No. _____

IN THE
Supreme Court of the United States

MARCUS JERELL ANDERSON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX

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TABLE OF APPENDICES

United States Court of Appeals
For the Eighth Circuit

No. 24-1562

United States of America

Plaintiff - Appellee

v.

Marcus Jerell Anderson

Defendant - Appellant

Appeal from United States District Court
for the District of South Dakota - Southern

Submitted: October 25, 2024
Filed: November 27, 2024
[Unpublished]

Before LOKEN, SMITH, and GRASZ, Circuit Judges.

PER CURIAM.

Marcus Anderson was charged with being a prohibited person knowingly in possession of a firearm on February 11, 2023 in violation of 18 U.S.C. § 922(g)(1). He moved to dismiss the indictment, arguing the statute violates his Second

Amendment right to keep and bear arms. The district court[1] denied the motion as foreclosed by United States v. Jackson, 69 F.4th 495 (8th Cir.), reh'g and reh'g en banc denied, 85 F.4th 468 (8th Cir. 2023), vacated, 144 S. Ct. 2710 (2024). Anderson then pleaded guilty to a § 922(g)(1) violation, preserving the right to appeal this Second Amendment ruling. The district court sentenced him to 50 months imprisonment on March 4, 2024.

Anderson appealed, arguing that § 922(g)(1) is unconstitutional, on its face and as applied, and acknowledging that the issue was then governed by controlling Eighth Circuit precedent, Jackson and United States v. Cunningham, 70 F.4th 502 (8th Cir. 2023), reh'g and reh'g en banc denied, No. 22-1080 (8th Cir. 2023), vacated, 144 S. Ct. 2713 (2024). The Supreme Court granted writs of certiorari in Jackson and Cunningham and remanded for further consideration in light of United States v. Rahimi, 144 S. Ct. 1889 (2024). On remand, our panels again ruled that § 922(g)(1) is not unconstitutional. United States v. Jackson, 110 F.4th 1120 (8th Cir. 2024) (Jackson II); United States v. Cunningham, 114 F.4th 671 (8th Cir. 2024) (Cunningham II). Jackson and Cunningham petitioned for rehearing en banc.

This appeal was submitted after oral argument on October 25, 2024, with the Jackson II and Cunningham II petitions for rehearing still pending. A divided en banc Court has now denied panel rehearing and rehearing en banc in both cases. Order, United States v. Jackson, No. 22-2870, 2024 WL 4683965 (8th Cir. Nov. 5, 2024); Order, United States v. Cunningham, No. 22-1080, 2024 WL 4683878 (8th Cir. Nov. 5, 2024). These two Eighth Circuit decisions, which the district court properly ruled to be controlling precedent, are now final, subject to further Supreme Court review. We therefore affirm the judgment of the district court.

[1]The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota.

GRASZ, Circuit Judge, concurring.

I concur in the opinion in full. This case is controlled by Jackson II. As a result, the panel is bound to affirm. I write separately to reiterate my view that the court's analysis in Jackson II was, and is, erroneous in precluding all as-applied challenges. This approach strays from Supreme Court precedent and continues to treat the Second Amendment rights of litigants as third-class privileges. Cf. Rahimi, 144 S. Ct. at 1898–1903 (applying § 922(g)(8) within a tradition meant to prevent individuals who pose a credible threat to others from misusing firearms and concluding § 922(g)(8) survived a facial challenge because "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment"); id. at 1909 (Gorsuch, J., concurring) (noting the court's resolution of the facial challenge "necessarily leaves open the question whether the statute might be unconstitutional as applied in 'particular circumstances'" (quoting United States v. Salerno, 481 U.S. 739, 751 (1987))).

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARCUS JERELL ANDERSON, Defendant.	**4:23-CR-40069-KES** **ORDER DENYING MOTION TO DISMISS**

Marcus Jerell Anderson moves to dismiss the indictment in the above-entitled matter that charges him with possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1), (g)(3), and 924(a)(8). Docket 25. Anderson contends that § 922(g)(1) and (g)(3) are unconstitutional under the test articulated by the Supreme Court in its recent decision *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022). *Id.* Anderson further contends that § 922(g)(3) is unconstitutionally vague, both facially and as applied to him. *Id.* The government objects and argues that both sections of the statute are constitutional. Docket 27.

BACKGROUND

I. Alleged Facts

For the purposes of this motion to dismiss, the court considers the following allegations, which were summarized by the parties in their briefs. *See* Docket 26 at 1-2; Docket 27 at 2-4. But the court reaffirms that Anderson

remains innocent of the charges against him, and the court takes no position on the question of his guilt, or the veracity of any factual allegation presented by the government. *See Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary[.]" (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

On February 11, 2023, Sioux Falls police offers observed a suspected drug transaction occur in a parking lot along West 12th Street in Sioux Falls, South Dakota. Docket 26 at 2; Docket 27 at 2. Two vehicles were involved in the transaction, one of which was a green 2005 Chevrolet Tahoe. Docket 27 at 2. When the Tahoe left the parking lot following the suspected drug deal, officers followed the vehicle eastbound on 12th Street. *Id.*; Docket 26 at 2. The officers noticed that the vehicle did not have a working license plate light. Docket 26 at 2. The officers initiated a traffic stop based on this vehicle-related violation. Docket 27 at 2. The driver of the vehicle was identified as the defendant, Anderson. *Id.* There was also a passenger in the vehicle. *Id.*; Docket 26 at 2.

Officers report that, as they approached the Tahoe, they smelled the odor of marijuana and saw drug paraphernalia. Docket 26 at 2; Docket 27 at 2. They searched the vehicle and found the following items: approximately 116.4 grams of marijuana, 21.7 grams of cocaine, working digital scales, $2,575 in cash, and a Springfield Armory Hellcat 9mm handgun, bearing serial number BY183702. Docket 27 at 2-3; *see also* Docket 26 at 2. The handgun was found

under the driver seat of the vehicle where Anderson had been seated. Docket 27 at 3.

Between February 14 and February 15, 2023, a detective with the Sioux Falls Police Department obtained and executed a search warrant for collection of Anderson's urine. Docket 26 at 2; Docket 27 at 3. Anderson's urine tested positive for THC, the active agent in marijuana. Docket 26 at 2; Docket 27 at 3.

II. Procedural Background

On June 6, 2023, Anderson was indicted on the sole count in the Indictment, which charges him with possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(1), (g)(3), and 924(a)(8). Docket 1. Section 922(g)(1) prohibits the possession of firearms or ammunition by anyone "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year[.]" Section 922(g)(3) prohibits the possession of firearms or ammunition by anyone "who is an unlawful user of or addicted to any controlled substance . . . [.]" Anderson moves to dismiss the Indictment, arguing that 18 U.S.C. §§ 922(g)(1) and (g)(3) are unconstitutional under the standard articulated by the Supreme Court in its opinion in *Bruen*, 142 S.Ct. 2111 (2022). Docket 26 at 3. Anderson also argues that that § 922(g)(3) is unconstitutionally vague in violation of the Fifth Amendment. *Id.* at 3, 11, 18. The government opposes the motion on all grounds. Docket 27.

BRUEN CHALLENGE

I. Legal Developments Regarding Firearms

The Second Amendment of the United States Constitution was construed during the twentieth-century as a right held by individuals in the militia and not an everyday individual. *See United States v. Miller*, 307 U.S. 174, 178-79 (1939). In *District of Columbia v. Heller*, 554 U.S. 570 (2008), however, the Supreme Court held that the Second Amendment of the United States Constitution "conferred an *individual* right to keep and bear arms." *Heller*, 554 U.S. at 595 (emphasis added). *McDonald v. City of Chicago, Ill.* then incorporated that holding to the states via the Fourteenth Amendment. *See* 561 U.S. 742, 750 (2010).

Following the Supreme Court's decisions in *Heller* and *McDonald*, the Courts of Appeals developed a two-step test to evaluate Second Amendment claims. *Bruen*, 142 S.Ct. at 2125-26 (2022). "At the first step, the government may justify its regulation by establishing that the challenged law regulates activity falling outside the scope of the right as originally understood[.]" *Id.* at 2126 (citations omitted). Activity that falls beyond the original scope of the amendment was "categorically unprotected[,]" and the analysis could thus end. *Id.* If the activity was protected, the court proceeded to the second step, where "courts often analyze[d] how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Id.* (citations omitted). Most courts considered the right to possess arms for self-

protection in the home to be the core of the right. *See Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018).

In *Bruen*, the Supreme Court examined the test developed after *Heller* and found that it had "one step too many." 142 S.Ct. at 2127. According to the test articulated in *Bruen*,

> [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. Only then may a court conclude that the individual's conduct falls outside the Second Amendments 'unqualified command.'

Id. at 2129-30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49, n. 10 (1961)).

The decision in *Bruen* has prompted significant litigation concerning existing gun laws, including numerous challenges to 18 U.S.C. § 922(g). *See, e.g., United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023) (finding 18 U.S.C. § 922(g)(8) unconstitutional); *United States v. Ryno*, --- F. Supp. 3d ---, 2023 WL 3736420, at *7 (D. Alaska May 31, 2023) (upholding constitutionality of 18 U.S.C. § 922(g)(9)). The Eighth Circuit recently addressed a constitutional challenge to § 922(g)(1) in *United States v. Jackson* and, applying the *Bruen* framework, found that the section was constitutional. *See Jackson*, 69 F.4th at 501-506. The *Jackson* court analyzed the language in both *Heller* and *Bruen*, highlighting the ways in which the Supreme Court implicitly upheld the validity of felon in possession bans. *Id.* at 501-02. *Jackson* affirmed that "[g]iven these assurances by the Supreme Court, and the history that supports them, [the

Eighth Circuit] conclude[s] that there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *Id.* at 502.

The Eighth Circuit has not yet addressed the constitutionality of § 922(g)(3).

II. Discussion

A. 18 U.S.C. § 922(g)(1)

As Anderson acknowledges, "the Eighth Circuit has recently ruled that 18 U.S.C. § 922(g)(1) is constitutional." Docket 26 at 1. Though other circuit courts have ruled differently, *see Range v. Att'y Gen. of United States*, 69 F.4th 96, 106 (3d Cir. 2023), this court remains bound by the precedent of the Eighth Circuit. *See M.M. ex rel. L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 459 (8th Cir. 2008) (noting Eighth Circuit decision "is controlling until overruled by [the] court en banc, by the Supreme Court, or by Congress.") Thus, this court must deny Anderson's motion to dismiss as far as it rests on the contention that 18 U.S.C. § 922(g)(1) is unconstitutional.

B. 18 U.S.C. § 922(g)(3)

Anderson also argues that 18 U.S.C. § 922(g)(3) is unconstitutional. *See* Docket 26 at 3. Anderson contends that his conduct falls under the plain text of the Second Amendment and that the government cannot demonstrate that § 922(g)(3) is consistent with the historical tradition of firearm regulation. *See id.* at 4-5. The government objects and argues that the statute is constitutional. Docket 27 at 4.

1. Whether the Plain Text of the Second Amendment Covers Anderson's Conduct

The plain text of the Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In explaining the scope of the Second Amendment, the Supreme Court stated that the people "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. The Supreme Court also explained that "the natural meaning" of the phrase "bear arms . . . indicates: wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (cleaned up). And "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.' " *Id.* at 582. The government contends that Anderson had the firearm at issue below his seat in the Tahoe. *See* Docket 27 at 3. Though not directly upon his person, Anderson keeping a firearm in his immediate vicinity is sufficient to find that he was bearing the weapon. And a rational factfinder could conclude from these allegations that Anderson bore the firearm "for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (cleaned up).

Though the government argues that the plain text of the Second Amendment only extends to "law-abiding, responsible citizens[,]" this narrow reading of *Heller* and *Bruen* is unpersuasive. *See* Docket 27 at 7-11; *see also United States v. Okello*, --- F. Supp. 3d ---, 2023 WL 5515828, at *3 (D.S.D. Aug. 25, 2023); *United States v. Dubray*, 22-CR-40105, Docket 45 at *6-7

(D.S.D., Sept. 15, 2023); *United States v. Bernard*, 2022 WL 17416681, at *7 (N.D. Iowa, Dec. 5, 2022) ("The Court rejects the government's argument that the Second Amendment applies only to law-abiding citizens as a textual matter."). Both *Heller* and *Bruen* affirm that law-abiding citizens are presumptively permitted to "keep and bear Arms." *See Heller*, 554 at 625; *Bruen*, 142 S.Ct. at 2122. But nowhere do those cases state that the converse is also true and that those who break the law, regardless of the severity of the violation, are presumptively stripped of Second Amendment protections. Instead, the references in both cases to the constitutionality of longstanding felon-in-possession bans, *see* 18 U.S.C. § 922(g)(1), comment on the historical precedent for such restrictions. *See Heller*, 554 U.S. at 626-27; *Bruen*, 142 S.Ct. at 2162 (Kavanaugh, J. concurring). Thus, Anderson's conduct falls within the plain text of the Second Amendment and the court must proceed to the historic analysis proscribed by *Bruen*.

2. Whether 18 U.S.C. § 922(g)(3) is Consistent with the Nation's Historical Tradition of Firearm Regulation

Because Anderson's conduct falls under the plain text of the Second Amendment, "the Constitution presumptively protect[s] that conduct" and "the government must . . . justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2129-30. The government points to three traditions of historic regulation: (1) regulation of the mentally ill, (2) regulation of the intoxicated, and (3) regulation of lawbreakers. Docket 27 at 18-26. The government argues that each of these traditions, while not exact twins to § 922(g)(3), provide an

adequate historical analogue. *See id.*; *Bruen*, 142 S.Ct. at 2133 (finding that "analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*[]"(emphasis in original)). Having reviewed each proposed tradition, the court finds that historic laws prohibiting possession of firearms by the intoxicated are sufficient to justify § 922(g)(3).

As this court has previously articulated, *see Okello*, 2023 WL 5515828, at *3-5, at the time of the founding and before, various states prohibited carrying a firearm while under the influence of alcohol. In 1655, Virginia prohibited "shoot[ing] any gunns at drinkeing," except at marriages and funerals. Acts of Mar. 10, 1655, Act 12, *reprinted in* 1 *The Statutes at Large: Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619*, 401-02 (William Waller Henning ed., 1823) (sic). Similarly, in 1771, New York banned firing guns on New Year's Eve and the first two days of January to prevent "great Damages . . . frequently done on [those days] by persons . . . with Guns and other Fire Arms and being often intoxicated with Liquor." *Heller*, 554 U.S. at 632 (quoting Ch. 1501, 5 Colonial Laws of New York 244-46 (1894)). And New Jersey enacted a statute in 1746 that authorized the disarming of any soldier who "appear[ed] in Arms disguised in Liquor." *Acts of the General Assembly of the Province of New-Jersey* 303 (Samuel Nevill ed. 1752).

Many states also prohibited the sale of any strong liquor near militia-training locations. *See* Docket 27 at 21, n. 8 (collecting sources). And at least

one state excluded "common drunkards" from the militia entirely. An Act to regulate the Militia, § 1, *reprinted in Public Laws of the State of Rhode-Island and Providence Plantations*, 501, 503 (Providence, Knowles & Vose 1844). Though these militia regulations may facially appear narrower than § 922(g)(3), in practice, they affected large swaths of the population, given that many states included all able-bodied free men in their militias and only exempted certain subsets due to factors such as age or profession. *See* Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 509 (2004).

Restrictions on firearm use while intoxicated continued, and perhaps even increased, following the ratification of the Fourteenth Amendment in 1868 and the attendant extension of the Second Amendment to the states. *See McDonald*, 561 U.S. at 791 (2010); *see, e.g.,* Art. 9, § 282, *in The General Statutes of the State of Kansas* 378, 378 (Lawrence, Jons Speer 1868); 1878 Miss. Laws 175, ch.46, § 2; Act of Mar. 5, 1883, *reprinted in Laws of Missouri Passed at the Session of the Thirty-Second General Assembly*, 76, 76 (Jefferson City, State J. Co. 1883); Act of Apr. 3, 2883, ch. 329, § 3, *reprinted in* 1 *The Laws of Wisconsin* 290, 290 (Madison, Democrat Printing Co. 1883); Art. 47, § 4, *in The Statutes of Oklahoma* 495, 495 (Will T. Little et al. eds., Guthrie, State Capital Printing Co. 1891); Ch.12, § 252, *in* 2 *Code of Laws of South Carolina, 1902*, 318, 318 (1902). Starting at the turn of the century, intoxicants other than alcohol became more prevalent, as did regulation of those intoxicants. *See, e.g.,* 1916 N.J. Laws 275-76, ch. 130, §§ 1-2 (prohibiting entry

into the "woods or fields at any time with a gun or firearm when . . . under the influence of *any drug*") (emphasis added); Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 985 (1970) (describing increased recreational use of narcotics beginning at the turn of the century). In 1931, Pennsylvania prohibited "deliver[y] of a firearm . . . to one who he has reasonable cause to believe . . . is a drug addict." Uniform Firearms Act, No. 158, § 8, 1931 Pa. Laws 499. Shortly after, jurisdictions including the District of Columbia, Alabama, California, South Dakota, and Washington barred the sale of firearms to "drug addict[s]." Act of July 8, 1932, ch. 465, § 7, 47 Stat. 650, 652 (D.C.); Act of Apr. 6, 1936, No. 82, §1936 Ala. Laws 52; 1935 S.D. Sess. Laws ch. 208, § 8, 356; Short Firearms, ch. 172, § 8, 1935 Wash. Sess. Laws 601.

At least twenty-four states and the District of Columbia "have restricted the right of habitual drug abusers or alcoholics to possess or carry firearms." *United States v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010) (collecting modern statutes in pre-*Bruen* review of firearm regulation history). "The[se] state prohibitions . . . are merely the latest incarnation of the state's unbroken history of regulating the possession and use of firearms dating back to the time of the amendment's ratification." *Id.* As part of this unbroken history, "how and why" § 922(g)(3) burdens the Second Amendment is analogous to the statutes that came before it. *See Bruen*, 142 S.Ct. at 2133. Like the previous statutes detailed above, § 922(g)(3) operates by disarming those using intoxicating

substances. And § 922(g)(3) operates for the same reason as those statutes: because "habitual drug users . . . are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms." *Yancey*, 621 F.3d at 685.

Thus, because the government has demonstrated an adequate historical tradition, the court finds that § 922(g)(3) is not unconstitutional under the Second Amendment and Anderson's motion to dismiss is denied as to his *Bruen* challenge. *See* Docket 26 at 5-11. In so holding, this court reaffirms both its previous ruling in *Okello*, *Okello*, 2023 WL 5515828, at *3-5 and joins the majority of district courts in upholding the constitutionality of § 922(g)(3). *See, e.g., United States v. Wuchter*, 2023 WL 4999862, at * 5 (N.D. Iowa Aug. 4, 2023); *United States v. Lewis*, --- F. Supp. 3d ---, 2023 WL 4604563, at *17 (S.D. Ala. July 18, 2023); *United States v. Black*, --- F. Supp. 3d ---, 2023 WL 122920, at *4 (W.D. La. Apr. 6, 2023); *United States v. Seiwert*, 2022 WL 4534605, at *2 (N.D. Ill. Sept. 28, 2022). *But see United States v. Daniels*, --- F.4th ---, 2023 WL 5091317, at *1 (5th Cir. 2023) (finding § 922(g)(3) unconstitutional under *Bruen*).

VAGUENESS

Anderson also argues that § 922(g)(3) is unconstitutionally vague both as-applied to him and facially. Docket 26 at 11-18. The government opposes the motion. Docket 27 at 33-37.

I. Vagueness under the Fifth Amendment

"The Fifth Amendment guarantees every citizen the right to due process. Stemming from this guarantee is the concept that vague statutes are void." *United States v. Cook*, 782 F.3d 983, 987 (8th Cir. 2015) (quoting *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002)). "Vague laws contravene the 'first essential due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *Mumad v. Garland*, 11 F.4th 834, 838 (8th Cir. 2021) (quoting *United States v. Davis*, 139 S.Ct. 2319, 2325 (2019)). "A statute is void for vagueness if it: (1) fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Cook*, 782 F.3d at 987 (internal quotation omitted).

When reviewing a statute for vagueness, the court must first determine whether the statute is vague as applied to the defendant's conduct. *United States v. KT Burgee*, 988 F.3d 1054, 1060 (8th Cir. 2021). "This is because a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Id.* (quoting *Adam & Eve Jonesboro, LLC v. Perrin*, 993 F.3d 951, 958 (8th Cir. 2019)) (internal quotation omitted). In addressing the specific context of challenges to 18 U.S.C. § 922(g)(3), the Eighth Circuit reiterated that "[the] case law still requires [a defendant] to show that the statute is vague as applied to his particular conduct[]" before the court can consider a facial challenge. *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016).

II. Whether 18 U.S.C. § 922(g)(3) is Unconstitutionally Vague as Applied to Anderson

Under 18 U.S.C. § 922(g)(3), any person "who is an unlawful user of or addicted to any controlled substance" is prohibited from possessing a firearm. Section 922 does not define the terms "unlawful user" or "addicted to." Anderson argues that § 922(g)(3) is unconstitutionally vague as applied to him because "he did not have fair notice that he was prohibited from possessing a firearm if determined to be an unlawful user of controlled substances." Docket 26 at 17. Anderson further contends that he "could not have known if he even qualified as an unlawful user of controlled substances" absent a definition of the term "unlawful user." *Id.* at 18.

As an initial matter, "the usual rule is that ignorance of the law is no defense to a criminal charge." *United States v. Baez*, 983 F.3d 1029, 1042 (8th Cir. 2020) (quoting *United States v. Lalley*, 257 F.3d 751, 755 (8th Cir. 2001)) (cleaned up). "Although there is a very limited exception to the general rule that ignorance of the law is no excuse, that exception applies only if the statute prohibits activities that are not *per se* blameworthy and the defendant's lack of awareness of the prohibition was not objectively unreasonable." *United States v. Moreira-Bravo*, 56 F.4th 568, 578 (8th Cir. 2022) (citations omitted). In this case, the defendant's lack of awareness is unreasonable. Section 922(g)(3) is and has been publicly available. And, as the Eighth Circuit has already articulated, "the possession of a gun . . . is nevertheless a highly regulated activity, and everyone knows it." *United States v. Hutzell*, 217 F.3d 966, 969

(8th Cir. 2000). Thus, Anderson's ignorance of the § 922(g)(3)'s prohibition is no defense.

Further, to the extent that Anderson argues he could not have known he was an unlawful user of a controlled substance, the court is unpersuaded. As Anderson himself acknowledges, the limits of § 922(g)(3) are not without constraint.[1] *See* Docket 26 at 14-15. The Eighth Circuit has recognized that "[t]he term 'unlawful user' is not otherwise defined in the statute, but courts generally agree the law runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use." *United States v. Carnes*, 22 F.4th 743, 748 (8th Cir. 2022) (alteration in original) (citation omitted). The court has accordingly interpreted the offense as requiring a "temporal nexus" between the proscribed act, in this case possession of a firearm, and "regular drug use." *Id.* The Eighth Circuit does not require that the government demonstrate "evidence of use over an extended period" to prove "regular drug use." *Id.* at 749. Instead, the *Carnes* court cited with approval jury instructions requiring the jury to find that the defendant "ha[d] been actively engaged in use of a controlled substance during the time he possessed the firearm." *Id.* at 748 (emphasis omitted).

[1] The Supreme Court has also acknowledged a mens rea requirement to § 922(g) offenses in *Rehaif v. United States*, 139 S.Ct. 2191, 2200 (2019), finding that "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."

In light of this precedent, the question before this court is whether a person of ordinary intelligence in Anderson's circumstances would have fair notice of whether he was prohibited from possessing a firearm. *See Mumad*, 11 F.4th at 838 (8th Cir. 2021) (citation omitted). The government alleges that SFPD officers found both marijuana and cocaine in Anderson's vehicle. Docket 27 at 2. The government further alleges that Anderson tested positive for THC, the active agent in marijuana, days after his arrest. *Id.* at 3. The positive THC test sufficiently supports a temporal nexus between the alleged drug use and the firearm possession. *See Carnes*, 22 F.4th at 748. And a reasonable juror could find that the positive test, combined with possession of multiple illicit substances, indicates regular use. *See id.* at 749. Thus, a person of ordinary intelligence would have notice based on these facts that he was an unlawful user of a controlled substance and that his possession of a firearm was prohibited.

As the Eighth Circuit concluded in similar circumstances, "[t]hough it is plausible that the terms 'unlawful user' of a controlled substance and 'addicted to' a controlled substance could be unconstitutionally vague under some circumstances, [Anderson] . . . has not shown[] that either term is vague as applied to his particular conduct of possessing [a] firearm[] while regularly using marijuana." *Bramer*, 832 F.3d at 909-10. Because Anderson has not demonstrated a successful as-applied challenge, the court declines to consider his facial challenge and denies his motion to dismiss. *See id.*

CONCLUSION

Because 18 U.S.C. § 922(g)(1) and (g)(3) are constitutional under *Bruen* and because § 922(g)(3) is not unconstitutionally vague as applied to Anderson, it is

ORDERED that Anderson's motion to dismiss the Indictment (Docket 25) is denied.

Dated November 27, 2023.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE