

No. 25-372

In the Supreme Court of the United States

ERIK HARRIS, PETITIONER

v.

UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**BRIEF OF PROFESSOR JOEL S. JOHNSON
AS AMICUS CURIAE SUPPORTING PETITIONER**

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INTEREST OF AMICUS CURIAE

Joel S. Johnson is an Associate Professor of Law at the Pepperdine Caruso School of Law. His interest as amicus curiae is the sound construction of federal penal statutes. This brief draws on amicus's article, *Vagueness Avoidance*, 110 Va. L. Rev. 71 (2024) (*Vagueness Avoidance*).¹

SUMMARY OF ARGUMENT

Amicus agrees with petitioner that the Court should grant review in this case and submits this brief to highlight an important advantage this case has over other pending petitions involving constitutional challenges to Section 922(g)(3). The petition in this

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.

case alone asks the Court to consider a vagueness challenge to Section 922(g)(3) in addition to a Second Amendment challenge. That is significant not just because the vagueness challenge may bear on the statute's constitutionality, but also because vagueness considerations will likely play a central role in how the Court construes the statute in the first instance. A sufficiently narrow construction of the statute to avoid vagueness concerns could make resolution of the Second Amendment issue relatively straightforward.

ARGUMENT

THE COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE IT IS AN OPTIMAL VEHICLE FOR CONSTRUING SECTION 922(g)(3)

Section 922(g)(3) makes it a federal crime for anyone “who is an unlawful user of or addicted to any controlled substance” to “ship,” “transport,” or “possess * * * any firearm or ammunition.” 18 U.S.C. 922(g)(3). The court of appeals held that Section 922(g)(3) does not violate the Second Amendment as applied to a “drug user[] who would pose a risk of danger to others if armed.” Pet. App. 13a, 22a. The court of appeals also held that the term “unlawful user” is not unconstitutionally vague as applied to someone who “smok[ed] marijuana at least several times per week,” relying on its own precedent interpreting the term “unlawful user” as covering those who ““have engaged in regular use [of drugs] over a period of time proximate to or contemporaneous with the possession of the firearm.”” Pet. App. 24a (quoting *United States v. Augustin*, 376 F.3d 135, 139 (3d Cir. 2004)).

While amicus generally agrees with petitioner that the Court should grant review in this case, amicus submits this brief to draw attention to a significant

advantage that this case has over the other pending petitions presenting constitutional challenges to Section 922(g)(3). See *United States v. Cooper* (No. 24-1247) (petition filed June 5, 2025); *United States v. Daniels* (No. 24-1248) (same); *United States v. Sam* (No. 24-1249) (same); *United States v. Hemani* (No. 24-1234) (petition filed June 2, 2025). Only the petition in this case asks the Court to consider a vagueness challenge to Section 922(g)(3) in addition to a Second Amendment challenge. That is significant not just because the vagueness challenge may bear on the statute’s constitutionality, Pet. 21-30, but also because vagueness considerations will likely play a central role in how the Court construes the statute in the first instance.

A. Statutory Construction Will Precede Resolution of Any Constitutional Challenge

In whichever case the Court decides to take up, it will first have to determine Section 922(g)(3)’s purported legal effect as a statutory matter, before proceeding to consider its constitutionality. Indeed, because this Court has *never* before had occasion to construe Section 922(g)(3), statutory analysis will likely be a crucial component of the guidance that the Court’s decision offers to lower courts.

In particular, the Court will need to determine the scope of the undefined term “unlawful user.” 18 U.S.C. 922(g)(3). That term is vague in the linguistic sense, insofar as “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.” *Vagueness Avoidance* 82 (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 a different criminal statute).²

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 statutory 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; see also William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1085-1086 (2017) (recognizing the distinction between interpretation and construction).³

B. The Vague Term “Unlawful User” Is Open To A Wide Range Of Potential Constructions

In the decision below, the court of appeals recognized the vagueness of the term “unlawful user” in Section 922(g)(3), noting that its “exact boundaries * * * are debatable.” Pet. App. 24a. But the court of appeals could glide past that debate by relying on

² Although the Court’s opinion in *Dubin* did not explicitly label the statutory term “uses” as vague, four separate Justices raised vagueness concerns during oral argument. See *Vagueness Avoidance* 128-129 (identifying Justices Sotomayor, Gorsuch, Kavanaugh, and Jackson as raising vagueness concerns).

³ By contrast, an ambiguous term is one that can be used in “more than one sense,” Solum 97, such that it is open to a “discrete number of possible meanings,” Solan 38-39. Ambiguity 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.

its own precedent adopting a limiting construction of the vague term—one that covers “‘regular use [of drugs] over a period of time proximate to or contemporaneous with the possession of the firearm.’” *Ibid.* (quoting *Augustin*, 376 F.3d at 139).

The limiting construction of Section 922(g)(3) on which the court of appeals relied is far from obviously correct. Alternatives abound.

For decades, the government has been officially endorsing a far more expansive reading: a longstanding federal regulation instructs that an inference of unlawful-user status can be drawn from a mere single positive “drug test” in the past year; a single conviction for drug “possession” (not necessarily use) in the past year; or multiple use or possession-related “arrests” (each requiring merely probable cause) in the past five years. See 27 C.F.R. 478.11.

In addition, the courts of appeals have implemented the term “unlawful user” in a variety of ways. See, e.g., *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024) (broadly construing the statute in reliance on 27 C.F.R. 478.11); *United States v. Carnes*, 22 F.4th 743, 749 (8th Cir. 2022) (rejecting requirement of proof of “use over an extended period”); *United States v. Bowens*, 938 F.3d 790, 793 (2019) (requiring proof of use “over an extended period of time” (internal quotation marks omitted)); *United States v. Yancey*, 621 F.3d 681, 684-685 (7th Cir. 2010) (referring to “habitual drug abusers”); *United States v. Bennett*, 329 F.3d 769, 778 (10th Cir. 2003) (applying the statute to “regular and ongoing” use); *United States v. Purdy*, 264 F.3d 809, 813 (9th Cir. 2001) (requiring use “over an extended period of time” and “contemporaneously” with possession); *United States v. Nevarez*,

251 F.3d 28, 30 (2d Cir. 2001) (requiring “ongoing” use); see also Pet. 23-29 (describing the disarray).

As those competing approaches suggest, the vague term “unlawful user” is open to a wide range of possible constructions: it could be broadly construed to encompass any person who has *ever* unlawfully used a controlled substance; it could instead be narrowly construed to encompass only those who are unlawfully using a controlled substance *at the time of gun possession*; or its scope could be set at any of numerous points in between.

C. Vagueness Avoidance Will Play A Critical Role In The Statutory Analysis

However this Court ultimately draws the line, it will be engaging in statutory construction—not merely interpretation. See pp. 3-4, *supra*. As part of that process, the Court is likely to employ constitutional avoidance as a tool to account for any constitutional infirmities that some possible constructions of “unlawful user” may pose but that others may not. See, e.g., *Mathis v. United States*, 579 U.S. 500, 511 (2016) (adopting a narrow construction of a statute when a broader construction “would [have] raise[d] serious Sixth Amendment concerns”).

To be sure, constitutional avoidance is possible in any of the pending cases concerning the constitutionality of Section 922(g)(3). But the petition in this case alone asks the Court to consider a constitutional vagueness challenge pressed and passed upon below. The presence of that well-developed vagueness challenge would aid the Court’s statutory analysis of Section 922(g)(3) and likely shape how the term “unlawful user” is ultimately construed.

1. 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. *Davis v. United States*, 139 S. Ct. 2319, 2325 (2019).

Yet, in virtually all cases involving a federal penal statute, 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. 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.”).⁴ In recent years, the Court has done so under the banner of “interpretive restraint.” *Marinello v. United States*, 138 S. Ct. 1101, 1106 (2018); see, *e.g.*, *Fischer v. United States*, 144 S. Ct. 2176, 2189 (2024); *Dubin*, 143 S. Ct. at 1572.

⁴ 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).

Notably, ordinary constitutional avoidance canons⁵ 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 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, 106.⁶

2. In construing Section 922(g)(3), two significant potential constitutional infirmities will be relevant to

⁵ 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.

⁶ 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.

the constitutional avoidance analysis—Second Amendment concerns and vagueness concerns. Yet those two independent potential constitutional infirmities may require differing degrees of narrowing to preserve constitutionality. Indeed, the potential constitutional vagueness infirmity may preclude a larger subset of applications than the subset of applications that any Second Amendment infirmity may preclude.

As a result, adoption of a narrow construction to avoid vagueness concerns may ultimately make resolution of the Second Amendment challenge straightforward. For that reason, it will be important for the Court to keep separate the two potential constitutional infirmities posed by the open-ended language of Section 922(g)(3). Doing so will be significantly easier in this case, because both constitutional challenges were pressed and passed upon below and are included as questions presented in the petition.

* * * * *

Because the petition in this case is the only pending petition concerning the constitutionality of Section 922(g)(3) that presents a well-developed vagueness challenge, it is the best vehicle for the Court to address the vagueness concerns that will bear on the statutory analysis of the term “unlawful user” in Section 922(g)(3). That statutory analysis will necessarily precede any determination of the statute’s constitutionality, and adoption of a sufficiently narrow construction to avoid vagueness concerns may make resolution of the Second Amendment challenge relatively straightforward.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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