials that purposivism made available." *Id.* at 623 (quoting Shon Hopwood, *Clarity in Criminal Law*, 54 Am. Crim. L. Rev. 695, 717 (2017)); see, *e.g.*, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *United States* v. *Brown*, 333 U.S. 18, 25 (1948); *United States* v. *Gaskin*, 320 U.S. 527, 529-530 (1944). That demotion ensured that federal courts would rely on lenity only very rarely, as a "tool of last resort." Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U. L. Rev. 351, 379 (2019).

Since that time, this Court has retained a weakened version of lenity, even after the Court's methodology has shifted from purposivism towards textualism. If anything, the Court's more recent decisions

have further weakened lenity, often restricting its application to when "grievous ambiguity" remains following the use of all other interpretive tools. See, *e.g.*, *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 610, 619 n.17 (1994)); but see *Wooden* v. *United States*, 142 S. Ct. 1063, 1082-1083 (2022) (Gorsuch, J., concurring in judgment) (arguing for more robust lenity); *United States* v. *R.L.C.*, 503 U.S. 291, 307-310 (1992) (Scalia, J., concurring in judgment) (similar).

3. Unsurprisingly, this Court now rarely, if ever, firmly relies on lenity. Indeed, in a study of the Court's 43 cases concerning the construction of penal statutes decided from the October 2013 Term through the October 2022 Term, amicus found that the Court *never* firmly relied on lenity in the 27 cases in which it adopted a narrow construction. See *Ad Hoc Constructions* 109. That was not for lack of opportunity: in 21 of the 27 narrow-construction cases studied, lenity was raised in party briefs, amicus briefs, or at oral argument. *Ibid.* Lenity's prominence in the litigation materials of these cases may indicate that it did some persuasive work. Cf. *Snyder* v. *United States*, 144 S. Ct. 1947, 1960 (2024) (Gorsuch, J, concurring) (suggesting that "lenity is what's at work behind" many of the Court's narrow readings of penal statutes).

On the face of the Court's opinions, however, the apparent preference when narrowly construing penal statutes is to rely on statute-specific rationales that are "ad hoc," in the sense that they do not provide a generic principle of construction that can be widely applied by lower courts in future cases involving other penal statutes. *Ad Hoc Constructions* 79. In fact, the

Court relied on ad hoc rationales in 19 of the 27 narrow-construction cases studied. *Id.* at 104.[7]

That is not to say that the Court's interpretive analysis in the ad hoc cases was simplistic; to the contrary, it often involved sophisticated and resource-intensive analysis of dictionaries, statutory context, linguistic canons, and other tools for determining ordinary meaning. See *Ad Hoc Constructions* 79 n.21 (collecting examples). But the Court's heavy reliance on statute-specific ordinary-meaning analysis came at the expense of any distinct generic rule of narrow interpretation for penal statutes.

The Court's consistent ad hoc approach has significant downstream consequences. See *Ad Hoc Constructions* 128-143 (identifying the downstream effects on legislatures, lower courts, prosecutors, defense counsel, and police). In the absence of a generic rule of narrow construction, open-ended language in federal penal statutes has the effect of implicitly delegating the legislative task of specific crime definition to courts and to prosecutors. See *Major-Questions Lenity* 665-675 (describing in detail the implicit delegation to courts and prosecutors).

B. Separation-Of-Powers Principles Support A Generic Rule Of Major-Questions Lenity

The logic of the new major questions doctrine in the administrative-law context provides a fresh approach for a more robust generic rule of narrow construction for penal statutes. See *Major-Questions*

---

[7] In the remaining eight cases, the Court firmly relied on a different substantive canon, such as the federalism presumption, the scienter presumption, or the avoidance of constitutional vagueness concerns. See *Ad Hoc Constructions* 110-113.

Lenity 675-677. This Court should embrace a principle of major-questions lenity rooted in separation-of-powers concerns and clearly articulate it as a rule that frames the analysis of important interpretive questions arising from penal statutes.

1. a. In the context of administrative law, the major questions doctrine functions as an implied-limitation rule that requires clear statutory authorization before concluding that Congress has delegated an agency policymaking authority concerning "major" questions of "vast economic and political significance." *West Virginia*, 142 S. Ct. at 2605 (internal quotation marks omitted); see Caleb Nelson, Statutory Interpretation 923 (2d ed. 2023) (characterizing the major questions doctrine as "an implied-limitation rule"); *id.* at 230-232 (describing implied-limitation rules in more detail). The Court has applied the major questions doctrine to invalidate several significant agency actions. See, *e.g.*, *Biden* v. *Nebraska* 143 S. Ct. 2355, 2374-2376 (2023); *West Virginia*, 142 S. Ct. at 2609-2613; *National Federation of Independent Business* v. *OSHA*, 142 S. Ct. 661, 665 (2022).

In effect, the major questions doctrine prevents Congress from implicitly delegating major policy questions and reduces the discretion of agencies that previously understood broad or indeterminate statutory language as an invitation to issue regulations on those major questions.

b. The major questions doctrine has both normative and descriptive justifications. See *West Virginia*, 142 S. Ct. at 2609 (rooting the doctrine in "both separation of powers principles and a practical understanding of legislative intent").

The doctrine can be understood as a normative commitment to the separation of powers that prevents

courts from construing statutory language as a delegation of lawmaking authority to agencies on "major" questions absent an explicit statement to that effect. See *West Virginia*, 142 S. Ct. at 2616-2617 (Gorsuch, J., concurring). That may sometimes require departure from the most natural reading of statutory text to ensure that "important subjects * * * must be entirely regulated by the legislature itself," *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.), because Article I's Vesting Clause locates "[a]ll federal 'legislative powers * * * in Congress,'" *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting U. S. Const. Art. I, § 1).

The major questions doctrine can also be understood as a more modest descriptive "tool for discerning—not departing from—the text's most natural interpretation" by "situat[ing] text in context" of "common sense" that avoids "literalism." *Biden*, 143 S. Ct. at 2378-2379 (Barrett, J., concurring). The idea is that Congress is "expect[ed] * * * to speak clearly if it wishes to assign an agency decisions of vast economic and political significance." *Id.* at 2380 (internal quotation marks omitted). The "expectation of clarity" follows from "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'" *Ibid.* (quoting *United States Telecom Association* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)). That premise reflects "our constitutional structure, which is itself part of the [relevant] legal context." *Ibid.* Given Article I's Vesting Clause, "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself[.]" *Ibid.*

c. Whether understood in normative or descriptive terms (or both), the major questions doctrine plainly reduces the degree to which statutory text is understood to delegate questions of significance to administrative agencies. It constrains executive discretion to implement expansive readings of statutes that implicate major questions and, in turn, constrains judicial discretion to adopt those readings.

2. The logic of the major questions doctrine extends to the context of construing penal statutes.

a. The major questions doctrine purports to advance the same basic separation-of-powers-value of legislative primacy in the context of administrative law that historic strict construction did in the context of penal statutes, see pp. 12-14, *supra*, where limits on the delegation of criminal lawmaking have always been stronger, see *Hudson*, 11 U.S. (7 Cranch) at 32, and the prospect of punishment raises the stakes of interpretation, *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

The major questions doctrine comports with Chief Justice Marshall's general instruction that "important subjects * * * must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. (10 Wheat.) at 43. And historic strict construction was essentially an application of that general principle to the specific context of penal statutes. See *Wiltberger*, 18 U.S. (5 Wheat.) at 95 (rooting strict construction in the "plain principle" that "the legislature, not the Court" is "to define a crime[ ] and ordain its punishment" because "the power of punishment is vested in the legislative, not in the judicial department"); see *Major-Questions Lenity* 684-685.

But with historic strict construction now abandoned and lenity weakened to the point of near irrelevance, no generic rule ensures that Congress does not

implicitly delegate criminal lawmaking authority to prosecutors and courts. The major questions doctrine provides a path for restoring a robust generic rule of narrow construction of penal statutes.

When triggered,[8] a rule of major-questions lenity would require the government to show "clear congressional authorization for the [prosecutorial] power it claims," instructing courts to be "reluctant" to read into less-than-clear statutory language the delegated prosecutorial authority "claimed to be lurking there." *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted). Or, in the words of Chief Justice Marshall, "[t]o determine that a case is within the intention of a [penal] statute, its language must authorise [courts] to say so." *Wiltberger*, 18 U.S. (5 Wheat.) at 96; see *Major-Questions Lenity* 685.

b. Major-questions lenity could be understood as a rule rooted in a normative commitment to the separation of powers. Cf. *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring in judgment) (justifying a robust rule of lenity on separation-of-powers grounds); see also *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (describing the major questions doctrine as "protect[ing]" the "separation of powers"). It could also be viewed as a descriptive canon based on "commonsense principles of communication" that situate the text of penal statutes within the context of our constitutional structure. *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring); *Major-Questions Lenity* 700-704.

---

[8] A "majorness" trigger would require determining which interpretive questions are sufficiently important to warrant lenity. *Major-Questions Lenity* 695-699 (discussing various possibilities for determining what constitutes a "major" interpretive question arising from a penal statute). But by any measure, the interpretive question in this case is a major one. See p. 24-25, *infra*

Under either conception, major-questions lenity would work to limit the practice of implicit delegation of crime definition. Because major-questions lenity would not be relegated to the end of the interpretive process—as is modern lenity—it would meaningfully help curb lower courts' adoption of overly broad and literalistic constructions of penal statutes based on expansive theories of prosecution.

C. A Rule Of Major-Questions Lenity Comports With This Court's Recent Decisions

A generic rule of major-questions lenity is consistent with a rationale that has emerged in a series of this Court's recent decisions narrowly construing penal statutes.

In that line of cases, the Court has invoked a tradition of "interpretive restraint" for federal penal statutes that is rooted in separation-of-powers concerns. See, *e.g.*, *Fischer* v. *United States*, 144 S. Ct. 2176, 2189 (2024); *Dubin*, 143 S. Ct. at 1572; *Van Buren* v. *United States*, 141 S. Ct. 1648, 1661 (2021); *Marinello* v. *United States*, 138 S. Ct. 1101, 1108 (2018); *Yates* v. *United States*, 574 U.S. 528, 536, 540 (2015) (plurality opinion). When invoking interpretive restraint, the Court has often highlighted the significant and severe consequences of the government's proposed broad readings, see *Fischer*, 144 S. Ct. at 2189-2190; *Dubin*, 143 S. Ct. at 1572; *Van Buren*, 141 S. Ct. at 1661, and sometimes noted that clear direction from Congress would be needed before adopting those readings, see *Marinello*, 138 S. Ct. at 1108; *Yates*, 574 U.S. at 536, 540 (plurality opinion).

In *Dubin*, for example, the Court addressed the scope of the federal aggravated identity theft statute, which increases the penalty for anyone who, "during

and in relation to" the commission of an enumerated predicate felony, "knowingly * * * uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The Fifth Circuit had broadly construed the term "uses" to cover any person who recites another's name while committing a predicate crime; this Court disagreed, narrowly construing the statute as applying only when "the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal." *Dubin*, 143 S. Ct. at 1563.

This Court justified that "targeted reading" with an ad hoc approach that relied on the statute's text and title, statutory context, and a linguistic canon. *Dubin*, 143 S. Ct. at 1563-1572. But the Court also highlighted the "far-reaching consequences" that would have resulted from "the staggering breadth" and "implausib[ility]" of the government's reading, which would have "swe[pt] in the hour-inflating lawyer, the steak-switching waiter, the building contractor who tacks an extra $10 onto the price of paint he purchased[,] [s]o long as they used various common billing methods." *Id.* at 1572. And "[b]ecause everyday overbilling cases would account for the majority of violations in practice," the Court explained, the government's reading "places at the core of the statute its most improbable applications." *Id.* at 1573.

In highlighting these implausible applications of the government's reading, the Court situated its analysis with a "tradition[]" of "exercis[ing] restraint in assessing the reach of a federal criminal statute." *Dubin*, 143 S. Ct. at 1572 (quoting *Marinello*, 138 S. Ct. at 1109). That tradition, the Court explained, "arises 'both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given

to the [common] world,'" *id.* (quoting *Marinello*, 138 S. Ct. at 1109), adding that "[c]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language," *id.* (quoting *United States* v. *Spears*, 729 F.3d 753, 758 (7th Cir. 2013)).

The Court then pointed to three recent cases—*Van Buren*, *Marinello*, and *Yates*—to show how, "[t]ime and again, th[e] Court has prudently avoided reading incongruous breadth into opaque language in criminal statutes." *Ibid.*; see *Van Buren*, 141 S. Ct. at 1661 (noting that the "far-reaching consequences" of the government's reading "underscore[d] [its] implausibility"); *Marinello*, 138 S. Ct. at 1108 (noting that, if "Congress [had] intended" to sweep as far as the government argued, "it would have spoken with more clarity than it did"); *Yates*, 574 U.S. at 536, 540 (noting that "one would have expected a clearer indication" if Congress had intended the government's "unrestrained" reading that transformed a "records" and "documents" statute into "an all-encompassing ban on the spoliation of evidence" that would "sweep within its reach physical objects of every kind").

The interpretive-restraint cases reflect a modest form of major-questions lenity. See *Major-Questions Lenity* 684-694. In each case, the Court demonstrated the high stakes of the interpretive question by drawing attention to the far-reaching and severe consequences of the government's broad reading. It then declined to adopt that sweeping construction of a penal statute, sometimes adding that it would require clear Congressional authorization before doing so.

Yet, when invoking the interpretive-restraint rationale in those cases, the Court never explicated a generic rule of narrow construction that lower courts

should apply when construing federal penal statutes with sufficiently high stakes.

That should change. In this case, the Court should articulate a rule of major-questions lenity that generically applies to federal penal statutes and is more robust than the all-but-defunct modern version of lenity, which applies only at the back-end of the interpretive process. The rule of major-questions lenity should function as a front-end implied-limitation rule that frames the resolution of important interpretative questions arising from penal statutes.

D. Major-Questions Lenity Requires A Narrow Construction Of "Unlawful User"

Under a rule of major-questions lenity, the phrase "unlawful user" in Section 922(g)(3) should be construed to cover only those impaired while armed.

1. Determining the scope of "unlawful user" under Section 922(g)(3) is plainly a major question.

As already noted, a federal regulation has long taken the position that a person can be labeled an "unlawful user" under the statute based on a single use of a controlled substance within the past year, as demonstrated by a positive drug test or drug-offense conviction. See 27 C.F.R. 478.11. That regulation turns the statute into a sweeping ban with massive social implications. See Drug Abuse Statistics (observing that 24.9% of Americans ages twelve and over have unlawfully used a controlled substance in the past year).

The Solicitor General's newly proposed construction is somewhat narrower; it "applies only to *habitual* drug users, and imposes only temporary disarmament while that habitual use persists," Pet. Br. 11. Yet even that construction would likely sweep in millions of Americans. See Drug Abuse Statistics (observing

that 16.8% of Americans ages twelve and over used illegal drugs in the past month).

2. Applying a rule of major-questions lenity, the Court should insist that the statute's text cannot bear either of the government's sweeping constructions because Congress has not clearly authorized them. Instead, the Court should construe "unlawful user" in the narrowest clear way—as covering only those under the immediate influence of drugs while armed.

III. VAGUENESS AVOIDANCE ALSO SUPPORTS A NARROW CONSTRUCTION OF THE PHRASE "UNLAWFUL USER"

A second route is also available for narrowly construing "unlawful user." The Court could apply vagueness avoidance, a distinct tool of construction for constraining penal statutes with open-ended text posing constitutional vagueness concerns—statutes like Section 922(g)(3).

A. Vagueness Avoidance Is A Distinct Tool Of Statutory Construction

Vague language in a federal penal statute presents constitutional concerns because it does not sufficiently define the standard of conduct. *Johnson* v. *United States*, 576 U.S. 591, 595 (2015). That undermines due process and the separation of powers by effectively delegating the legislative task of crime definition, thereby inviting arbitrary enforcement and failing to provide adequate notice. *United States* v. *Davis*, 139 S. Ct. 2319, 2325 (2019).

Yet, in virtually all cases involving a federal penal statute,[9] this Court does not deem indeterminate statutory language unconstitutionally vague. Rather, the Court engages in "vagueness avoidance"—*i.e.*, narrowly construing the law to avoid any constitutional vagueness concerns. *Vagueness Avoidance* 73; see *Skilling* v. *United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice, * * * before striking a federal statute as impermissibly vague, to consider whether [it] is amenable to a limiting construction.").

Ordinary constitutional avoidance canons[10] do not capture what occurs when the Court engages in vagueness avoidance. Ordinary constitutional avoidance canons are triggered by ambiguity and "function[] as a means of choosing" between a discrete number of available alternatives. *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). Vagueness avoidance, by contrast, is triggered by vague statutory language that requires the Court to craft a supplemental rule that constrains the legal effect of a text that is irreducibly indeterminate. By engaging in vagueness avoidance, the Court can usually remove the delegation threat

---

[9] When faced with vague language in *state* laws, by contrast, this Court has often held those laws void for vagueness, because the Court's analysis is "constrained by a distinctive federalism principle" requiring it to adhere to "any preexisting state-court constructions of [the] indefinite statutory language." Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. Chi. L. Rev. 1565, 1571 (2023); see *id.* at 1611 nn. 272-273 (collecting examples where this Court has voided state laws for vagueness).

[10] The ordinary constitutional avoidance canons are the classical "unconstitutionality" canon and the more modern "constitutional questions" canon. Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 Harv. L. Rev. F. 331, 331-333 (2015); see *Vagueness Avoidance* 92-94.

posed by such language while also constraining its reach. Because most vague statutory terms have some identifiable core, the Court may legitimately craft a judicial construction of the text that encompasses that core while excising its indeterminate peripheries. *Vagueness Avoidance* 92-98, 106.[11]

B. Vagueness Avoidance Is Rooted In Precedent

This Court has a long history of engaging in vagueness avoidance to narrow excessively indeterminate language in federal penal statutes. See, *e.g.*, *United States* v. *Williams*, 553 U.S. 285, 306-307 (2008); *Posters 'n' Things, Ltd.* v. *United States*, 511 U.S. 513, 525-526 (1994); *Chapman* v. *United States*, 500 U.S. 453, 467-468 (1991); *Boos* v. *Barry*, 485 U.S. 312, 329-332 (1988); *Smith* v. *United States*, 431 U.S. 291, 308-309 (1977); *Parker* v. *Levy*, 417 U.S. 733, 754-757 (1974); *United States* v. *Vuitch*, 402 U.S. 62, 71-72 (1971); *Scales* v. *United States*, 367 U.S. 203, 223 (1961); *United States* v. *Harriss*, 347 U.S. 612, 620-624 (1954). Indeed, in the modern era, vagueness avoidance has sometimes served as a substitute for lenity. See *Major-Questions Lenity* 651-653.

a. An early example is *Screws* v. *United States*, 325 U.S. 91 (1945), which involved a federal criminal

---

[11] When the Court engages in vagueness avoidance, it does not offend the principle requiring the legislature to define crime and fix punishments, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812), because the narrowing construction hews to the identifiable core within the semantic meaning of the vague term enacted by the legislature. In such circumstances, the act of constraining the legal effect of the vague term often functions as a form of severance—the Court declines to apply the statute to the case before it while simultaneously recognizing that some portion of the statute remains in force and is constitutionally valid. *Vagueness Avoidance* 98-99.

statute that punished any person who "under color of any law * * * willfully subjects" anyone "to the deprivation of any rights * * * secured or protected by the Constitution." *Id.* at 93 (Douglas, J., plurality). The literal semantic meaning of that language "provide[d] no ascertainable standard of guilt," but instead "referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited." *Id.* at 95, 96 (Douglas, J., plurality).

To avoid that vagueness concern, the Court narrowly construed the statute to apply only to violations of constitutional rights clearly established at the time of the defendant's conduct. Justice Douglas justified that construction for a plurality of the Court by focusing on the statutory term "willfully," reasoning that the "requirement of a specific intent to deprive a person of a federal right *made definite by a decision or other rule of law* save[d] the Act from any charge of unconstitutionality on the grounds of vagueness." *Screws*, 325 U.S. at 103 (emphasis added).

In other words, once a judicial decision had established a specific type of conduct as violative of the Constitution, a standard of conduct was ascertainable and could be willfully violated. In effect, that narrowing construction limited the statute's application to its identifiable core—clearly established rights—while severing the statute's vague peripheries. *Vagueness Avoidance* 44.

b. The Court more recently engaged in vagueness avoidance in *Skilling*, a case concerning the honest-services statute enacted to resurrect a lower-court body of law that had been rejected in *McNally* v. *United States*, 483 U.S. 350 (1987).

In *Skilling*, the Court recognized the "force" of the argument that the honest-services statute was unconstitutionally vague. 561 U.S. at 405. Although the pre-*McNally* lower-court decisions had consistently applied to bribery or kickback schemes, the Court explained, "there was considerable disarray over the statute's application to conduct outside that core category." *Ibid.* To save the statute, the Court "pare[d]" it "down" to "*only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 404, 409. That narrowing construction effectively severed the vague penumbra of the honest-services statute while maintaining its core.

C. Vagueness Avoidance Requires A Narrow Construction Of "Unlawful User"

In this case, the phrase "unlawful user" in Section 922(g)(3) raises constitutional concerns because it is vague. See pp. 6-7, *supra*. It is clear that the phrase "unlawful user" captures a core category of those impaired at the time of gun possession. But beyond that core category, it is exceedingly difficult to draw a coherent line—as illustrated by the various attempts of the federal courts of appeals. See, *e.g.*, *United States* v. *Connelly*, 117 F.4th 269, 282 (5th Cir. 2024); *United States* v. *Carnes*, 22 F.4th 743, 749 (8th Cir. 2022); *United States* v. *Bowens*, 938 F.3d 790, 793 (6th Cir. 2019); *United States* v. *Yancey*, 621 F.3d 681, 684-685 (7th Cir. 2010); *United States* v. *Bennett*, 329 F.3d 769, 778 (10th Cir. 2003); *United States* v. *Purdy*, 264 F.3d 809, 813 (9th Cir. 2001); *United States* v. *Nevarez*, 251 F.3d 28, 30 (2d Cir. 2001).

The government's habitual-user construction fails to fix the line-drawing problem because it does not specify when someone begins and ends a drug habit.

Vagueness avoidance offers a better path. The Court can conclude that the phrase "unlawful user" covers only the clear core category—those who are intoxicated at the time of possession—and nothing else. Cf. *Skilling*, 561 U.S. at 404 ("par[ing]" the statute's scope "down to its core" to avoid vagueness concerns).

* * *

Both major-questions lenity and vagueness avoidance share a virtue missing from the Court's recent cases construing penal statutes: they provide a clear rule for future cases involving other criminal statutes. When the Court relies on ad hoc ordinary-meaning analysis alone, it encourages prosecutors to push the envelope on other statutes, knowing that the worst outcome is a course correction years down the road. But by the time the Court steps in to insist on a narrow reading, many defendants have already been unfairly punished—just like all those swept within the federal regulation's expansive view of "unlawful user" during the decades preceding the Solicitor General's newly announced position. The interpretive lag has real consequences.

If the Court narrowly construes "unlawful user" in Section 922(g)(3), the Second Amendment issues in this case will vanish. There would be no need to dig through history books to see how the Founders regulated guns for habitual drunkards. The Court could simply affirm on the ground that the statute means only what it clearly covers and that respondent was charged under a theory more expansive than that.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOEL S. JOHNSON
Counsel of Record
PEPPERDINE UNIVERSITY
CARUSO SCHOOL OF LAW
24255 E. Pacific Coast Hwy,
Malibu, CA 90263
310-506-7531
Joel.Johnson@pepperdine.edu

JANUARY 2026