No. _____

IN THE
Supreme Court of the United States

KYLE DAVEY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a person can be convicted of possessing a firearm by an "unlawful user" of a controlled substance under 18 U.S.C. § 922(g)(3) even if no law prohibits the person from using controlled substances?

RELATED PROCEEDINGS

United States v. Davey, No. 24-3132 (10th Cir. August 20, 2025)

United States v. Davey, No. 2:23-cr-20006 (D. Kan. Sept. 17, 2024)

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PETITION FOR WRIT OF CERTIORARI

Kyle Davey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's published opinion is available at 2025 WL 2405322, and is reprinted in the Appendix (Pet. App.) at 1a-21a. The district court's unpublished order denying Mr. Davey's motion to dismiss is available at 2024 WL 340763, and is reprinted at 22a-40a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 922(g)(3) provides:

> It shall be unlawful for any person … who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled and Substances Act (21 U.S.C. 802)) … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

INTRODUCTION

Section 922(g)(3) prohibits an "unlawful user" of controlled substances from possessing firearms. This petition is about the meaning of the modifier "unlawful" and the work (if any) it does within the statutory scheme. Specifically, if a person is a "user" of controlled substances, but no law prohibits his "use," does that person still

qualify as an "unlawful user" under section 922(g)(3)? The Tenth Circuit said yes. It reasoned that, because it is unlawful to *possess* controlled substances, and because "a person cannot *use* a controlled substance without *possessing* it," a person qualifies as an "unlawful *user*" of controlled substances if that person *uses* controlled substances so long as it is unlawful for the person to *possess* the controlled substance. Pet. App. 2a (emphasis added).

This Court should grant this petition to review the Tenth Circuit's interpretation of section 922(g)(3) for two overarching reasons. First, the Tenth Circuit's interpretation is inconsistent with how this Court interprets statutes in several significant ways. Rather than consider section 922(g)(3)'s plain, ordinary meaning, its grammatical structure, and the relevant statutory context, the Tenth Circuit looked beyond section 922(g)(3) to unrelated statutes to adopt an unnatural and grammatically unsound meaning of the term "unlawful user." Second, the meaning of section 922(g)(3) is exceptionally important, not only because it is a criminal statute that results in a loss of liberty for those convicted under it, but also because of the serious possibility that the statute violates the Second Amendment in many instances, as several lower courts have recently acknowledged. Before courts pass on section 922(g)(3)'s constitutionality, they should have a proper understanding of its reach. And this is the perfect vehicle for this Court to provide a definitive interpretation on section 922(g)(3)'s reach.

STATEMENT OF THE CASE

A. Statutory Background

Section 922 is entitled "Unlawful acts," and it sets forth various unlawful acts related to firearms offenses. In particular, section 922(g) prohibits several classes of individuals from possessing firearms. Those classes include felons, domestic-violence misdemeanants, fugitives from justice, unlawful aliens, those who have been adjudicated mental defectives, committed to mental institutions, or dishonorably discharged from the Armed Forces, and those who have renounced their citizenship, are subject to certain restraining orders, or are addicted to controlled substances. 18 U.S.C. § 922(g)(1)-(9). As relevant here, section 922(g)(3) also prohibits any person "who is an unlawful user of … any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))" from possessing firearms.

Congress enacted section 922 in the Gun Control Act of 1968. Pub. L. 90-351, Title IV, § 902, 82 Stat. 228 (1968). The purpose of the legislation, which was ostensibly enacted under Congress's Commerce-Clause authority, was to help assist "the States to control" the interstate traffic of firearms "through the exercise of their police power." Pub. L. 90-351, Title IV, § 901, 82 Stat. 225 (1968). The federal law was to "ma[k]e possible" "effective State and local regulation of" the interstate traffic of firearms and to prevent individuals from "thwart[ing] the effectiveness of State laws and regulations, and local ordinances." *Id.*

The "unlawful user" prohibition was not included within the initial version of section 922, but instead was added as section 922(g)(3) a few months later, in October 1968. Pub. L. 90-618, Title I, § 102, 82 Stat. 1220-1221 (1968). The statute's original

language differs from its current language only in terms of the enumerated controlled substances covered under the provision.[1] That difference is immaterial to this appeal, which, again, focuses solely on the phrase "unlawful user." When amending section 922 in October 1968, Congress reiterated that the purpose of the gun-control legislation was "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence." *Id.* 1213.

Although Congress has prohibited an "unlawful user" from possessing firearms in section 922(g)(3), Congress has not separately prohibited drug use. Instead, Congress has made it unlawful to possess, distribute, manufacture, create, and dispense controlled substances. *See* 21 U.S.C. §§ 841(a)(1)-(2), 844; *see also* 21 U.S.C. § 846 (criminalizing conspiracies to do any of these things). While Congress cross-referenced section 802 (and its definition of "controlled substance") in section 922(g)(3), Congress did not cross-reference any of these other provisions from the Controlled Substances Act within section 922(g)(3).

While there is not a general federal prohibition on drug use, some federal statutes nonetheless prohibit certain groups of people from using drugs. *See*, *e.g.*, 18 U.S.C. § 3563(b)(7) (permitting a condition requiring the probationer/releasee to "refrain from … any use of a narcotic drug or other controlled substance … without a prescription by a licensed medical practitioner"); USSG § 5D1.3 (including as a "mandatory

[1] Congress had not yet enacted the controlled-substance schedules in 21 U.S.C. § 812, and so that portion of section 922(g)(3) looked different. *Compare* 18 U.S.C. § 922(g)(3) (Oct. 1968) ("marijuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Control Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)"), *with* 18 U.S.C. § 922(g)(3) (2022) ("any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))").

condition" that the supervised releasee "shall refrain from any unlawful use of a controlled substance")[2]; 49 U.S.C. § 45103(a) (prohibiting the "use" of a "controlled substance" by, *inter alia*, "an airman, crewmember, airport security screening employee, air carrier employee responsible for safety-sensitive functions").

Congress did not define the phrase "unlawful user" in section 922(g)(3). By contrast, Congress has provided a definition of a similar term, "ultimate user," in section 802(a)(27): "The term 'ultimate user' means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household." 21 U.S.C. § 802(a)(27). Moreover, the government has included its own definition of "unlawful user" in the code of federal regulations: "any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician." 27 C.F.R. § 478.11.

Because this case originates in Kansas, it is also relevant that Kansas does not generally prohibit drug use. Similar to federal law, Kansas has only made it unlawful to distribute, possess, or cultivate a controlled substance. Kan. Stat. Ann. §§ 21-5705, 5706. There is also not a local ordinance that prohibited drug use in this case. Yet there are still people within Kansas who are prohibited from using controlled substances under other state laws. *See*, *e.g.*, Kan. Stat. Ann. § 39-709e(b) (prohibiting drug use for certain welfare recipients).

[2] *See also* https://sentencing.ks.gov/forms/2022-sentencingforms/docs/sentencinglibraries/forms/2022/psi-2022/2022_PSI-basic (noting that Kansas state courts may preclude the use of "illegal drugs" as a condition of probation).

Unlike Kansas, other states have statutes that generally prohibit drug use (in addition to drug possession, etc.). *See*, *e.g.*, Cal. Health & Safety Code § 11550 (misdemeanor offense for the use of a controlled substance without a valid prescription); Col. Stat. § 18-8-404(1)(a) (similar); Del. Code Ann. tit. 16, § 4763 (similar); Okla. Stat. tit. 63, § 465.20(a) (similar); Wyo. Stat. § 35-7-1039 (similar); Ariz. Stat. §§ 13-3405(A)(1), 13-3406(A)(1) (prohibiting the use of marijuana or prescription-only drugs); Wis. Stat. § 961.335(1)(a)-(b) (prohibiting the use of controlled substances "without a permit"); Ark. Code Ann. § 20-64-402 (prohibiting the use of LSD and DMT); D.C. Code § 48-911.01(a) (prohibiting the use of marijuana in public); Idaho Code Ann. § 37-2732C (similar; prohibiting the use of any narcotic drug in public or on private property open to the public); Ga. Stat. § 16-13-91 (prohibiting the inhalation of model glue); Haw. Rev. Stat. Ann. § 712-1250(1)(a) (prohibiting the use of certain intoxicating compounds); 720 Ill. Comp. Stat. Ann. 690/1 (similar). This list is not exhaustive. And it does not include state-specific statutes that prohibit certain groups of people from using drugs. Nor does it include local ordinances that prohibit drug use. The point is simply that, even without a general federal prohibition on drug use, many people are still prohibited by law from using drugs (not just possessing them) throughout the Country.

B. Proceedings in the District Court

In February 2023, a federal grand jury in Kansas City, Kansas returned a two-count indictment, charging Mr. Davey with: (1) possession of a machinegun, 18 U.S.C. § 922(o); and (2) possession of a firearm by an "unlawful user" of a controlled

substance, 18 U.S.C. § 922(g)(3). Pet. App. 3a. In August 2023, Mr. Davey moved to dismiss the "unlawful user" count because it failed to state an offense under the undisputed facts of the case. Pet. App. 3a, 22a, 32a-34a.

Mr. Davey conceded that he used heroin daily at the time he possessed the firearms in his home. Pet. App. 1a-2a, 34a. But he explained that no law (local, state, or federal) prohibited his use (rather than his possession) of heroin. Pet. App. 2a, 3a, 32a-33a. Because it was not unlawful for him to use controlled substances, Mr. Davey explained that he could not be charged as an "unlawful user" of a controlled substance under section 922(g)(3). Pet. App. 32a-33a.

The government disagreed and took the position that, because one cannot use a controlled substance without also possessing it, and because federal law prohibits the possession of controlled substances without a valid prescription, Mr. Davey's daily use of heroin qualified him as an "unlawful user" under section 922(g)(3). Pet. App. 4a.

The district court denied the motion. Pet. App. 32a-34a. The district court acknowledged that no law prohibited Mr. Davey's use of heroin. Pet. App. 32a-33a. But the district court rejected Mr. Davey's argument because the court "just [couldn't] see how an individual could use a controlled substance without possessing it." Pet. App. 33a. Because "possession precedes use," a person "can't use controlled substances without possessing them." Pet. App. 34a. And because it was unlawful for Mr. Davey to possess heroin, his daily use of heroin meant that he qualified as an "unlawful user" under section 922(g)(3). *See* Pet. App. 33a-34a.

Although the district court acknowledged that the question was one of "statutory interpretation," the district court did not conduct a textual analysis of section 922(g)(3). Pet. App. 32a. Rather, the district court relied on a line of Tenth Circuit precedent interpreting a supervised-release-related statute, 18 U.S.C. § 3583(g). Pet. App. 33a. Section 3583(g) does not include the phrase "unlawful user" or any form of the word "use." Instead, it requires mandatory revocation of supervised release if the defendant "possesses a controlled substance in violation of the condition set forth in [18 U.S.C. § 3583(d)]." 18 U.S.C. § 3583(g)(1). The Tenth Circuit has held that the government may establish possession of a controlled substance under section 3583(g)(1) based on evidence that the defendant used a controlled substance. Pet. App. 33a (discussing *United States v. Rockwell*, 984 F.2d 1112, 1114 (10th Cir. 1993); *United States v. Hammonds*, 370 F.3d 1032, 1035 (10th Cir. 2004), *United States v. Rodriguez*, 945 F.3d 1245, 1251 (10th Cir. 2019)). Stated differently, "knowing use of a controlled substance supports a charge of possession." Pet. App. 33a (quoting *Rodriguez*). This is so because "[t]here can be no more intimate form of possession than use," and because "'a person cannot use a drug without possessing it.'" Pet. App. 33a (quoting *Rockwell* and *Hammonds*).

Mr. Davey entered a conditional guilty plea, reserving the right to appeal the district court's denial of the motion to dismiss. Pet. App. 5a.

C. Proceedings in the Tenth Circuit

The Tenth Circuit affirmed. Pet. App. 2a. The Tenth Circuit held that the plain, ordinary meaning of the term "unlawful user" "covers persons who regularly use a

controlled substance that has no lawful use." Pet. App. 5a. To determine whether a substance has a "lawful use," the Tenth Circuit consulted the controlled substances tables. The Tenth Circuit concluded that, because heroin is a Schedule I controlled substance, which unlike controlled substances in Schedules II-V cannot be "lawfully obtained," it "has no legal use"; its use "is not permissible in any circumstance." Pet. App. 7a (quoting *United States v. Ocegueda*, 564 F.2d 1363, 1365 (9th Cir. 1977)).

In its textual analysis, the Tenth Circuit extended the modifier "unlawful" to "controlled substances" and held that section 922(g)(3) "determines unlawfulness *through* the legal status of the controlled substance." Pet. App. 11a-13a. It did so via a discussion of the Controlled Substances Act, not section 922(g)(3), and under the belief that a refusal to do so would "turn[] the [Controlled Substances Act] on its head" by "in effect criminaliz[ing] the use of legitimate substances for a certain class of users, regardless of whether the drug was 'lawfully obtained' for an 'accepted medical use in treatment.'" Pet. App. 12a (quoting 21 U.S.C. § 812(b)(5)). The Tenth Circuit also concluded that Mr. Davey's interpretation "would obliterate" the Controlled Substance Act's "detailed hierarchy" of controlled substances "to view lawfulness as contingent on who the user is, not what the substance is," and implied that Mr. Davey's interpretation would produce "absurd results." Pet. App. 12a-13a. The Tenth Circuit stated that there was a "consensus" in the courts of appeals on this point, even though "no circuit has conducted a textual analysis of the term '*unlawful* user.'" Pet. App. 14a.

The Tenth Circuit acknowledged that its interpretation of section 922(g)(3) was consistent with the definition found in 27 C.F.R. § 478.11, but noted that it arrived at its definition "independent of the ATF's definition." Pet. App. 15a n.6.

The Tenth Circuit also relied on section 844's criminalization of the *possession* of controlled substances despite the lack of a cross-reference to this statute in section 922(g)(3). Pet. App. 16a. It did so because: (1) a court must look to "what is contrary to or unauthorized by law" to define the phrase "unlawful user"; (2) "Congress knows how to limit criminal liability to conduct made unlawful by a specific statute" by including the phrase "unlawful under this section," but this phrase was not included in section 922(g)(3); and (3) Mr. Davey's own consideration of state laws to determine whether an individual is an "unlawful user" "belies his argument that we cannot look[] beyond § 922(g)(3) to other statutes to determine what is unlawful." Pet. App. 16a-17a (quotations omitted). Like the district court, the Tenth Circuit also relied on its precedents involving section 3583(g) to support its interpretation of "unlawful user." Pet. App. 18a-20a.

This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This court should grant this petition because the way in which the Tenth Circuit interpreted section 922(g)(3) conflicts with numerous statutory-interpretation cases from this Court. This petition also raises an exceptionally important question about the meaning of a federal criminal statute that involves a prohibition on the possession of firearms, thus triggering serious concerns that the statute violates the Second

Amendment, as several lower courts have recently acknowledged. Before this Court addresses the constitutionality of section 922(g)(3), it should first interpret the meaning of the statute. And this is an excellent vehicle for this Court to do just that.

I. The Tenth Circuit erred under this Court's precedents.

Review is necessary because the Tenth Circuit's reasoning is inconsistent with the way in which this Court normally interprets statutes in several respects.

First, the Tenth Circuit's interpretation of the phrase "unlawful user of any controlled substances" is unfaithful to section 922(g)(3)'s grammatical structure. Although the Tenth Circuit acknowledged that "unlawful" modifies "user," thus limiting the reach of "unlawful user" to a "subset of drug users who cannot possess firearms," the Tenth Circuit further concluded that "unlawful" also modifies "controlled substances," so that "§ 922(g)(3) determines unlawfulness *through* the legal status of the controlled substance." Pet. App. 10a-13a. By extending the modifier "unlawful" to "controlled substances," the Tenth Circuit could conclude that Mr. Davey's use of heroin was "unlawful" because heroin is a Schedule I controlled substance with "no legal use … in any circumstance." Pet. App. 7a (quotations omitted).

This Court expressly rejected this type of reasoning in *Babb v. Wilkie*, 589 U.S. 399, 406 (2020). In that case, this Court noted that the phrase "based on age" was "an adjectival phrase that modifies the noun 'discrimination.' It does not modify 'personnel actions.'" *Id.* Thus, while age must be "a but-for cause of discrimination," it need not be "a but-for cause of a personnel action itself." *Id.* In other words, it is

improper to interpret a modifier in a statute to modify a word other than the one it actually modifies. Yet that is what the Tenth Circuit did below.

On a broader level, this Court has held that "'[w]ords are to be given the meaning that proper grammar and usage would assign them.'" *Nielsen v. Preap*, 586 U.S. 392, 407-408 (2019) (quoting A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 140 (2012)). And as a matter of proper grammar and usage, "unlawful" in the phrase "unlawful user of any controlled substances" modifies "user," not "controlled substances." The prepositional phrase "of any controlled substances" merely identifies the object that an "unlawful user" must use to be prohibited from possessing firearms ("controlled substances"). The statute does not also refer to "controlled substances" as "unlawful." Thus, it does not follow that an "unlawful user" is a user who uses "unlawful controlled substances." That is not the statute that Congress wrote.

Additionally, Congress defined "controlled substances" via a cross-reference to 21 U.S.C. § 802. 18 U.S.C. § 922(g)(3). And section 802(6) defines "controlled substance" broadly as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V," without any mention of the substance's lawfulness. 21 U.S.C. § 802(6). Yet the Tenth Circuit somehow singled out Schedule I controlled substances as "unlawful" controlled substances, Pet. App. 7a, even though the cross-referenced statute defines "controlled substances" as "schedule I, II, III, IV, or V" controlled substances, 21 U.S.C. § 802(6). And the Tenth Circuit even made clear that it would not interpret section 922(g)(3) "to render the [Controlled Substances Act's] careful

consideration of substances irrelevant." Pet. App. 13a. But that is precisely what section 922(g)(3) does itself by defining all scheduled controlled substances as "controlled substances" via the cross-reference to section 802(6). 18 U.S.C. § 922(g)(3).

The Tenth Circuit justified its departure from grammar because of its belief that Mr. Davey's interpretation would "turn the [Controlled Substances Act] on its head." Pet. App. 12a. But Mr. Davey's interpretation had nothing to do with the Controlled Substances Act, and it would certainly not turn that statutory scheme "on its head" or "obliterate" the Controlled Substances Act's "detailed hierarchy." *See* Pet. App. 12a. Mr. Davey would simply interpret "unlawful user" to encompass anyone who uses a controlled substance if a law prohibits that person's use of the controlled substance. That plain, ordinary meaning of the phrase does not turn on whether the substance is a schedule I, II, III, IV, or V controlled substance. It turns on whether it is "unlawful" for the "user" to use the substance. And if the person has a valid prescription for the substance, then certainly that person's use of the substance would not be "unlawful." But it does not follow that the lack of a prescription renders a person's use "unlawful" because Congress has not prohibited the *use* of a non-prescribed controlled substance (just its *possession*). 21 U.S.C. § 844(a).

Second, the Tenth Circuit's interpretation of section 922(g)(3) is not based on section 922(g)(3)'s text and context, but instead on the Controlled Substances Act's text and context. The Tenth Circuit defined "unlawful user" in section 922(g)(3) to include those who cannot lawfully possess (rather than use) controlled substances

because 21 U.S.C. § 844 prohibits the possession of controlled substances. Pet. App. 16a-18a.

This reasoning is infirm because section 922(g)(3) includes a cross-reference to one section of the Controlled Substances Act – section 802 – for one specific purpose – to define the phrase "controlled substances," but does not include a cross-reference to any other section of the Controlled Substances Act to define the phrase "unlawful user." The Tenth Circuit's decision to consider section 844 despite the lack of a cross-reference directly conflicts with *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 428 (2018). That case makes that clear that, "[w]hen Congress wants to refer only to a particular subsection or paragraph [within a cross-reference], it says so." *Id.* And here, Congress only cross-referenced section 802 to define "controlled substances," not, as the Tenth Circuit held, the entirety of the Controlled Substances Act (or section 844 specifically) to define "unlawful user."

This reasoning also conflicts with *Azar v. Allina Health Servs.*, 587 U.S. 566, 577 (2019). That case involved a statutory cross-reference to one exemption found in one subsection of a different statute. But the government attempted to invoke a different exemption that was not cross-referenced in the statute. This Court rejected the argument. "If, as the government supposes, Congress had also wanted to borrow the other APA exemption, for interpretive rules and policy statements, it could have easily cross-referenced that exemption in exactly the same way." *Id.* at 576. And "Congress's choice to include a cross-reference to one but not the other of the APA's neighboring exemptions strongly suggests it acted 'intentionally and purposefully in

the disparate' decisions." *Id.* at 577. So too here. If Congress wanted to define "unlawful user" via section 844 (or any other provision within the Controlled Substances Act), surely it would have cross-referenced that statute (or statutes), just as it cross-referenced section 802 to define "controlled substances."

There is also *City of Chicago v. Fulton*, 592 U.S. 154, 161 (2021). In that case, this Court refused to interpret one statute in relation to another statute because of a lack of a cross-reference. "Had Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross-reference or provide any other indication that it was transforming § 362(a)(3)." *Id.* Again, so too here.

The Tenth Circuit justified its departure from this rule because Mr. Davey's position also requires courts to look to other laws not cross-referenced in section 922(g)(3) to determine whether a person is an "unlawful user" of a controlled substance. Pet. App. 16a-18a. This reasoning is unpersuasive. Congress has not defined "unlawful user," and so a court will necessarily have to consult other laws to determine whether an individual has *unlawfully used* a controlled substance. Mr. Davey's position looks to statutes that prohibit drug *use* because that is consistent with section 922(g)(3)'s plain text. But section 844 does not prohibit drug *use*. Thus, the lack of a cross-reference is key. Without a cross-reference to section 844's *possession* prohibition, there is no reason to think that Congress meant to define "unlawful *user*" via section 844.

The Tenth Circuit also reasoned that Congress would have included the phrase "is unlawful under this section" in section 922(g)(3) if it "intended to alter 'unlawful"s ordinary meaning in § 922(g)(3) by restricting criminal liability to unlawful conduct described solely in the statute." Pet. App. 17a. But our position does not require a court to adopt an unnatural definition of "unlawful." Our position merely requires courts to consult those statutes that make drug *use* (not *possession*) "unlawful" because "unlawful" modifies "user" in section 922(g)(3). And we do not understand the criticism that our position "restrict[s] criminal liability to unlawful conduct described solely in" section 922(g)(3). That is precisely what a criminal statute should do. That the Tenth Circuit has expressly conceded that it has interpreted section 922(g)(3) to reach conduct not described within section 922(g)(3) should be reason alone for this Court to grant this petition.

Third, the Tenth Circuit interpreted "unlawful user" via section 3583(g), which is an unrelated statute that governs mandatory revocation of supervised release. Pet. App. 18a-20a. But section 3583(g) includes materially different language. That statute does not include the phrase "unlawful user," but instead provides for mandatory revocation of supervised release if the defendant "possesses a controlled substance." 18 U.S.C. § 3583(g). Thus, the Tenth Circuit interpreted the phrase "unlawful user" in section 922(g)(3) based on Tenth Circuit precedent interpreting the phrase "possesses a controlled substance" in section 3583(g).

This reasoning conflicts with the well-established rule of statutory construction that the use of different words in statutes "convey differences in meaning." *Henson v.*

Santander Consumer USA Inc., 582 U.S. 79, 86 (2017); *see also Borden v. United States*, 593 U.S. 420, 442-443 (2021) ("Thus does a 'difference in text yield[] a difference in meaning'"; "the Government's argument ignores the textual difference between the two statutes"). Under this rule, this Court has consistently refused to interpret statutes by reference to unrelated statutes that contain different language or to prior cases that interpret such differently-worded statutes. *See*, *e.g.*, *Babb*, 589 U.S. at 408-411 (rejecting the "Government's primary argument [that] rest[ed] not on the text of [the applicable statute] but on prior cases interpreting different statutes"; refusing to rely on one differently worded statute because the relevant phrase at issue modified a different word in each statute; refusing to rely on another differently-worded statute because "the syntax . . . [was] critically different"); *Salinas v. United States R.R. Ret. Bd.*, 592 U.S. 188, 199 (2021) (rejecting a party's reliance on precedent interpreting a different statute because of a "key textual difference"); *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 593 U.S. 67, 78-79 (2021) (same); *Barton v. Barr*, 590 U.S. 222, 235 (2020) (refusing to rely on statutes that did "not employ similar language"); *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 673 (2021) (similar).

And this is particularly true here considering that Congress enacted section 922(g)(3) in 1968, 82 Stat. 1220-1221, some twenty years before it first enacted section 3583(g) in 1988, Public Law 100–690, Title VII, § 7303(b), 102 Stat 4181(1988), and some twenty-four years before the Tenth Circuit first interpreted section 3583(g) in 1992. The Congress that enacted section 922(g)(3) could not have been thinking about

section 3583(g) or Tenth Circuit precedent interpreting section 3583(g) because neither of those things existed at the time. For this reason as well, the Tenth Circuit's decision doubly conflicts with this Court's precedents. *See*, *e.g.*, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 337 (2020) (refusing to interpret one statute based on precedent interpreting another differently-worded statute enacted after the relevant statute was enacted; "So we have two statutes with two distinct histories, and not a shred of evidence that Congress meant to incorporate the same [] standard"). "To accept [the district court's] invitation to consult, tinker with, and then engraft a test from a modern statute onto an old one would thus require more than a little judicial adventurism, and look a good deal more like amending a law than interpreting one." *Id.* at 338.

It is also worth noting that the Tenth Circuit's precedents on section 3583(g) do not even support the Tenth Circuit's decision in this case. The Tenth Circuit's decision in *Rockwell* did not hold that the term "possesses" in section 3583(g) means "uses." *Rockwell* held that evidence of use can prove possession. 984 F.2d at 1114-1115. But the opposite is not true. The mere physical possession of a controlled substance does not establish the use of that substance. And here, Congress included the term "unlawful user" within section 922(g)(3), without any reference to drug possession.

Fourth, the Tenth Circuit's interpretation effectively rewrites section 922(g)(3) to replace "unlawful user" with "an individual who uses a controlled substance if it is unlawful for the individual to possess the controlled substance." As this Court has held, however, "statutory construction does not work that way: A court does not get

to delete inconvenient language and insert convenient language to yield the court's preferred meaning." *Borden*, 593 U.S. at 436. By adding words to the statute, the Tenth circuit violated the "fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.' To do so 'is not a construction of a statute, but, in effect, an enlargement of it by the court.'" *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019). *See also Nichols v. United States*, 578 U.S. 104, 110 (2016) ("'[w]hat the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'").

And this is particularly true here when one considers section 922 as a whole. By our count, Congress used some form of the word "possession" around sixty times within section 922. Knowing this, it is not plausible to think that Congress used the phrase "unlawful user" to connote unlawful possession in section 922(g)(3). *See*, *e.g.*, *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 215 (2020) (noting that courts do not "usually read into statutes words that aren't there. It's a temptation we are doubly careful to avoid when Congress has (as here) included the term in question elsewhere in the very same statutory provision"); *see also Henderson v. United States*, 476 U.S. 321, 326-327 (1986) (similar); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014) (when legislators did not adopt "obvious alternative" language, "the natural implication is that they did not intend" the alternative).

Fifth, and relatedly, by defining "unlawful user" via the lawfulness to possess in this specific context, the Tenth Circuit effectively adopted a term-of-art reading of the

phrase "unlawful user." But the Tenth Circuit did not conclude that the phrase "unlawful user" carried a "'widely accepted meaning'" at the time of section 922(g)(3)'s enactment. *See United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 617 n.5 (2020); *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 354 (2021) ("this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption"). At most, the Tenth Circuit concluded that the term "possession" carries a specialized meaning that includes "use." Pet. App. 18a-20a. But even assuming the point, a specialized meaning of "possession" tells us nothing about whether the phrase "unlawful user" was a term of art with a specialized meaning when Congress enacted section 922(g)(3). "The first precondition of any term-of-art reading is that the term be present in the disputed statute. Here, it is not." *Borden*, 593 U.S. at 435. *See also Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 211 (2019) (similarly rejecting term-of-art argument because the phrase "was not a term of art"); *Kousisis v. United States*, 145 S. Ct. 1382, 1393 (2025) (similar).

Sixth, the Tenth Circuit's atextual interpretation of the phrase "unlawful user" to include those who unlawfully possess the controlled substance is also problematic because Congress expressly defined other similar terms in this way. *Sessions v. Dimaya*, 584 U.S. 148, 165 (2018) (rejecting the government's interpretation of a statute because Congress could have, but did not, include the government's preferred language; "other statutes, in other contexts, speak in just that way"). Specifically, although section 802 does not define "unlawful user," it does include a definition of

"ultimate user." An "ultimate user" "means a person who has lawfully obtained, *and who possesses*, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household." 21 U.S.C. § 827(27) (emphasis added). Congress's inclusion of a specialized definition of the term "ultimate user," defining that term unnaturally to include an individual "who possesses" controlled substances, establishes that, if Congress also wanted to define the term "unlawful user" unnaturally to require some relation to drug possession, it would have done so expressly. But Congress has not done so.

Seventh, to the extent that the Tenth Circuit implied that our position is absurd, that implication is also undermined by this Court's precedents. "[T]o justify a departure from the letter of the law upon [the anti-absurdity doctrine], the absurdity must be so gross as to shock the general moral or common sense." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). This is so because the "application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter." *Id.* Interpreting "unlawful user" according to its ordinary, natural meaning – an individual whose use of drugs is prohibited by law – is not absurd. It is the most natural reading of the statute. And considering the plethora of federal, state (and no doubt local) laws prohibiting drug use (some of which are cited above), interpreting section 922(g)(3) according to its plain text does not come close to rendering the statute inoperable.

Eighth, rather than adopt its atextual interpretation of "unlawful user," the Tenth Circuit should have applied the rule of lenity to resolve any ambiguity in Mr. Davey's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). After all, it is not true that the Tenth Circuit's "position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994). When Congress speaks "in language that is clear and definite," courts may impose the harsher alternative construction. *United States v. Bass*, 404 U.S. 336, 347 (1971). But when Congress fails to unambiguously define a criminal law, courts are forced to sort out the matter. *Id.* at 348. And in that instance, because the Court "does not play the part of a mindreader," *Santos*, 553 U.S. at 515, the rule of lenity resolves ambiguity in favor of the defendant. And here, at a minimum, lenity should resolve this issue in Mr. Davey's favor.

In the end, the government could not have charged Mr. Davey as an "unlawful user" of any controlled substance because no law prohibits his use of any controlled substance. And while section 922(g)(3) also reaches individuals who are "addicted to" controlled substances (which has nothing to do with the lawfulness of the individual's drug use), the government did not charge Mr. Davey under this alternative language. Thus, it follows that Mr. Davey's drug use, which is not prohibited by any law (criminal or civil), does not prohibit his possession of a firearm under section 922(g)(3). Because the Tenth Circuit held otherwise, based on reasoning that conflicts

with how this Court interprets statutes in several material ways, this Court should grant this petition.

II. The question presented is exceptionally important.

This Court should also grant this petition because the proper interpretation of the phrase "unlawful user" is exceptionally important for two overarching reasons. **First**, the scope of "unlawful user" defines criminal liability for a federal offense. If a person who is an "unlawful user" possesses a firearm, that person is guilty of a federal offense. If not, the person is not guilty of a federal offense. And here, the Tenth Circuit adopted an unnatural interpretation of that phrase, extending its reach beyond those who unlawfully use drugs (i.e., that who are prohibited by some law from using drugs) to those who lawfully use drugs if they unlawfully possessed the drugs (i.e., to those who use drugs that they cannot lawfully possess). That unnatural reading raises serious notice concerns and criminalizes conduct beyond that which the statute's plain text criminalizes.

Second, several courts of appeals have recently questioned the constitutionality of section 922(g)(3) under the Second Amendment. *See*, *e.g.*, *United States v. Harris*, 144 F.4th 154, 165 (3d Cir. 2025) (remanding for further proceedings to determine whether an individual who "admitted smoking [marijuana] multiple times a week throughout the year" could be prosecuted under section 922(g)(3) consistently with the Second Amendment); *United States v. Cooper*, 127 F.4th 1092, 1094 (8th Cir. 2025) (similar; involving an individual who "smoked marijuana three to four times a week" and "two days before officers found a [gun] in his car"); *United States v.*

Harrison, ___ F.4th ___, 2025 WL 2452293 (10th Cir. Aug. 26, 2025) (similar; involving a non-intoxicated marijuana user's possession of a firearm; remanding for the district court to determine whether such users pose a risk of future danger).

And the Fifth Circuit has even reversed section 922(g)(3) convictions as unconstitutional under the Second Amendment. *United States v. Daniels*, 124 F.4th 967, 970 (5th Cir. 2025) (reversing because "the jury did not necessarily find that Daniels was presently or even recently engaged in unlawful drug use"); *United States v. Connelly*, 117 F.4th 269, 272, 282 (5th Cir. 2024) (reversing conviction involving an individual who occasionally smoked marijuana as a sleep-and-anxiety aid and who kept a pistol in her bedroom).

Yet to properly gauge whether section 922(g)(3) is constitutional under the Second Amendment, courts must have a correct understanding of the reach of that statute. A court must first understand what it means to be an "unlawful user" before deciding whether an individual who qualifies as an "unlawful user" has a Second Amendment right to possess firearms. As it stands now, while the lower courts have grappled over what it means to be a "user" (and whether there is a temporal requirement associated with that word), only the Tenth Circuit has been asked to address the meaning of "unlawful" in section 922(g)(3). Pet. App. 14a-15a.[3] While it might normally make sense for that question to percolate in the lower courts, considering the prevalence of

[3] The Tenth Circuit's stated "consensus" of its position is simply not true. Pet. App. 14a. Because "no circuit has conducted a textual analysis of the term '*unlawful* user,'" id., there is no consensus on the meaning of that phrase. Moreover, it is worth noting that the Ninth Circuit's decision in *Ocegueda*, 564 F.3d at 1365, which the Tenth Circuit relied on below, Pet. App. 7a, is just as consistent with our position because that case comes from California, a state that prohibits drug use, Cal. Health & Saftey Code § 11550.

Second Amendment cases on section 922(g)(3), further percolation can only cause problems, not resolve them. A Second Amendment decision premised on an incorrect understanding of "unlawful user" does nobody any good. Thus, this Court should grant this petition to resolve definitively the meaning of "unlawful user" so that courts can then move sequentially to whether the statute violates the Second Amendment.

The same is true for the serious void-for-vagueness concerns that have engendered much litigation in the lower courts. *See*, *e.g.*, *United States v. Espinoza-Roque*, 26 F.4th 32, 35 (1st Cir. 2022) (recognizing a temporal limitation "to avoid unconstitutional vagueness"); *United States v. Morales-Lopez*, 92 F.4th 936, 945 (10th Cir. 2024) (similar); *United States v. Carnes*, 22 F.4th 743, 747-749 (8th Cir. 2022) (similar); *United States v. Cook*, 970 F.3d 866, 878-880 (7th Cir. 2020) (similar); *United States v. Bowens*, 938 F.3d 790, 793 (6th Cir. 2019) (similar); *United States v. Stennerson*, ___ F.4th ___, 2025 WL 2600006, at *7 (9th Cir. Sept. 9, 2025) (similar; defendant's drug use was "sufficiently consistent, prolonged, and close in time to his gun possession"); *Harris*, 144 F.4th at 166-167 (similar; noting that "the exact boundaries of 'unlawful user' are debatable," but nonetheless rejecting a void-for-vagueness claim). Again, before a court can analyze whether a statute is void for vagueness, it must properly construe that statute. And in light of the various formulations the courts have adopted to reject void-for-vagueness challenges, it is imperative that this Court definitively interpret the meaning of the "unlawful user" provision.

III. This case is an excellent vehicle.

This case is an excellent vehicle to resolve the question presented. The question arises on direct review from a lower federal court of appeals. Mr. Davey properly preserved the question, and the Tenth Circuit affirmed under de novo review. Thus, there are no procedural hurdles to overcome for this Court to address the merits of this exceptionally important issue of statutory interpretation.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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