Case No. 24-2441

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ALEXANDER WESLEY LEDVINA,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF IOWA
Honorable C.J. Williams, Judge
(District Court No. 1:23-cr-00036-CJW-1)

APPELLANT ALEXANDER WESLEY LEDVINA'S BRIEF AND ARGUMENT

Michael K. Lahammer
425 2nd Street SE, Ste. 1010
Cedar Rapids, IA 52401
Telephone: (319) 364-1140
Facsimile: (319) 364-4442
e-mail: michael.lahammer@lahammerlaw.com

ATTORNEY FOR APPELLANT
ALEXANDER WESLEY LEDVINA

SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Defendant-Appellant Alexander Wesley Ledvina appeals his conviction for being a drug user in possession of a firearm and for making a false statement during the purchase of a firearm. Mr. Ledvina raises facial and as-applied void for vagueness challenges, an argument that § 922(g)(3) violates the Second Amendment, and other issues.

Appellant Alexander Wesley Ledvina requests fifteen (15) minutes of oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES AND OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

The decisions appealed:

Defendant/Appellant Alexander Wesley Ledvina appeals from the District Court's Judgment, filed June 28, 2024 (R. Doc. 88).

Jurisdiction of the Court below:

The United States District Court had jurisdiction of Mr. Ledvina's federal criminal prosecution pursuant to 18 U.S.C. § 3231.

Jurisdiction of this Court:

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(1) & (2).

Filing of appeal:

Mr. Ledvina filed a timely Notice of Appeal on July 11, 2024 (R. Doc. 91). This appeal is from a final order or judgment that disposes of all claims asserted in the district court. The Notice of Appeal was timely filed pursuant to Federal Rule of Appellate Procedure 4(b).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER 18 U.S.C. §§ 922(g)(3) AND 924(a)(1)(A) ARE VOID FOR VAGUENESS ON THEIR FACE?

Johnson v. United States, 576 U.S. 591 (2015)

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

United States Constitution, Fifth Amendment, Due Process Clause

18 U.S.C., § 922(g)(3)

II. WHETHER § 922(g)(3) VIOLATES THE SECOND AMENDMENT?

New York State Rifle and Pistol Association v. Bruen, 142 S. Ct. 2111 (2022)

United States v. Daniels, 77 F.4th 337 (5th Cir. 2023)

United States Constitution, Second Amendment

III. WHETHER §§ 922(g)(3) AND 924(a)(1)(A) ARE VOID FOR VAGUENESS AS APPLIED?

Rehaif v. United States, 139 S. Ct. 2191 (2019)

United States v. Bramer, 832 F.3d 908 (8th Cir. 2016)

STATEMENT OF THE CASE

Nature of the case:

This is an appeal from the 51 month sentence imposed upon Mr. Ledvina by the District Court.

Course of proceedings:

Mr. Ledvina was convicted of Possession of a Firearm by a Drug User, in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(8) (Count 1), and Making a False Statement During Purchase of a Firearm, in violation of 18 U.S.C. § 924(a)(1)(A) (R. Doc. 88).

Disposition in the District Court:

Mr. Ledvina was sentenced to 51 months of imprisonment (51 months on each Count, imposed concurrently), a term of supervised release of three years with various conditions, and a special assessment of $200. (R. Doc. 88).

Background

The Superseding Indictment (R. Doc. 33) charged Mr. Ledvina with possession of a firearm while being an unlawful user of marijuana and cocaine, in violation of 18 U.S.C. § 922(g)(3) (Count 1), and False Statement during Purchase

of Firearm, in violation of 18 U.S.C. § 924(a)(1)(A) (Count 2). The key averment in Count 1 is that the Defendant allegedly knew that he was an "unlawful user" of marijuana and cocaine while in possession of a firearms on or about August 11, 2022. The key averment in Count 2 is that the Defendant allegedly knowingly made a false statement that he was not an "unlawful user" of controlled substances in connection with his acquisition of a firearm on July 29, 2022.

The parties filed a Joint Stipulation in Lieu of Trial Evidence which sets for the the relevant undisputed facts of this case. (R. Doc. 52). Between April of 2018 and February of 2022, Mr. Ledvina purchased 14 firearms. *Id*. at ¶ 1. He was in possession of firearms in March of 2022. *Id*. at ¶ 2. On March 24, 2022, a Cedar Rapids Police Officer was in Mr. Ledvina's half of a duplex, smelled the odor of marijuana, and observed multiple firearms. *Id*. at ¶ 3. The parties stipulated that "Defendant was smoking marijuana in March of 2022." *Id*. at ¶ 1.

On July 29, 2022, and relevant to Count 2, ATF agents were contacted by the owner of Black Dog Guns who provided information that Mr. Ledvina had purchased a pistol on that date and that a store employee smelled the odor of marijuana coming from Mr. Ledvina. R. Doc 52 at ¶¶ 5, 6. The parties stipulated that "Defendant was smoking marijuana in July of 2022." *Id*. at ¶ 6. Black Dog Guns is a federally licensed firearms dealer. *Id*. In connection with the July 29, 2022, purchase of the firearm, Mr. Ledvina filled out and signed an ATF 4473

form. *Id*. "On the form, defendant knowingly made a representation that he was not an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance. At the time defendant made the representation, defendant knew he had used controlled substances in March, April, May, June, and July 2022." *Id*.

Forming the basis for Count 1, a search warrant was executed at Mr. Ledvina's residence on August 11, 2022. R. Doc. 52 at ¶ 8. Mr. Ledvina arrived at his residence in a vehicle, in which a firearm and cannabis were found. *Id*. Four firearms, ammunition, and marijuana were found inside Mr. Ledvina's residence. *Id*. at ¶ 9. A urine sample was obtained. *Id*. at ¶ 10. Upon testing, metabolites for THC and cocaine were confirmed. *Id*.

Mr. Ledvina filed a Motion to Dismiss on July 31, 2023. (R. Doc. 37). That Motion asserted two arguments. First, Mr. Ledvina argued that the District Court should dismiss the Indictment because § 922(g)(3) is unconstitutionally vague on its face in violation of the Due Process Clause of the Fifth Amendment. The statute fails to give ordinary people fair notice of the conduct it punishes because it does not define the terms "addicted to" and "unlawful user." Thus, a citizen must guess at what point he or she, after unlawfully using a controlled substance, may lawfully possess a firearm. Section 924(a)(1)(A) is also unconstitutionally vague because the Superseding Indictment alleges that Mr. Ledvina made a false statement that he

was not an "unlawful user" of controlled substances. The same analysis with respect to "unlawful user" as used in § 922(g)(3) applies with equal force to this statute.

Second, Mr. Ledvina argued that § 922(g)(3) is unconstitutional in violation of the Second Amendment in light of the United States Supreme Court's ruling in *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). The restriction contained in § 922(g)(3) prohibits possession of a firearm for any person "who is an unlawful user of or addicted to a controlled substance." Because the Government cannot demonstrate that prohibiting such conduct is consistent with the Nation's historical tradition of firearm regulation, the Superseding Indictment must be dismissed.

On August 16, 2023, the District Court filed a Memorandum Opinion and Order denying Defendant's Motion as to Count 1 and holding the Motion in abeyance as to Count 2 until trial. (R. Doc. 41). The District Court denied Mr. Ledvina's facial challenge to Count 1 and held his challenge to Count 2 in abeyance until trial. *Id*. The District Court further held that § 922(g)(3)

Subsequently, the parties agreed to waive jury trial and try this matter to the bench. (R. Doc. 42). A Joint Stipulation in Lieu of Trial Evidence was filed on October 30, 2023. (R. Doc. 52). The facts set forth in the Joint Stipulation were agreed to be true. *Id*.

Mr. Ledvina did not make make an as applied challenge to the unconstitutional vagueness of the statutes at issue in his Motion to Dismiss. An as applied challenge can be decided only after presentation of evidence at trial and cannot be decided on a motion to dismiss. *See United States v. Turner*, 842 F.3d 602, 605 (8th Cir. 2016); *United States v. Stupka*, 418 F.Supp.3d 402, 405 (N.D. Iowa 2019). Mr. Ledvina made an as applied challenge at trial. (R. Doc. 57). Mr. Ledvina also argued at trial, with respect to Count 2, that Mr. Ledvina could reasonably have read ATF Form 4473 as equating "unlawful user" with "addict" and, not believing himself to be an "Addict," honestly answered the question "no." *Id*.

The District Court, on December 1, 2023, denied Mr. Ledvina's as applied constitutional challenge to the statutes and found Mr. Ledvina guilty with respect to both Counts 1 and 2. (R. Doc. 64 – Bench Trial Order, Findings, and Conclusions).

Sentencing was held on June 27, 2024. (R. Doc. 88 - Judgment). Mr. Ledvina objected to judicial fact finding at sentencing based upon acquitted or uncharged conduct. (R. Doc. 85-1 – Def. Sentencing Brief). *Id*. He also objected to the application of the "in connection with another felony" adjustment based on the Ex Post Facto Clause. *Id*. Mr. Ledvina also moved for a downward variance from the advisory Sentencing Guidelines range based on a variety of factors. *Id*.

Mr. Ledvina was sentenced to 51 months imprisonment, three years of supervised release with conditions, and a $200 special assessment. (R. Doc. 88).

SUMMARY OF THE ARGUMENT

Mr. Ledvina's convictions violate various constitutional provisions. The charges against him must be dismissed. First, 18 U.S.C. § 922(g)(3) is void for vagueness on its face. The statute contains no definitions for "unlawful user" or "addict." Those terms are too vague to allow a reasonable person to determine when the statute is violated. 18 U.S.C. § 924(a)(1)(A) is also void for vagueness on its fact as it also uses the undefinable term "unlawful user."

Second, § 922(g)(3) violates the Second Amendment. There is no historical tradition of prohibiting controlled substance users from possessing firearms.

Finally, both statutes are void for vagueness as applied to Mr. Ledvina. Mr. Ledvina would not know that he was an "unlawful user" of controlled substances or an addict.

ARGUMENT

I. THE STATUTES ARE UNCONSTITUTIONALLY VAGUE ON THEIR FACE

A. *Standard of Review and Preservation of Error*

Challenges that a statute is void-for-vagueness is reviewed *de novo*. *See United States v. Buie*, 946 F.3d 443, 445 (8th Cir. 2019).

This issue was raised in Mr. Ledvina's Motion to Dismiss (R. Doc. 37), and decided by the District Court. (R. Doc. 41). Error was preserved.

B. ***Section 922(g)(3) Violates Mr. Ledvina's Due Process Rights because the Statute is Unconstitutionally Vague on Its Face***

Title 18, U.S.C., § 922(g)(3) provides:

> (g) It shall be unlawful for any person—
>
> . . .
>
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled 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.

Section 922(g)(3) violates the Due Process Clause of the Fifth Amendment because the statute is so vague on its face that it fails to provide fair notice of the acts prohibited and allows for arbitrary and discriminatory enforcement. Section 922(g)(3) prohibits possession of a firearm where an individual is found to be "addicted to" or an "unlawful user of" a controlled substance. However, the statue fails to define what it means to be an addict, or one who unlawfully uses a controlled substance, thereby creating several vagueness problems.

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V. Courts have long held that "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague, that it fails to give ordinary people fair notice of the conduct it punishes or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 596 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)). In addition to violating due process guarantees, vague laws contravene the basic tenet of the separation of powers doctrine. *See United States v. Davis,* 139 S. Ct. 2319*,* 2325 (2019) (affirming that vague laws allow "relatively unaccountable police, prosecutors, and judges," rather than elected representatives, to define the law thereby undermining "democratic self-governance"); *see also Kolender*, 461 U.S. at 358 ("[I]f the legislature could set a net large enough to catch all possible

offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for legislative department"). Thus, where a law is so vague it violates a defendant's due process rights, "the role of courts under our constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *Davis* at 2323.

i. Section 922(g)(3) is facially void because the text is ambiguous

Congress' decision not to define the key terms within § 922(g)(3) renders the statute facially invalid because it fails to provide individuals of common intelligence notice as to whether they fall within its proscribed class. As written, § 922(g)(3) must be stricken as facially void-for-vagueness. *See United States v. Morales-Lopez*, No. 2:20-CR-00027-JNP, 2022 WL 2355920, at *8 (D. Utah June 30, 2022).

While the statute does reference a definition of "controlled substance," it provides no such definition for the terms "addicted to" or "unlawful user." "In interpreting statutes, it is the duty of the court to give effect, if possible, to every clause and word of a statute." *Morales-Lopez* at 8. "Here the legislature included two categories of individuals covered by the statute." *Id.* "Thus, the court must

give independent meaning to unlawful user and a person addicted to a controlled substance." *Id.*

The term "addict" is defined as: (1) "one exhibiting a compulsive, chronic, physiological or psychological need for a habit-forming substance, behavior, or activity," or (2) one strongly inclined to do, use, or indulge in something repeatedly." *See* Miriam-Webster.com (10/29/24) (definition of "addict"). However, the statute does not establish when a behavior becomes compulsive or chronic, or how an individual prosecutor, judge, or jury, will determine when a behavior, or activity, has become a physiological or psychological need or habit. Also, the statute fails to clarify exactly what the government must prove. Must there be some overt act or is an attempt sufficient? Is the inclination to use a substance without action enough to deprive one of their constitutional rights? Similarly, how can a defendant know if they are "strongly inclined" to do, use, or indulge in something repeatedly without further clarification? What about a recovering addict, *i.e.,* a person who received a diagnosis of addiction in the past, but who has been or is in treatment and has been substance free for months or years?

Turning to the term "user," it must be something less than an addict. *Morales-Lopez* at 8. The dictionary simply defines the term as: "someone who uses suomething" or "a person who frequently uses alcoholic beverages or narcotics."

See Miriam-Webster.com (last visited 10/29/24) (definition of "user"). Section 922(g)(3), therefore, prohibits firearm possession by one who unlawfully "uses" a controlled substance, but does not clarify if there are any temporal constraints on when such use took place. Thus, on its face, the statute would prohibit anyone who has ever unlawfully used a controlled substance from possessing a firearm. Without a temporal link or defined threshold for determining when the prohibited status begins, individuals are left to read § 922(g)(3) with the understanding that "once a user, always a user."

In *Morales-Lopez*, the District Court stated, "this court finds an interpretation that would make gun possession at any point in a person's life after a single instance of ingesting drugs absurd." *Id*. at 8. In assessing the constitutionality of § 922(g)(3), the Seventh Circuit noted unlawful drug users "could regain [their] right to possess a firearm by simply ending [their] drug abuse." *United States v. Yancey*, 621 F.3d 681, 696 (7th Cir. 2010). The Fourth Circuit has concluded, "[s]ection 922(g)(3) does not forbid possession of a firearm *while unlawfully using* a controlled substance. Rather the statute prohibits *unlawful users* of controlled substances…from possessing firearms. *See United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002). Moreover, several circuits, including the Fifth, have rejected such an expansive interpretation of § 922(g)(3) recognizing that a temporal nexus must be read into the statute to avoid rendering it

unconstitutional. *See United States v. Patterson*, 431 F.3d 832, 839 (5th Cir. 2005) (upholding § 922(g)(3) against an "as applied" vagueness challenge) (citing *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003) (citations omitted)). Thus, the plain language of the statute renders § 922(g)(3) unworkable because it subject to multiple interpretations each more problematic and ambiguous than the last.

Turning to the context of the broader statute, the vagueness concerns of § 922(g)(3) are compounded. Unlike § 922(g)(1) (possession of a firearm by a felon) or § 922(g)(4) (possession of a firearm by one adjudicated as a mental defective or who has been committed to a mental institution), § 922(g)(3) has no adjudication requirement or prerequisite of a discrete act, such as commitment to an institution, prior to receiving the restricted status. Without a discernible threshold for when one obtains the status "addict" or "unlawful user of" a controlled substance, it cannot be said that the statue is unambiguous, nor does it provide an ordinary person notice of the statutory proscriptions.

Likewise, Congressional intent sheds no light on the ambiguities. The legislative record indicates that "the principal purpose of the federal gun control legislation… was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). U.S.Code Cong. & Admin.

News 1968, p. 4410; *see also*, Congressman Celler, the House Manager, 114 Cong. Rec. 13647, 21784 (1968) ("No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons."). Subsequent legislative history of § 922(g)(3), however, is telling. Since its passage, Congress has amended § 922(g)(3) several times but at no time has it clarified what it means to be "addicted to" or "an unlawful user of" the prohibited substance(s). *See e.g.*. H.R. REP. 99-495, 99th Cong., 2d Sess., 14, 1986 U.S.C.C.A.N. 1327, 1340 (expanding the list of substances prohibited under § 922(g)(3)); H.R. REP. 91-1549, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4007, 4011(prohibiting the sale of explosives to "drug addicts"). Congress did, however, provide guidance under the National Instant Criminal Background Check System Improvement Amendments Act of 2007 in which it stated that a record, for purposes of § 922(g)(3):

> identifies a person who is an unlawful user of, or addicted to a controlled substance (as such terms "unlawful user" and "addicted" are respectively defined in regulations implementing section 922 (g)(3) of title 18, United States Code, as in effect on the date of the enactment of this Act) as demonstrated by arrests, convictions, and adjudications, and whose record is not protected from disclosure to the Attorney General under any provision of State or Federal law.

H.R. REP. 115-437, 20. Though this, too, fails to supply a definition for what it means to be a "addicted to" or "an unlawful user of" a controlled substance, Congress has, at the very least, demonstrated that it is possible and desirable for the Attorney General to obtain verifiable information establishing a history of drug use as it relates to § 922(g)(3). It follows then that Congress has the ability, as well as the constitutional mandate, to abandon § 922(g)(3) or amend it so an ordinary person understands its proscription and ensures against arbitrary enforcement. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

From legislative history it is clear that Congress intended to bar certain classes of people from possessing of a firearm. Yet how to identify these classes, and how one may evaluate their risk of entering these classes, remains unanswered. *e.g. Johnson,* 576 U.S. at 598. (finding the residual clause of the Armed Career Criminal Act void for vagueness and noting the clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony"). "Without knowledge of [their criminal] status, [a] defendant may well lack the intent needed to make [their] behavior wrongful." *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019). In its *Rehaif* decision, the Supreme Court held that prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), requires that the government "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." *Id.* Scienter

requirements, such as the one examined in *Rehaif*, are consistent with the understanding that, underlying criminal law, is the principle of "a vicious will." *Id.* at 2196 (citing 4 William Blackstone, Commentaries on the Laws of England 21 (1769)). Thus, in any case charged under § 922(g)(3) the Government must establish, beyond a reasonable doubt, that the defendant knew he fell within the statute's proscribed class.

The plain language of the statute, congressional history, and judicially created definitions all fail to provide an individual with notice of their status as an "unlawful user." This exact observation underscores the vagueness problem at the core of § 922(g)(3). Without comprehensible statutory definitions, it is unclear when a person begins, or ends, use of a controlled substance that prohibits possession of firearm. Unless one first knows their status as a prohibited person, they cannot knowingly commit a violation of § 922(g)(3). The constitutional infirmities of § 922(g)(3) are so grave they render the statute meaningless and unenforceable. Because the statutory language of § 922(g)(3) is so vague it fails to provide an ordinary person fair warning about what the law demands of them including whether they fall within a prohibited status under the statute, it must be found unconstitutionally vague.

There is also a fundamental problem with "unlawful user." "Unlawful" specifically modifies "user." A "user" would, of course, be a person who uses an

item or thing. "Unlawful user" would require that the "use" be "unlawful." However, there are no laws that specifically make "use" of a controlled substance "unlawful." Title 21, U.S.C., § 841 is the primary law criminalizing acts relating to controlled substances . Section 841(a) criminalizes manufacturing, distributing, dispensing, and possessing with the intent to manufacture, distribute or dispense a controlled substance. It does not criminalize the "use" of a controlled substance. The only context in which § 841 employs "use" is with respect to sentence enhancements "if death or serious bodily injury results from the use of such substance." Title 21, U.S.C., § 844 criminalizes the possession of controlled substances, but does not regulate the "use" of controlled substances either. Likewise, Iowa Code § 124.401, covering prohibited acts relating to controlled substances criminalizes manufacturing, delivering, and possession with the intent to manufacture or deliver. It does not criminalize "use." Thus, under neither federal nor Iowa law is the "use" of a controlled substance "unlawful." How is a user of controlled substances to know that their "use" is "unlawful?"

ii.. Judicial attempts to salvage § 922(g)(3) violate Separation of Powers

In *Davis,* the Supreme Court rejected the notion of judicial intervention aimed at saving a vague law. *See Davis*, 139 S. Ct. at 2323 ("Only the people's

elected representatives in Congress have the power to write new federal criminal laws"). In part, this mandate exists to "[guard] against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Sessions v. Dimaya*, 138 S. Ct. at 1212.

As examined above, both the plain language of the statute, as well as legislative history of § 922(g)(3), fail to provide insight into exactly which class of people Congress intended to exclude from those who may exercise their Second Amendment rights. There is nothing contained within the statute, or history, to support the judicially created definitions of "addicted to" and "unlawful user." Section 922(g)(3) may only be rectified, as it relates to a void for vagueness challenge, through congressional action addressing the statutory deficiencies. Congress' decision not to do so, especially when it has taken steps to clarify similar terms in other contexts, is not an invitation to the courts to abandon judicial restraint. *Davis*, 139 S. Ct. at 2333. The continued attempts to judicially define and salvage § 922(g)(3) are not only futile, they are an unconstitutional violation of the Separation of Powers doctrine. As such, the statute, as written by Congress, must be stricken as void for vagueness.

C. Section 924(a)(1)(A) Is Also Facially Void Because the Text Is Ambiguous

Title, U.S.C., § 924(a)(1)(A) provides:

> (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—
>
> > (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
> >
> > . . .
>
> shall be fined under this title, imprisoned not more than five years, or both.

The Superseding Indictment alleged that Mr. Ledvina made a false statement that he was not an "unlawful user" of controlled substances. The same analysis as set forth above with respect to "unlawful user" as used in Section 922(g)(3) applies with equal force to this statute. Section 924(a)(1)(A) is also unconstitutionally vague.

D. To the Extent That There is Any Ambiguity, the Rule of Lenity Applies

> "To the extent doubt persists at this point about the best reading of the [statute], a venerable principle supplies a way to resolve it. Under the rule of lenity, this Court has long held, statutes imposing penalties are to be "construed strictly" against the government and in favor of

> individuals [such as Defendant]." *Bittner v. United States*, 598 U.S. ___, 143 S.Ct. 713 (2023) (citing *Commissioner v. Acker*, 361 U. S. 87, 91 (1959)). "[T]he rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Ibid*.; [citation omitted]. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another." *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2333 (2019).

For the reasons stated above, "unlawful user" is impermissibly vague. Under the rule of lenity, it must be strictly construed against the Government.

II. SECTION 922(g)(3) VIOLATES THE SECOND AMENDMENT

A. Standard of Review and Preservation of Error

This Court reviews *de novo* a denial of a motion to dismiss when a defendant alleges his or her conviction violates the Second Amendment. *See United States v. Sitladeen*, 64 F.4th 978, 983 (8th Cir. 2023).

This issue was raised in Mr. Ledvina's Motion to Dismiss (R. Doc. 37), and decided by the District Court. (R. Doc. 41). Error was preserved.

B. Section 922(g)(3) Unconstitutionally Infringes on an Individual's Right to Bear Arms Under the Second Amendment

The Second Amendment to the United States Constitution "confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). This right "shall not be infringed." U.S. CONST. amend. II. The right to keep and bear arms is fundamental, applicable against state and local governments, and entitled to the same protections as other fundamental rights enshrined in the Constitution. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). Still, Congress passed § 922(g)(3), a law that strips citizens of rights guaranteed to them by the Second Amendment without any historical precedent. The criminalization of the possession of firearms falls within the scope of the Second Amendment. Thus, the blanket prohibition on firearm possession by those who are unlawful users of or addicted to a controlled substance is unconstitutional under the Supreme Court's new *Bruen* analysis.

After, the United States Supreme Court's *Heller* decision in 2008, "most federal appellate courts applied a two-step framework using a means-ends analysis to determine the constitutionality of § 922(g) restrictions on Second Amendment rights." *U.S. v. Jackson*, CR-22-59-D – Order dated 8/19/2022 (ECF #45). However, in *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111

(2022), the Court adopted a new standard for determining the constitutionality of regulation based on the Second Amendment. The Court stated,

> When 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 this Nation's historical tradition of firearm regulation.

Id. at 2129-30.

Therefore, the first step in the Court's analysis is to determine whether the plain text of the Second Amendment covers a defendant's conduct.

i. The Second Amendment's plain text covers conduct at issue in § 922(g)(3)

In *Bruen,* the Court stated that the Second and Fourteenth Amendments "protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 2122. The decision further acknowledged "that the right to "bear arms" refers to the right to "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 of another." *Id*. at 2134. (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998)). Section 922(g)(3) is a complete bar on firearm possession. It is not limited by the type of firearm or the purpose for which the firearm might be used. Nor is it limited to firearms possessed in a particular

public area. It applies with equal force to firearms kept in the home for self-defense. A person's ability to possess a firearm for self-defense is the central component of the Second Amendment right. Thus, the conduct of any individual charged under this statute is clearly covered by the plain text of the Second Amendment.

The District Court correctly found this part of the test met. (R. Doc. 41 at 5-6).

ii. The Government cannot meet its burden to show that § 922(g)(3)'s restrictions are "consistent with the Nation's historical tradition of firearm regulation"

The second step of the *Bruen* analysis places the burden on the government to demonstrate that the regulation is consistent with the "Nation's historical tradition of firearm regulation." Under *Bruen's* new model, disarmament laws that address persistent social problems require evidence that similar provisions existed at the time of ratification. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen* at 2131. With this understanding, the government clearly cannot meet its burden to show

that the Nation's history, particularly around the passage of the Second Amendment, supports firearm restrictions for those addicted to, or who unlawfully used, a controlled substance.

As in *Heller* and *Bruen*, historical examples of regulations offered by the government must be "distinctly similar" to § 922(g)(3) because the restriction does not address "unprecedented societal concerns or dramatic technological changes[.]" *See Bruen*, 142 S. Ct. at 2132–33. There are no "distinctly similar" regulations from the founding. Indeed, the history of barring firearm possession by those who use or are addicted to controlled substances (or narcotics in general) is limited and relatively recent. Congress first passed § 922(g)(3) in 1968. *See* Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213 (codified at 18 U.S.C. § 921 *et seq*.). *Bruen* requires looking at the state of the law at the time the Second Amendment was adopted. The Court cannot look at evolving, and substantially later, concepts of persons whom society might consider "dangerous" for some reason and who therefore should be precluded from possessing firearms.

1968 was the first time in the Nation's history that Congress enacted such a ban on unlawful users of controlled substances possessing firearms. The government cannot rely on the passage of a mid-twentieth century statute to establish a long-standing historical tradition dating back to the enactment of the Second Amendment. *See Bruen*, 142 S. Ct. at 2137. In fact, the Supreme Court

specifically declined to consider any twentieth century evidence offered by the respondents in *Bruen*, noting it "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* 142 S. Ct. at 2154, n. 28.

Nor can the Government rely on the general pronouncement by the Supreme Court in *Heller* that presumptively lawful regulatory measures include: "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller* at 626-27. That list does not include those who are accused of being an unlawful user of a controlled substance. Those regulations would not be "distinctly similar" to § 922(g)(3) to address a "general societal problem." Even if § 922(g)(3) were a uniquely modern regulation, such that the Court could expand its historical analysis to include merely similar historical analogues, those longstanding regulations are not "relevantly similar" because they do not impose a comparable burden or evince comparable justifications. *See Bruen*, 142 S. Ct. at 2132-33. While the examples provided by the Court in *Heller* were not exhaustive, they generally all comport with a historical principle of disarming select groups for the sake of public safety. *See National Rifle Association v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 200-01 (5th

Cir. 2012) (citing Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 231–36 (1999)). There is no comparable "public safety" justification for disarming all drug users. Moreover, the Supreme Court has since explained that the "government may not simply posit that the regulation promotes an important interest." *Bruen*, 142 S. Ct. at 2126. Therefore, the Government cannot rely on general public safety justifications to uphold § 922(g)(3).

The issue is not whether, at the time the Second Amendment was adopted, persons who were considered "dangerous" were prohibited from possessing firearms. The issue is whether, at the time the Second Amendment was adopted, persons who were "unlawful users" of controlled substances were prohibited from owing firearms or were considered sufficiently "dangerous" that they should be prohibited from possessing firearms. There are several cases finding that § 922(g)(3) violates the Second Amendment provide the proper view of how *Bruen* is to apply. *See, e.g.*, *United States v. Connelley,* Cause No. EP-22-CR-229(2)-KC, 2023 WL 2806324, at *12 (W.D. Tex. Apr. 6, 2023); *United States v. Harrison*, Case No. CR-22-00328-PRW, 2023 WL 1771138, at *24 (W..D. Okla. Feb. 3, 2023).

A panel of the Fifth Circuit Court of Appeals extensively addressed this issue in *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023), cert granted, judgment vacated, 144 S.Ct. 2707 (2024), remanded to Fifth Circuit for further consideration in light of *Rahimi* (6/2/24). The opinion in *Daniels* is highly persuasive.

Daniels' specific holding invalidates 18 U.S.C. § 922(g)(3) as applied to Daniels. (Slip op at 29). Overall, the Fifth Circuit found that Daniels' conviction for possession of a firearm when there was evidence that he was a regular user of marijuana but when there was no evidence that he was under the influence of marijuana at the time he possessed the firearm was inconsistent with the nation's "history and tradition" of the regulation of guns under *Bruen*. While that specific holding does not help Mr. Ledvina as there is evidence (from a urine test) that he was under the influence of controlled substances at the time he possessed the firearm at issue, the rationale and reasoning of *Daniels* would apply to conclude that § 922(g)(3) violates the Second Amendment in all of the statute's application.

Daniels extensively examines the history of gun regulation as it pertains to users of controlled substances and analogous groups using the analytical framework required by *Bruen*. *Daniels* goes through three justifications offered by the Government (regulation of users of alcohol, the mentally ill, and those deemed dangerous) for restricting the gun rights of marijuana users and finds each of them

insufficient. That lack of historical regulation of users of controlled substances, as well no sufficient analogous regulation, renders § 922(g)(3) invalid in all of its applications.

The *Daniels* Court begins with the analytical framework established by *Bruen*. (Slip op. at 4-5). The Court must first look at "whether the Second Amendment applies by its terms." *Id*. at 5. Second, the Court must consider "whether a given gun restriction is 'consistent with the Nation's historical tradition of firearm regulation.'" *Id*.

With regard to the first question, the Fifth Circuit found that the Second Amendment applies to "the people" without regard to whether they are "law-abiding." (Slip op. at 6-8). This Court has already reached the same conclusion in other cases.

With regard to the second part of the analysis, the Fifth Circuit initially discussed the nature of the required similarity between the gun restriction at issue and any claimed historical tradition of firearm regulation. Is it the "distinct" similarity that applies to a "general societal problem that has persisted since the 18th century" or the "relevant" similarity" that applies to an "unprecedented societal concern" that did not exist at the time of the adoption of the Second Amendment. (Slip op. at 8). The Court determined that "relevant" similarity was appropriate because, although the Founders were aware of marijuana plants and

grew hemp to make rope, marijuana was not used as a mood-altering drug. (Slip op. at 8-9). Thus, there was no need for the Founders to "consider the relationship between firearms and intoxication via cannabis." (Slip op. at 9). However, use of alcohol as an intoxicant was known to the Founders and "generally was a persistent social problem." *Id*. at 8-9.

Thus, because of little regulation of drugs until the late-19th century, the Fifth Circuit considered intoxication by alcohol and any regulation of guns thereto as the closest and most relevant comparator. (Slip op. at 11, et seq.). However, at the time of the adoption of the Second Amendment, there were no laws that barred possession of firearms by regular drinkers. *Id*. at 11. There were a couple of States with restrictions on firing weapons while intoxicated. *Id*. at 11-13. Even if those regulations are sufficient, § 922(g)(3) prohibits the possession of firearms, not their discharge. There were also laws that regulated members of the militia, firearms, and intoxication. *Id*. at 13-14. Those laws are distinguishable because their purpose was to "ensure a competent military" and they did not apply outside of military service. *Id*. at 14. The Fifth Circuit found that "[t]he government has failed to identify any relevant tradition at the Founding of disarming ordinary citizens who consumed alcohol." *Id*.

The Fifth Circuit then looked to Reconstruction-era evidence, when the 14th Amendment was adopted, governing possession of firearms while intoxicated.

(Slip op. at 14, et seq.). The Court did not find those laws persuasive. Further, since § 922(g)(3) is a federal law, the Second Amendment, not the 14th Amendment applies, and those Reconstruction-era laws did not exist at the time the Second Amendment was adopted. (Slip op. at 16-17).

The Fifth Circuit then turned to the second ground advanced by the Government: disarmament of the mentally ill. (Slip op. at 18, et seq.). With regard to that issue, the Court noted that the federal ban on gun possession by those adjudicated mentally ill (18 U.S.C. § 922(g)(4)) was not enacted until 1968. (Slip op. 18). However, at the time of the Founding, justices of the peace could lock up "lunatics" who were "dangerous," suggesting that if the insane could be deprived of their liberty, they could be deprived of their firearms. *Id*. But that analogy could only justify disarming a citizen only while in a state comparable to lunacy. *Id.* at 19.[1] With respect to a habitual marijuana user, the analogy to a repeat alcohol user is more apt than the analogy to a lunatic. *Id*.

Finally, the Fifth Circuit addressed the argument that Congress could limit gun possession by those "dangerous" to the peace and safety of the public. (Slip op. at 20). The Government argued that principle was well understood by the Founders and at a repeat marijuana user such as Daniels is presumptively

[1]There is no evidence that Mr. Ledvina, even if using controlled substances, was in a state equivalent to "lunacy" while under the influence of any controlled substance.

dangerous. *Id*. However, the laws barring the "dangerous" from possessing firearms that existed at the time of the adoption of the Second Amendment do not fit with dispossessing unlawful users of controlled substances of their gun rights.

First, there were laws barring political dissidents from owning guns, generally during wartime or periods of political turmoil. (Slip op. at 21, 22). Second, there were laws disarming religious minorities. *Id*. at 21. Further, the Militia Act of 1662, an English law that allowed the Crown to dispossess the dangerous of firearms, is not apposite because it was not adopted in the States and, in fact, was one of the reasons for the Revolutionary War. (Slip op. at 22-23).

Even though the laws disarming the "dangerous" are sparse, the Fifth Circuit went on to assume that "the Second Amendment encodes some government power to disarm the dangerous." (Slip op. at 25). With that assumption, there is still the question of what level of generality allows for implementation of that principle? *Id*. Under *Bruen*, the Court must look for historically relevant similar regulations; the Court may not "enforce unenacted policy goals lurking behind the Second Amendment." *Id*. To stay true to *Bruen*, the Court must "analogize to particular regulatory traditions instead of a general notion of 'dangerousness.'" *Id*. at 26-27. Applying the "why" and "how" approach of *Bruen*, marijuana users are not "dangerous" for the same reasons as political traitors or potential insurrectionists. *Id*. at 27. Protection of the public "peace," at the time of the Founding, referred to

violence or rebellion, not a generalized public harm. *Id*. at 28. Further, even if political traitors and potential insurrectionists were disarmed, the "ordinary drunkards" (the more analogous group) went unregulated. *Id*.

For all of the above reasons and the reasons previously stated, 18 U.S.C. § 922(g)(3) is invalid under the Second Amendment and the analytical approach required by *Bruen*. The charges against Mr. Ledvina must be dismissed.

This Court's opinion in *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010), is not controlling. *Seay*, decided after *Heller*, but before *Bruen*, rejected a facial constitutional challenge to § 922(g)(3). *Seay,* however, does not apply the proper Constitutional analytical framework set forth in *Bruen*. As *Seay* is effectively overruled by *Bruen*, *Seay* need not be followed by this Court. An Eighth Circuit precedent that is inconsistent with subsequent United States Supreme Court opinions is no longer binding authority. *See United States v. Watson*, 623 F.3d 542, 544 (8th Cir. 2010); *United States v. Williams*, 537 F.3d 969, 975 (8th Cir.2008) ("Although one panel of this court ordinarily cannot overrule another panel, this rule does not apply when the earlier panel decision is cast into doubt by a decision of the Supreme Court.") (emphasis and citation omitted)

Even if this Court finds that § 922(g)(3) does not violate the Second Amendment on its face, the statute should not apply to a person like Mr. Ledvina,

who was merely found with a controlled substance and who has no criminal history of using controlled substances. This set of circumstances is not "distinctly similar" or even "relevantly analogous" to founding era prohibitions on the right to bear arms. Though intoxicants existed at the founding, the government cannot establish that eighteenth century history supports stripping a man of his ability to defend himself because he possessed an intoxicant. Because the Government cannot establish that § 922(g)(3) is consistent with the Nation's historical tradition of firearm regulation, it violates the Second Amendment facially and as applied to Mr. Ledvina.

III. THE STATUTES ARE UNCONSTITUTIONALLY VAGUE AS APPLIED

A. Standard of Review and Preservation of Error

Challenges that a statute is void-for-vagueness is reviewed *de novo*. *See United States v. Buie*, 946 F.3d 443, 445 (8th Cir. 2019).

This issue was raised in Mr. Ledvina's Sentencing Brief (R. Doc. 57), and decided by the District Court. (R. Doc. 64). Error was preserved.

B. The Statutes are Unconstitutionally Vague as Applied to Mr. Ledvina. Additionally, There is No Evidence That Mr. Ledvina Was or Would Have Understood Himself to Be an "Unlawful User" or an "Addict"

In *United States v. Bramer*, 832 F.3d 908 (8th Cir. 2016), this Court observed that "we are inclined to think that this argument [that "unlawful user of controlled substance" and "addicted to" as used in § 922(g)(3) are unconstitutionally vague as applied] could be meritorious under the right factual circumstances." *Id*. at 909. An as applied argument requires a showing by the defendant "that the statute is vague as applied to his particular conduct." *Bramer*, 832 F.3d at 909 (citing *United States v. Cook*, 782 F.3d 983, 987 (8th Cir.), *cert. denied* 136 S.Ct. 262 (2015).

Bramer found that Bramer's admission in his written plea agreement that he was an unlawful user of marijuana while in knowing possession of firearms was sufficient to overcome the as applied challenge. *See Bramer*, 832 F.3d at 909. As discussed below, the Joint Stipulation (R. Doc. 52) contains no admission by Mr. Ledvina that he is an "unlawful user" of or "addicted to" controlled substances.

The United States Supreme Court has made clear what the Government must prove in a prosecution under § 922. "Without knowledge of [their criminal] status, [a] defendant may well lack the intent needed to make [their] behavior wrongful." *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019). In its *Rehaif*

decision, the Supreme Court held that prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), requires that the government "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." *Id.* (emphasis added).

In contrast to *Bramer*, the Government has failed to adduce any evidence that Mr. Ledvina knew that he was either an "unlawful user" or an "addict." The Joint Stipulation in Lieu of Trial Evidence establishes the following:

1. Mr. Ledvina knew that he had used marijuana in March, April, May, June and July of 2022. (Joint Stipulation at ¶¶ 6, 10, 12);

2. Mr. Ledvina had used cocaine on one known occasion in August of 2022 (Joint Stipulation at ¶ 10);

3. Mr. Ledvina knowingly possessed firearms on August 11, 2022 (Joint Stipulation at ¶¶ 11, 12).

What is missing is any stipulation or evidence that Mr. Ledvina was an "unlawful user" of controlled substances. It is expected that the Government will argue that everyone is presumed to know the law. *See United States v. Ray*, 411 F.3d 900, 904 (8th Cir. 2005) ("people are generally presumed to be aware of the criminal laws. *See Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)."). "Unlawful user" comes in the statute as one concept. It is not enough for the Government to prove that Mr. Ledvina knew he was a "user" of

controlled substances. The Government must prove he knew he was an "unlawful user."

However, as discussed above, there are no laws that specifically make "use" of a controlled substance "unlawful." Title 21, U.S.C., § 841 is the primary law criminalizing acts relating to controlled substances. Section 841(a) criminalizes manufacturing, distributing, dispensing, and possessing with the intent to manufacture, distribute or dispense a controlled substance. It does not criminalize the "use" of a controlled substance. The only context in which § 841 employs "use" is with respect to sentence enhancements "if death or serious bodily injury results from the use of such substance." Title 21, U.S.C., § 844 criminalizes the possession of controlled substances, but does not regulate the "use" of controlled substances either.[2] Likewise, Iowa Code § 124.401, covering prohibited acts relating to controlled substances criminalizes manufacturing, delivering, and possession with the intent to manufacture or deliver. It does not criminalize "use."[3]

[2]Congress does know how to criminalize the "use" of a controlled substance. Title 10, U.S.C. § 912(a), among other things, makes the "use" of controlled substances by a person in the military illegal and subject to court-martial. That statute also covers possession, distribution, and manufacture of controlled substances, which are prohibited by 21 U.S.C. § 841(a) and § 844, which statutes do not criminalize "use." As Congress addressed "use" of a controlled substance in § 912(a), but left "use" out of §§ 841(a) and 844, Congress obviously intended to criminalize "use" of a controlled substance by a person in the military, but not by civilians.

[3]Other states do expressly criminalize use or consumption of controlled substances. *See, e.g.,* North Dakota Century Code 19-03.1-22.3 (criminal provisions relating to "a person who intentionally ingests, inhales, injects, or

Thus, under neither federal nor Iowa law is the "use" of a controlled substance "unlawful." How is Mr. Ledvina, or any user of controlled substances in Iowa, to know that their "use" is "unlawful?"

Although the Court can find from the Joint Stipulation that Mr. Ledvina knowingly possessed controlled substances and can conclude that the possession of controlled substances violates the law, § 922(g)(3) does not criminalize the possession of a firearm by an "unlawful possessor" of controlled substances. Possession of controlled substances is not relevant. Simply put, a person who possesses, but does not use, controlled substances would not violate § 922(g)(3). Although it is difficult to envision how someone could "use" controlled substances without possessing them, § 922(g)(3) is expressly tied to "use," not "possession."

The Government argued that "unlawful user" should be defined as regular use of a controlled substance reasonably contemporaneous with the possession of the firearm. The problem is that interpretation is that is an improper judicial revision of the words used by Congress unmoored from the words actually used. Congress required that the use be "unlawful." That requires a statutory criminalization, under either federal or state law, of use of a controlled substance.

---

otherwise takes into the body a controlled substance"); Delaware Code Title 16, Section 4763(a) ("It shall be unlawful for any person to knowingly or intentionally possess, use, or consume a controlled substance"); 29 Ohio Revised Code § 2925.11(A) ("No person shall knowingly obtain, possess, or use a controlled substance").

As discussed above, use of a controlled substance is not a criminal offense under either federal or Iowa law. If a single use is not unlawful, neither is regular use. The frequency of use and the temporal proximity of the use to the possession of the firearm are not related to whether the use is unlawful, *i.e.*, in violation of a specific federal or state law. The Court cannot construe § 922(g)(3) to eliminate the requirement that the use itself be "unlawful" and supplant that statutory term with "regular and contemporaneous use" to define "unlawful."[4]

With regard to "addict,"[5] there is no evidence that Mr. Ledvina has ever been diagnosed by any health care provider with a substance abuse disorder, *i.e.,* that he is an "addict." Further, the Government produced no expert testimony regarding drug addiction or that Mr. Ledvina qualifies as an "addict." The Court has no basis in the evidence before it to conclude that Mr. Ledvina is an "addict."

Section 924(a)(1)(A) is also unconstitutionally vague as applied to Mr. Ledvina. The Superseding Indictment alleges that Mr. Ledvina made a false

[4]"Regular and contemporaneous use" also poses vagueness issues. How often constitutes "regular?" Is it once a month, once a week, or daily? How close in time must the use and the possession of the firearm be? Must it be at the same time? Must it be within a day, a week, a month, a year? How does Mr. Ledvina or anyone else know when his "use" crosses the line into being an "unlawful user?"

[5]The definition of "addict" in 21 U.S.C. § 802(1) does not answer the question. First, that definition is limited to "this subchapter," which does not include 18 U.S.C. § 922(g). Second, the definition of "addict" is "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." Besides being vague, the definition of "narcotic drug" in does not include marijuana.

statement that he was not an "unlawful user" of controlled substances. As discussed above, Mr. Ledvina could not have falsely stated that he was an "unlawful user" of controlled substances because no law makes use of controlled substances "unlawful."

For the same reasons, even if the statutes are not unconstitutionally vague, Mr. Ledvina must be acquitted of both charges. There is no such thing as an "unlawful user" of controlled substances.

Further, under *Rehaif*, it is the Government burden to prove that Mr. Ledvina subjectively knew that he was an "unlawful user" or an "addict." *See United States v. Cook*, 970 F.3d 866, 884 (7th Cir. 2020) ("That Cook ought to have known his use was unlawful would not suffice to convict him; he had to actually know his use was unlawful."). There was absolutely no evidence as to Mr. Ledvina's subjective knowledge as to either of those points. Specifically, there is no evidence that Mr. Ledvina had any knowledge that the "use" of controlled substances is unlawful in any way. Further, there is no evidence that Mr. Ledvina considered himself an "addict."

Accordingly, both statutes are unconstitutionally vague as applied to Mr. Ledvina. Alternatively, Mr. Ledvina is not guilty of either offense because there is no such thing as an "unlawful user" of controlled substances. The Government

failed to prove that Mr. Ledvina is an "unlawful user" of controlled substances or that he is an "addict."

CONCLUSION AND REQUESTED RELIEF

For the above stated reasons, Appellant Alexander Wesley Ledvina respectfully requests the Court to reverse his convictions and sentence and to remand to the District Court for dismissal of this case.

Respectfully submitted,

____/s/ Michael K. Lahammer_____
Michael K. Lahammer
425 2nd Street SE, Ste. 1010
Cedar Rapids, IA 52401
Telephone: (319) 364-1140
Facsimile: (319) 364-4442
e-mail: michael.lahammer@lahammerlaw.com
ATTORNEY FOR APPELLANT
Alexander Wesley Ledvina

CERTIFICATE OF FILING AND SERVICE

I certify that on October 30, 2024, I, Michael K. Lahammer, attorney for Defendant-Appellant, Alexander Wesley Ledvina, electronically filed the foregoing Brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which will send notice of all parties separately represented or proceeding pro se, including AUSA Adam Vander Stoep, counsel for the United States.

I further certify that, after the electronic filing of the Brief is approved by the Clerk, I will submit ten paper copies of this Brief to the Clerk of Court and serve one paper copy upon each party separately represented or proceeding pro se.

____/s/ Michael K. Lahammer_____
Michael K. Lahammer

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this Brief contains approximately 8,781 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 point Times New Roman font. The electronic copy of the Brief filed has been scanned for viruses and is virus free.

____/s/ Michael K. Lahammer____
Michael K. Lahammer