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 SUPPLEMENTAL PRO SE BRIEF AND ARGUMENT

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Defendant-Appellant Alexander Wesley Ledvina appeals his conviction for being an unlawful user of controlled substances in possession of a firearm and for making a false statement during the purchase of a firearm.

Mr. Ledvina raises facial and as-applied Second Amendment and vagueness challenges, statutory interpretation arguments, an evidentiary challenge, a sufficiency of the evidence challenge, a challenge to the criminal forfeiture, and other issues.

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

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JURISDICTIONAL STATEMENT

The decisions appealed:

Defendant/Appellant Alexander Wesley Ledvina appeals from the District Court's Judgment, filed June 28, 2024 (R. Doc. 88) and Order of Forfeiture, preliminary filed January 8, 2024 (R. Doc. 71) and final filed July 18, 2024 (R. Doc. 96).

Jurisdiction of the Court below:

The United States District Court had jurisdiction of 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:

Ledvina filed a timely Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(b). This appeal is from a final order or judgment that disposes of all claims asserted in the district court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether a dismissal or acquittal on both counts is required because 18 U.S.C. § 922(g)(3) is unconstitutional

New York State Rifle and Pistol Association v. Bruen, 142 S. Ct. 2111 (2022)
Norton v. Shelby County, 118 U.S. 425 (1886)
18 U.S.C. § 922(g)(3)
18 U.S.C. § 924(a)(1)(A)
27 C.F.R. § 478.124(c)(1)

II. Whether a conviction under § 922(g)(3) requires a separate law making the act of use itself unlawful to be violated

Colbaugh v. United States, 15 F.2d 929 (8th Cir. 1926)
Cargill v. Garland, 57 F.4d 447 (5th Cir. 2023), aff'd 219 L. Ed. 2d 151 (2024)
Loper Bright Enterprises v. Raimondo, 219 L. Ed. 2d 832 (2024)
18 U.S.C. § 922(g)(3)
10 U.S.C. § 912a
21 U.S.C. § 844
27 C.F.R. § 478.11
21 U.S.C. § 801(2)
Iowa Code § 124.401

III. Whether the stipulation precluded outside evidence, or whether the stipulation was entered knowingly and voluntarily

United States v. Morales, 684 F.3d 749 (8th Cir. 2012)
United States v. Lara, 690 F.3d 1079 (8th Cir. 2012)
United States v. Posner, 408 F. Supp. 1145 (D. Md. 1976)

IV. Whether the government's exhibit violated the Rules of Evidence

United States v. Bruguier, 961 F.3d 1031 (8th Cir. 2020)
United States v. Cheatham, 500 F. Supp. 2d 525 (W.D. Pa. 2007)
United States v. Taylor, No. 2:10cr192, 2011 U.S. Dist. LEXIS 163530 (E.D. Va. March 3, 2011)
Rules of Evidence 803(6) & 807

V. Whether there was sufficient evidence of mens rea to support a conviction

Rehaif v. United States, 588 U.S. 225 (2019)
United States v. Cook, 970 F.3d 866 (7th Cir. 2020)
United States v. Kelton, 446 F.2d 699 (8th Cir. 1971)
Fulbright v. United States, 91 F.2d 210 (8th Cir. 1937)

VI. Whether the criminal forfeiture was time barred

United States v. 14 Various Firearms, 899 F. Supp. 875 (E.D. Va. 1995)
United States v. 52 Firearms, 362 F. Supp. 2d 1308 (M.D. Fl. 2005)
18 U.S.C. § 924(d)(1)

VII. Whether § 922(g)(3) exceeds the scope of Congress's authority under the Commerce Clause and violates the Tenth Amendment

United States v. Lopez, 514 U.S. 549 (1995)
Bond v. United States, 572 U.S. 844 (2014)
Range v. Garland, 69 F.4th 96 (3rd Cir. 2023) (en banc) (Porter, J., concurring)
Commerce Clause
Tenth Amendment

STATEMENT OF THE CASE

Nature of the case:

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

Course of proceedings:

Ledvina was convicted of Possession of a Firearm by an Unlawful User of Controlled Substances, 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:

Ledvina was sentenced to 51 months' imprisonment 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 as 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 a Firearm, in violation of 18 U.S.C. § 924(a)(1)(A) (Count 2)--commonly known as the Hunter Biden charges. The key averment in Count 1 is that Ledvina allegedly knew that he was an "unlawful user" of marijuana and cocaine while in possession of firearms on or about August 11, 2022. The key averment in Count 2 is that Ledvina 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 relevant undisputed facts of this case. R. Doc. 52. On March 24, 2022, a Cedar Rapids Police Officer was in Ledvina's half of a duplex at his

invitation and smelled the odor of marijuana and observed multiple firearms. Id. at ¶3. The parties stipulated "Defendant was smoking marijuana in March of 2022." Id. There is no evidence that the officer ever suggested that marijuana was unlawful or that Ledvina could not possess firearms.

On July 29, 2022, relevant to Count 2, ATF agents were contacted by the owner of Black Dog Guns. Id. at ¶5. On that date Ledvina purchased a pistol and an employee smelled the odor of marijuana coming from defendant. Id. In connection with this purchase, Ledvina filled out and signed an ATF Form 4473. Id. at ¶6. "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." Id.

Forming the basis for Count 1, a search warrant was executed at Ledvina's residence on August 11, 2022. Id. at ¶8. 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 the residence. Id. at ¶9. A urine sample was obtained which upon testing, metabolites for THC and cocaine were confirmed. Id. at ¶10.

Ledvina filed a Motion to Dismiss on July 31, 2023. R. Doc. 37. That Motion asserted two arguments. First, that the Indictment should be dismissed because § 922(g)(3) is facially unconstitutionally vague and that the same analysis applies to the § 924(a)(1)(A) count. Second, that § 922(g)(3) is unconstitutional under the Second Amendment.

On August 16, 2023, the District Court filed a Memorandum Opinion and Order denying Ledvina's Motion as to Count 1 and holding in abeyance as to Count 2 until trial. R. Doc. 41.

Subsequently, the parties agreed to waive jury trial and try the matter as

a stipulated bench trial. R. Doc. 42. A Joint Stipulation in Lieu of Trial Evidence was filed on October 30, 2023. R. Doc. 52. It was agreed the facts in the Joint Stipulation were true and "may be considered by the Court without further evidence being offered." Id. at 1.

On November 13, 2023, the parties filed their trial briefs. R. Doc. 55 (government); R. Doc. 57 (Ledvina). On November 15, 2023--the eve of trial--the government filed a Reply to Ledvina's Trial Brief (R. Doc. 60) and an Exhibit containing completed ATF Form 4473's (R. Doc. 61). Ledvina timely objected to the admission of the exhibit at trial. R. Doc. 99 at 11. The District Court overruled the objection and admitted the exhibit. R. Doc. 99 at 12-13.

Ledvina made as-applied vagueness and Second Amendment challenges at trial. R. Doc. 57; R. Doc. 99 at 25. At trial Ledvina also argued that as a matter of law he was not an "unlawful user" and that the government's evidence was insufficient to establish the mens rea element with respect to both counts. R. Doc. 57.

On December 1, 2023, the District Court denied Ledvina's as-applied constitutional challenges and found him guilty of both counts. R. Doc. 64.

On December 7, 2023, the government moved for a Hearing on Forfeiture. R. Doc. 65. On January 4, 2024, Ledvina filed a Resistance to Forfeiture. R. Doc. 68. In it he argued that the forfeiture should be stayed pending appeal, that the forfeiture was time barred by statute, and that forfeiture was barred under res judicata due to the government voluntarily dismissing a pre-indictment civil proceeding which Ledvina litigated pro se. Id. The District Court entered a Preliminary Order of Forfeiture on January 8, 2024 (R. Doc. 71) and a Final Order of Forfeiture on July 18, 2024 (R. Doc. 96).

Sentencing was held on June 27, 2024. R. Doc. 88--Judgment. Ledvina

objected to judicial fact-finding at sentencing based upon acquitted or uncharged conduct as violating the 5th and 6th Amendments. R. Doc. 85-1-Def. Sentencing Brief. He also objected to the application of U.S.S.G. § 2k2.1(b)(6)(B) based on the Ex Post Facto Clause. Id. He also moved for a downward variance. Id. Ledvina was sentenced to 51 months' imprisonment, three years of supervised release, and a $200 special assessment. R. Doc. 88. On July 11, 2024, Ledvina timely appealed. R. Doc. 91.

SUMMARY OF THE ARGUMENT

Mr. Ledvina's convictions violate the Constitution and are contrary to law. Section 922(g)(3) violates the Second Amendment both facially and as-applied which requires dismissal or acquittal on both counts.

As a matter of law, Ledvina was not an "unlawful user" because no state or federal statute he was subject to makes using a controlled substance unlawful. This fact requires an acquittal.

The government's exhibit violated both the stipulation agreement and Rules of Evidence. Thus, it should be treated as stricken from the record in any sufficiency of the evidence analysis. If it is construed that the exhibit did not violate the stipulation, then it was not entered knowingly and voluntarily, requiring reversal.

There was also insufficient evidence showing Ledvina subjectively knew and believed he was either a "user" as defined by caselaw or that using a controlled substance is unlawful. Legally insufficient evidence of mens rea requires an acquittal.

Further, independent of the validity of the convictions, the forfeiture was time barred and entered contrary to law. Therefore, it must be vacated.

Finally, Ledvina preserves for further review the argument that § 922(g)(3) exceeds the scope of Congress's authority under the Commerce Clause and violates the Tenth Amendment.

ARGUMENT

I. Unconstitutionality of § 922(g)(3) Requires Dismissal or Acquittal on Both Counts

A. Standard of Review and Preservation of Error

The constitutionality of a statute and questions of statutory interpretation are reviewed de novo. See United States v. Rodriguez, 581 F.3d 775, 796 (8th Cir. 2009).

The issue of facial validity was raised in Ledvina's Motion to Dismiss (R. Doc. 37), and decided by the District Court (R. Doc. 41). As-applied constitutionality was raised in Ledvina's Trial Brief (R. Doc. 57 at 3) and at trial (R. Doc. 99 at 25). The issue was decided by the District Court. R. Doc. 64. Error was preserved.

The claim that both counts must be dismissed or an acquittal must be entered as a result was raised in Ledvina's Motion to Dismiss (R. Doc. 37), Trial Brief (R. Doc. 57) and at trial (R. Doc. 99 at 24-25). The District Court found Ledvina guilty. R. Doc. 64. Error was preserved. See Yee v. City of Escondido, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim, parties are not limited to the precise arguments they made below.").

B. Section 922(g)(3) is Unconstitutional

The Second Amendment to the United States Constitution guarantees that "the right to keep and bear arms shall not be infringed."

In New York State Rifle and Pistol Association v. Bruen, 142 S. Ct. 2111 (2022), the Supreme Court prescribed the standard for determining the constitutionality of a regulation based on the Second Amendment. The Court stated,

> When the Second Amendment's plain text covers an individuals 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.

Section 922(g)(3) is a complete bar on firearm possession, so the Second Amendment's plain text covers the conduct at issue. Because there were no laws dating to the Founding that totally banned the possession--not simply the carrying in public--of a firearm by a person who uses intoxicants on occassion--even while sober--the government cannot meet its burden. See Id. at 2137.

Any unconstitutional applications of § 922(g)(3) are unseverable. If a statutes language doesn't "limit its reach to a discrete set" of squarely constitutional applications it is facially unconstitutional. United States v. Lopez, 514 U.S. 549, 562 (1995). To only hold partially invalid a statute with general language that has unconstitutional applications is to engage in forbidden judicial rewriting of the law into a new law with limiting language that didn't exist in the original. See United States v. Reese, 92 U.S. 214, 219-221 (1876). "[I]f, taking the whole statute together, it is apparent that it was not the intent of Congress thus to limit the operation of the act, we cannot give it that effect." Id. at 219. For this independent reason, United States v. Veasley was wrongly decided and must be overruled. 98 F.4th 906 (8th Cir. 2024) (holding § 922(g)(3) facially valid but recognizing potentially unconstitutional applications).

Further, in an as-applied challenge, the government bears the burden of showing a historical tradition of disarming an individual on facts similar to those adduced at trial.[1] The government must prove facts at trial that would make applying the statute to a defendant consistent with history and tradition.

1 See United States v. Panoam Deng, 104 F.4th 152 (8th Cir. 2024); United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.) (holding that as-applied Second Amendment challenges require facts to be found by a jury at trial); United States v. Paulin, 588 F. Supp. 2d 52, 61-62 (D. Me. 2008) (requiring facts to be found at trial in as-applied Commerce Clause challenge).

In other words, the government may not rely on facts that are outside of those proven beyond a reasonable doubt at trial.

The government failed to prove such facts at trial and cannot meet its burden in Ledvina's case.

Therefore, § 922(g)(3) is unconstitutional both on its face and as-applied to Ledvina.

C. The Unlawful User Question is Not "Information Required To Be Kept"

18 U.S.C. § 924(a)(1)(A) prohibits providing false information with respect to information required by Chapter 44 of Title 18 to be kept in the records of a federally licensed firearms dealer.

No section of Chapter 44 itself requires a declaration that one is not an unlawful user. The District Court correctly held that 18 U.S.C. § 923(g)(1) requires firearms dealers to "maintain such records of ... sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may prescribe." R. Doc. 64 at 15. It also correctly held that 27 C.F.R. § 478.124(c)(1) requires the dealer to obtain an ATF Form 4473 that includes "a certification by the transferee that the transferee is not prohibited by the [Gun Control] Act from ... receiving a firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce." Id.

Neither a statute nor a regulation specifically requires an answer to whether someone is an unlawful user of or addicted to controlled substances. However, § 922(g)(3)'s prohibition may arguably make such an answer part of a certification that one is not prohibited. This means absent § 922(g)(3) such a declaration would be ultra vires or not "information required to be kept," because it would have nothing to do with if the individual is prohibited. Section 924(a)(1)(A) is not a statute that "criminalizes a false answer to an

ultra vires question." Abramski v. United States, 573 U.S. 169, 206 (2014) (Scalia, J., dissenting); see also Id. at 192 n.11 (majority); United States v. Hern, 926 F.2d 764, 765 n.2 (8th Cir. 1990).

The unconstitutionality of § 922(g)(3) has this effect. This is because "an unconstitutional provision is never really part of the governing body of law." Collins v. Yellen, 141 S. Ct. 1761, 1788-89 (2021). In other words, in resolving this case, the statute is "as inoperative as though it had never been passed." Norton v. Shelby County, 118 U.S. 425, 442 (1886).

The same applies whether the statute is unconstitutional facially or as-applied. "If an as-applied challenge is successful, the statute may not be applied to the challenger." Turtle Island Foods v. Thompson, 922 F.3d 694, 700 n.5 (8th Cir. 2021). This means when invalid as-applied that courts must "disregard an unconstitutional enactment in resolving a legal dispute." United States v. Arthrex, 141 S. Ct. 1970, 1986 (2021). So after deciding a statute is unconstitutional as-applied, further legal questions must be decided as though the statute doesn't exist. See Taylor v. McDonough, 71 F.4th 909, 943-44 (Fed. Cir. 2023) (holding a statute unconstitutional as-applied then disregarding it in deciding further legal questions).

Thus, because § 922(g)(3) is constitutionally infirm, falsely representing he was not an "unlawful user" would be no more illegal for Ledvina than his favorite color or "volunteering of a false e-mail address on that form." Abramski, 573 U.S. at 206-7 (Scalia, J., dissenting).

D. Conclusion

For the reasons stated, § 922(g)(3) is unconstitutional and requires both counts of the indictment to be dismissed or result in an acquittal.

II. Ledvina Did Not Unlawfully Use a Controlled Substance

A. Standard of Review and Preservation of Error

Questions of statutory interpretation are reviewed de novo. Rodriguez, 581 F.3d at 796.

The issue was raised in Ledvina's Motion to Dismiss (R. Doc. 37) and Trial Brief (R. Doc. 57). The issue was decided by the District Court (R. Doc. 64). Error was preserved.

B. Prohibition on Possession Does Not Make Use Unlawful

In convicting Ledvina in the absence of a law making the "use" of a controlled substance itself unlawful, the District Court held that "use always means possession" to find he was an "unlawful user." R. Doc. 64 at 7-8.

This holding is precluded by binding 8th Circuit precedent and conflicts with holdings dating from the Prohibition Era to the modern day. Colbaugh v. United States, 15 F.2d 929, 931 (8th Cir. 1926). This section discusses the tradition of differenciating "use" and "possession" and how this means Ledvina did not unlawfully use a controlled substance.

1. Tradition Differenciating Use and Possession

a. State Prohibition Era Cases

As in Bruen, we begin our analysis when laws prohibiting intoxicating substances began. "States have broad authority to enact legislation" that "we often called a 'police power'" while the "Federal Government by contrast, has no such authority." Bond v. United States, 572 U.S. 844, 854 (2014) (quoting Lopez, 514 U.S. at 567 (1995)). Until relatively recently this understanding was reflected by a lack of Congress regulating local activities, such as the possession or consumption of alcohol. Thus, historically the states were the earliest to consider the matter and makes for the natural starting point. Further, several of these holdings were relied on by Colbaugh in reaching its holding.

• Sizemore v. Commonwealth, 202 Ky. 273 (Ky. Ct. App. 1924) ("To take a drink of intoxicating liquor is not itself a violation of law. Nor does the manual act of handling a bottle while taking a drink of itself constitute the illegal possession denounced by statute.")

• Nethercutt v. Commonwealth, 241 Ky. 47 (Ky. 1931) ("liquor in one's stomach does not constitute possession within the meaning of the law")

• State v. Munson, 111 Kan. 318 (Kan. 1922) ("[T]he Statute does not punish personal use of intoxicating liquor. Keeping or having in possession is made a crime ... but drinking intoxicating liquor is not unlawful")

• Harness v. State, 130 Miss. 673 (Miss. 1923) (being passed a bottle to drink upon is not unlawful possession)

• People v. Ninehouse, 227 Mich. 480 (Mich. 1924) (law forbidding possession did not criminalize "to take a drink of intoxicating liquor")

• State v. Gohn, 161 Wash. 177, 180 (Wash. 1931) ("possession as used in the statute defining the offense of unlawful possession of intoxicating liquor means something more than the mere taking in the hand for the purpose of immediately drinking the thing.") (quoting State v. Jones, 114 Wash. 144, 148 (Wash. 1921))

• State v. Williams, 117 Or. 238, 240-42 (Or. 1926) (same, also citing Jones)

• Graham v. State, 150 Ga. 411 (Ga. 1920) (possessing whiskey was unlawful but "the mere drinking of whiskey is not unlawful")

b. Federal Prohibition Era Cases

The 8th Circuit adopted this uniform understanding that prohibiting possession does not make use unlawful, or that use and possession are not one in the same. "Even if he had [taken a drink of whiskey], the weight of

authorities is that such fact does not constitute criminal possession." Colbaugh, 15 F.2d at 931 (citing Munson; Sizemore; Harness; Ninehouse; Jones among others).

This Court was not alone. The 4th Circuit in adopting the same view said "it has been expressly held that to take a drink ... does not involve the possession as to constitute a violation of the act." Zurich Gen. Accident & Liability Ins. Co. v. Flickinger, 33 F.2d 853, 855 (4th Cir. 1929) (citing Colbaugh).

The statute from Colbaugh is a direct analogue to simple possession in the Controlled Substances Act, meaning its interpretation on possession directly applies. See Murphy v. Matheson, 742 F.2d 564, 571 (10th Cir. 1984) (considering the National Prohibition Act "an analogous statutory scheme to modern offenses involving controlled substances"). As the Supreme Court said "alcohol is a 'drug'" and "drug use, includ[es] use of alcohol." Board of Education v. McCluskey, 458 U.S. 966, 970-71 (1982).

The Act of May 25, 1918 (Section 4137aa, Comp. Stat.)

> "provides that 'possession by a person of intoxicating liquors in the Indian Country or where the introduction is or was prohibited by treaty or federal statute shall be an offense' ... Mere possession is made criminal. The purpose of the possession or the intended use is not material."

Kennedy v. United States, 265 U.S. 344, 345 (1924).

Further, the purpose of the statutes are directly analogous. Compare Id. ("These statutes apply locally for the special purpose of keeping whiskey and other intoxicants out of the reach of Indians") with 21 U.S.C. § 801(2).

The prohibition statute, like the CSA's simple possession statute (21 U.S.C. § 844), does not give a special definition for "possession," showing that in both statutes it carries the same meaning. See Abuelhawa v. United States, 556 U.S. 816, 821 (2009) ("as we have said many times, we presume legislatures

act with caselaw in mind and we presume here that when Congress enacted [a statute], it was familiar with the traditional judicial limitation on applying terms") (quotes and citation omitted).

Further supporting that understanding is that the CSA itself describes "possession" as "illegal," while by contrast it describes "use" merely as "improper." 21 U.S.C. § 801(2) ("The illegal importation, manufacture, distribution and possession, as well as improper use of controlled substances has a substantial and detrimental effect on the health and general welfare of the American people.") (emphasis added). This language is affirmative proof the CSA doesn't make "use" of controlled substances unlawful. See SEC v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words."); Compare Black's Law Dictionary 5th Ed. (1983) definitions for "illegal" and "unlawful" with "improper."

c. Modern Era State Cases

This tradition of distinguishing proscriptions of use and possession continued into the modern day, applying to controlled substance statutes.

• State v. Jedlicka, 938 N.W. 2d 854, 860-61 (Neb. 2020) ("The Nebraska Criminal Code does not criminalize 'use' of controlled substances, rather it prohibits possession of them. This distinction is fundamental ... There is a logical reason for treating possession different from ingestion; the former is a crime, the latter is not.") (emphasis kept)

• People v. Rutledge, 645 N.W. 2d 333, 338 (Mich. App. 2002) (a statute prohibiting any amount of metabolites in ones system "does not criminalize the consumption itself.")

• State v. Harris, 646 S.E. 2d, 526, 529 (N.C. 2007) (after discussing the

only federal statute making "use" unlawful--10 U.S.C. § 912a--as only applying to those in the military, "the General Statutes of North Carolina, as well as the United States Code, provides only for the offense of wrongful possession and do not criminalize wrongful use.")

• People v. Spann, 232 Cal. Rptr. 31, 33-35 (Cal. App. 1986) ("use" and "possession" are distinct acts and should not be merged, collecting cases)

• Collins v. Commonwealth, 640 S.W. 3d 55 (Ky. Ct. App. 2021) (use of controlled substances is not synonymous with possession) (citing Spann; Harris; Nethercutt)

• Commonwealth v. Rivera, 367 A.2d 718, 721 (Pa. 1977) ("By itself drug use, even habitual use is not a crime in this state. Our statute law prohibits the unauthorized manufacture, possession, sale, and distribution of controlled substances such as heroin and marijuana. The mere use of such drugs, however is not an offense under the law.")

• Commonwealth v. Fraize, Docket No. 1481cr00537 (Mass. Super. Oct. 18, 2018) (Defendant did not violate terms of probation which forbade any state or federal law violations because marijuana is legal in state. "Mere use or consumption does not violate federal law either.")

d. Modern Era Federal Jurists

Here are examples of modern federal jurists carrying on this tradition.

• United States v. Herrera, 289 F.3d 311, 321 (5th Cir. 2002) (observing that "no federal statute makes it illegal ... to be a 'user' of drugs"), overruled on other grounds 313 F.3d 882 (5th Cir. 2002); see also Herrara, 313 F.3d at 885-91 (DeMoss, J., dissenting)

• United States v. Ocegueda, 564 F.2d 1363, 1365 (9th Cir. 1977) (by "unlawful user," "Congress intended to refer to any law, federal, state, or municipal in making use of narcotics unlawful." Conviction upheld because

California Health & Safety Code § 11550 specifically proscribed "use" of heroin without a prescription)

·Bambu Sales, Inc. v. Gibson, 474 F. Supp. 1297, 1300 (D. N.J. 1979) ("the [Controlled Substances] Act itself does not reach use")

· Rice v. Holder, 597 F.3d 952, 956 (9th Cir. 2010) ("California law has the offense of using or being under the influence of a controlled substance, but no federal statute covers that crime"), overruled on other grounds Nunez-Reyez v. Holder, 646 F.3d 684 (9th Cir. 2011)

· Nunez-Reyez, 646 F.3d at 708 (Pregerson, J., dissenting) ("There is no federal criminal statute prohibiting using or being under the influence of a controlled substance")

· United States v. Safehouse, 985 F.3d 225, 253 (3rd Cir. 2021) (Roth, J., dissenting in part and judgment) ("using a controlled substance is not 'unlawful' under federal law; possessing it is")

· Hernandez-Munoz v. Sessions, 718 Fed. Appx. 511, 512 (9th Cir. 2017) ("It is well established ... that use of a drug does not necessarily imply possession of that drug. Rather, use is at most circumstantial evidence of possession.") (citation omitted and emphasis kept)

There is further significance to Hernandez-Munoz, there the government conceded the exact argument being advanced by Ledvina. The "Government also acknowledges that 'it is not ... a violation of federal law to use a controlled substance.'" Id. at 512 n.1 (quoting government's brief). Considering this is the position the government took in a prior legal proceeding, it should be barred by judicial estoppel from arguing the contrary here. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001).

As shown by the weight of the authorities, including the government's previous stance, it is not unlawful to use a controlled substance.

2. Congress Chose not to Make Use Unlawful

If Congress intended to make use unlawful, it would have explicitly done so. Instead, they only chose to make possession unlawful. 21 U.S.C. § 844. As mentioned, the CSA itself categorizes possession as "illegal" while use only as "improper." 21 U.S.C. § 801(2).

Congress knows how to make use unlawful. As discussed in Harris, Congress did make use itself unlawful in 10 U.S.C. § 912a. 642 S.E. 2d at 529. There Congress made both possession and use unlawful for military personnel. They are treated as separate offenses. See United States v. Reichenbach, 29 M.J. 128, 136-37 (C.M.A. 1989). Obviously, this shows Congress didn't intend for mere use to be unlawful for civilians, but only for those in the military. In fact, that is exactly how military courts interpret it. See Id. at 138 n.10 ("we are unaware of any federal prosecution in which 'use' has been equated with 'possession'"); United States v. Bennitt, 72 M.J. 266, 268 n.4 (C.A.A.F. 2013) (a civilian's controlled substance "use was not an offense under federal or state law").

The "wrongful" use proscribed by § 912a is broader than the "unlawful" use required by § 922(g)(3)--wrongful doesn't require an underlying law saying its illegal. "The word 'wrongful' ... has a much broader and stronger meaning than the word 'unlawful.'" Masters v. United States, 42 App. D.C. 350, 356 (Ct. App. D.C. 1914). The words are not synonyms. Compare Black's Law Dictionary, 5th Ed. definition for "unlawful" with "wrongful."

The CSA, § 912a and §922(g)(3) are in pari materia because they involve the same subject. Thus they should be construed in light of each other. The CSA (passed in 1970)[2] did not proscribe use but only proscribed possession while

2 Controlled Substances Act, Pub. L. 91-513 (Oct. 27, 1970)

§ 912a (enacted in 1983)[3] specifically proscribed both. This shows that Congress intended to make use unlawful for only the military but never did so for civilians--if possession meant to subsume use, then the use provision in § 912a would be surplusage.

As the Supreme Court stated,

> "The correct rule of interpretation is, that if divers statutes related to the same thing, they ought to be taken into consideration in construing any one of them ... and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

Branch v. Smith, 538 U.S. 254, 281 (2003) (quoting United States v. Freeman, 3 How. 556, 564-65 (1845)).

> "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."

Yates v. United States, 574 U.S. 528, 543 (2015) (quotes and brackets omitted).

Because federal law does not make use itself unlawful for civilians, the only lawful prosecutions under § 922(g)(3) that rely solely on federal law are those involving a violation of § 912a during the relevant time period. See, e.g., United States v. Freitas, 59 M.J. 755 (N-M Ct. Crim. App. 2004).

To hold otherwise would require adding to and rearranging the words of the statute to read: user of controlled substances that are unlawful to possess. This is essentially what the government argued at trial. R. Doc. 99 at 24:9-15, 29-30. The "problem with this approach is the one that inheres in most incorrect interpretation of statutes; it asks us to add words to the law to produce what is thought to be a desirable result." EEOC v. Abercrombie &

3 Military Justice Act, Pub. L. 98-209, § 8(a), 97 Stat. 1403 (Dec. 6, 1983)

Fitch Stores, Inc., 575 U.S. 867, 874 (2015).

So as the Ocegueda court held, by "unlawful user" "Congress intended to refer to any law, federal, state or municipal in making the 'use' of narcotics unlawful." 564 F.2d at 1365. Therefore, any prosecution under § 922(g)(3) for anybody not in the military requires proof that one used a controlled substance in a state or local jurisdiction that makes use or consumption itself unlawful.

That this limits who can be prosecuted is irrelevant, it is not the role of the judicial branch to make things easy for prosecutors. Such a rule would "turn the normal construction of statutes upside-down, replacing the doctrine of lenity with the doctrine of severity." Crandon v. United States, 494 U.S. 152, 179 (1990) (Scalia, J., concurring). "A criminal conviction ought not rest upon an interpretation reached by policy judgments rather than by the inexorable command of relevant language." M. Krause & Bros. v. United States, 327 U.S. 614, 626 (1946). "And any concerns about the statute's reach should be addressed to, and must ultimately be resolved by Congress." Nygaard v. Taylor, 78 F.4th 995, 1002 (8th Cir. 2023).

Neither is it relevant whether the substance is said to have no accepted medical use. Use other than for a medical purpose would merely make it the "improper use" spoken of in § 801(2), not unlawful use. No act of Congress makes "improper use" unlawful for civilians.

"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." Bittner v. United States, 215 L. Ed. 2d 1, 15 (2023) (cite omitted).

Many states today, like at the time of § 922(g)(3)'s enactment, do have laws making use unlawful which would bring those in such jurisdiction under the statute.[4] Iowa, however, is not one of them. Like federal law, it only criminalizes possession. Iowa Code § 124.401.

Thus, because there was no showing in the instant case that Ledvina ever set foot in such a jurisdiction, the conviction on both counts must be reversed.

C. The Model Jury Instructions Are Not Law

The government and District Court relied on Eighth Circuit Model Jury Instruction Section 6.18.922B's definition for "unlawful user." R. Doc. 60 at 3-4; Doc. 64 at 8. This can quickly be dismissed as borderline frivolous. The Committee on Model Jury Instructions is neither Congress nor an Article 3 court. They have no authority to write the law nor are their interpretations binding. See United States v. Owens, 966 F.3d 700, 705 (8th Cir. 2020) ("The 'model' jury instructions are not promulgated by this court" and "are not binding on the district courts.") (quotes and citation omitted). The logic that they have any force of law would require giving the Committee legislative powers they do no possess.

D. The Executive Branch Lacks Authority To Define "Unlawful User"

The government and District Court relied on the regulation in 27 C.F.R. § 478.11 to define "unlawful user" as a "person who uses controlled substances in a manner other than prescribed." R. Doc. 60 at 3-4; R. Doc. 64 at 8-9. There is a fundamental flaw with this reliance: No act of Congress says this is a crime or defines the term as such.

The very first substantive clause of the Constitution reads: "All

4 See, e.g., North Dakota Century Code 19-03.1-22.3; Delaware Code Title 16, Section 4763(a); 29 Ohio Revised Code § 2925.11(A)

legislative powers herein shall be vested in a Congress." U.S. CONST. Article 1, Section 1. Defining the term by an executive agency "cannot be done except by specific authorization of Congress." Int. Ry. Co. v. Davidson, 257 U.S. 506, 514 (1922). Even assuming such authorization, the "limits of power to issue regulations are well settled. They may not extend a statute or modify its provisions." Campbell v. Galeto Chemical Co., 281 U.S. 599, 610 (1930). Here, to reach their desired result, the government is attempting to "extend" and "modify" one or both of two statutes through regulation.

The simple possession statute--21 U.S.C. § 844--says nothing about "manner" of use, nor use in general. If we accept the regulation in § 478.11, that would mean one with a prescription would somehow violate § 844 by using it orally rather than nasally or using it once every other day rather than daily. There has never been a prosecution under § 844 for this because that is not what it says. Section 478.11 essentially adds words and acts prohibited plainly not covered by the statute.

Likewise, § 922(g)(3) says nothing about "possession" aside from the firearm or ammunition. "Unlawful" modifies the term "user," not "possessor." As thoroughly discussed, "use" is not unlawful under federal law. To say what the government is putting forth, they must totally rearrange the statute and add words to extend the definition to cover classes of people it plainly does not cover. The statute doesn't read "user of controlled substances that are unlawful to possess or in a manner other than as prescribed." Neither the executive branch through a regulation, nor even a court, can change it to do so without doing an end-run around the Constitution's separation of powers. As the Supreme Court recently put it, "we will not 'add words to the law' to achieve what some ... might think 'a desirable result.'" Muldrow v. St. Louis, 144 S. Ct. 967, 976 (2024)

(quoting Abercrombie & Fitch, 575 U.S. at 774)).

No act of Congress has defined "unlawful user" in this way nor does the executive branch have "clear authorization to do so." West Virginia v. EPA, 124 S. Ct. 2587, 2609 (2022). The regulation is "one branch of government arrogating power belonging to another ... it is the Executive seizing the power of the Legislature." Biden v. Nebraska, 600 U.S. 477, 503 (2023).

In considering another part of § 922, the Supreme Court said it has "never held that the Government's reading of a criminal statute is entitled any deference." Abramski, 573 U.S. at 191 (citation omitted). Further, the Court held that the ATF's position was "not relevant at all." Id. The Court recently affirmed a holding regarding another regulation in § 478.11 purporting to define another term in § 922 which expressly held that "ATF lacked the authority to issue a regulation purporting to define the term." Cargill v. Garland, 57 F.4th 447, 451 (5th Cir. 2023), aff'd 219 L. Ed. 2d 151 (2024). Further, if there is any question if Cheveron deference plays any role, the Court recently held "Chevron is overruled." Loper Bright Enterprises v. Raimondo, 219 L. Ed. 2d 832, 867 (2024). "[I]t is not the province of an executive agency to write laws for our nation." Vanderstok v. Garland, 86 F.4th 179, 197 (5th Cir. 2023) (invalidating § 478.11 regulation purporting to define undefined statutory terms in § 922 "frame or receiver"), cert. granted No. 23-852 (Apr. 22, 2024).

Together the holdings of Abramski, Cargill, and Loper make it more than clear that an executive agency lacks authority to define "unlawful user" and the regulation in § 478.11 purporting to do so is not entitled any deference. In fact, other courts before had already understood this in regard to other terms in § 922(g).

In vacating a § 922(g)(5)(A) conviction, the 5th Circuit declined to

show any deference to the ATF's interpretation for the term "illegally or unlawfully in the United States" in § 478.11. United States v. Garcia, 707 Fed. Appx. 231, 234 (5th Cir. 2017) (citing Abramski; see also United States v. Balde, 943 F.3d 73, 83 (2nd Cir. 2019) (same) (citing Abramski; Garcia). In United States v. Harvey, the court dismissed a § 922(g)(4) indictment because it rejected the government's reliance on § 478.11's definitions for "adjudicated as mentally defective" and "committed to a mental institution." 609 F. Supp. 3d 759, 762-63 (D. Neb. 2022), appeal dismissed by government's motion No. 22-2585 (8th Cir. Sept. 15, 2022). Similarly, in United States v. Tucker, the court reversed a § 922(g)(4) and false statement conviction because the government's interpretation of "adjudicated" conflicted with the plain language of the statute. 47 F.4th 258 (5th Cir. 2022).

Additionally, in an even earlier case, when asked by the court to brief the issue of whether § 478.11 was entitled to any deference in regard to § 922(g) the government agreed that it wasn't. United States v. Gayle, 342 F.3d 89, 93 n.4 (2nd Cir. 2003). Thus, they should be barred by judicial estoppel from arguing otherwise in this case.

Absent "clear authorization to do so" (West Virginia, 124 S. Ct. at 2609) an executive agency cannot "define the scope of activities that subject the public to criminal penalties." Cargill, 57 F.4th at 467. Such authorization requires a statute "expressly delegate to an agency to give meaning to a particular statutory term." Loper, 219 L. Ed. 2d at 856 (brackets, quotes and citation omitted). In this case, such authorization would require the statute to have a statement like "as such term is defined by the Attorney General." See Id. at 856 n.5. Rather, the statute says "as defined in section 102 of the Controlled Substances Act." § 922(g)(3).

Thus, lacking authority to define "unlawful user," the regulation in § 478.11 is void. Any interpretation of the term must disregard it. The "agency interpretation of statutes--like agency interpretions of the Constitution--are not entitled deference." Loper, 219 L. Ed. 2d at 841 (emphasis kept).

E. Conclusion

Neither federal or Iowa law makes "use" of a controlled substance unlawful. Because the government failed to prove at trial that Ledvina ever even set foot -let alone used a controlled substance--in a jurisdiction that makes "use" unlawful in the relevant period, the conviction on both counts must be reversed.

III. Stipulation and Outside Evidence

A. The Stipulation Precluded Outside Evidence

1. Standard of Review and Preservation of Error

The interpretation and enforcement of agreements with the government is a question of law reviewed de novo. See United States v. Lara, 690 F.3d 1079, 1081 (8th Cir. 2012).

The issue was raised in a timely objection at trial (R. Doc. 99 at 11), and the issue was decided by the District Court (R. Doc. 99 at 12-13). Error was preserved.

2. The Parties Agreed To Not Present Further Evidence

The very first sentence of the stipulation agreement states that the parties "stipulate and agree that the following facts are true and may be considered by the Court **without further evidence being offered.**" R. Doc. 52 at 1 (emphasis added). It is well-established that "a stipulation is akin to a contract." United States v. Morales, 684 F.3d 749, 755 (8th Cir. 2012) (citation omitted). The government has an "obligation to comply with the

stipulation agreement" because it "was freely entered and not compelled." Id.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." Stahl v. U.S. Dept. of Agriculture, 327 F.3d 697, 701 (8th Cir. 2003) (citation omitted). "The rule of construction that ambiguities are to be construed against the drafter applies with equal, if not greater, force against the United States." Id. (citing United States v. Seekinger, 397 U.S. 203, 209-10 (1970)). In the criminal context, when agreements have ambiguities "the ambiguities are construed against the government" as the rule. Lara, 690 F.3d at 1083 (citation omitted).

Here, the title of the document is "Joint Stipulation **In Lieu of Trial Evidence**", a name that suggests there would be no other evidence. The very first sentence of the agreement says the parties agreed to the facts and were not going to offer further evidence. Even if it could alternatively be read to mean what the District Court held, this simply shows ambiguity. The government drafted the agreement and it is analogous to a plea agreement, so the District Court clearly erred by ignoring the fundamental rule of construction that this ambiguity was to be construed against the government.

However, other principles of contract law support the agreement precluded outside evidence. "[U]nder federal common law 'a contract should be interpreted as to give meaning to all of its terms--presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.'" Harris v. Epoch Group, L.C., 357 F.3d 822, 825 (8th Cir. 2004) (citation omitted). Under the District Court's view, the phrase "without further evidence being offered" is rendered superfluous--if the parties were simply agreeing the "facts are true and may be considered" then the rest of the sentence serves no purpose. This Court should "reject the argument"

that the agreement does not preclude outside evidence "because it would render the disputed phrase superfluous." Id.

Further, "in trials upon stipulation of facts ... the Government cannot present facts other than those stipulated." United States v. Tobin, 701 F.2d 1108, 1110 (4th Cir. 1983) (citing United States v. Posner, 408 F. Supp. 1145 (D. Md. 1976)). This is because "the prejudice would be substantial. The defendant waived his right to trial by jury on the assumption that he would be tried by the Court on a known set of facts stipulated to by him and his counsel." Posner, 408 F. Supp. at 1149. Especially when the evidence is introduced on the eve of trial days after the parties filed their trial briefs. R. Doc. 61. "The Government chose to try this case on stipulated facts: it cannot at this late stage change its mind to present evidence outside those stipulated facts" because it realized a hole in its case. Posner, 408 F. Supp. at 1149. This "would impose upon the defendant a risk he never reasonably anticipated in making his decision to waive trial by jury." Id.

Typically when entering a stipulation like this, if a party intends to preserve the right to present evidence, they explicitly say so in the stipulation.[5] Ledvina did so to preserve the right to present evidence at the

5 See, e.g., United States v. Kubini, No. 11-14, 2017 U.S. Dist. LEXIS 91293 *34 (W.D. Pa. June 14, 2017); United States v. Dunn, 345 F.3d 1285, 1287 (11th Cir. 2003) (when government agreed to stipulated bench trial, "it expressly reserved the right to introduce additional evidence at the bench trial"); United States v. Stephans, 609 F.2d 230, 231 n.1 (5th Cir. 1980); United States v. Illinois C.R. Co., 234 F. 433, 437-38 (N.D. Ia. 1915); Dr. Salsbury's Laboratories v. United States, No. 47 Civil, 1942 U.S. Dist. LEXIS 3376 (N.D. Ia. May 7, 1942); Consumers Power Co. v. United States, 299 F. Supp. 1180, 1217 (E.D. Mich. 1969); Associated Grocers of Alabama, Inc. v. Willingham, 77 F. Supp. 990, 992 n.2 (N.D. Ala. 1948); Beach v. Busey, 64 F. Supp. 220, 222 (S.D. Oh. 1945); Patterson v. American Tobacco Co., No. 101-73-R, 1974 U.S. Dist. LEXIS 6583 *18 (E.D. Va. Sept. 26, 1974); Hart v. United States, No. 7517-Civil, 1958 U.S. Dist. LEXIS 4645 (N.D. Tx. Feb. 27, 1958).

forfeiture hearing. R. Doc. 52 at ¶20. Nowhere does the government preserve the right to present further evidence at trial. To the contrary, the stipulation stated the "facts are true and may be considered by the Court **without further evidence being offered.**" Id. at 1 (emphasis added). This at the very least "makes ambiguous the government's right to introduce evidence" and in such a case "the ambiguities are construed against the government." Lara, 690 F.3d at 1083.

Thus, the stipulation precluded introduction of Government Exhibit 1 at trial. R. Doc. 61. The government breached the agreement and the District Court erred by not enforcing it. The appropriate remedy is specific relief producing the condition that would have existed had the breach not occurred. That is, the disputed evidence should be stricken and any sufficiency of the evidence analysis must disregard it. This should be done without remand for judicial economy because stipulations in a first trial are typically binding on the parties in a retrial--meaning the evidence would remain the same. See United States v. Burkhead, 646 F.2d 1283, 1285 (8th Cir. 1981).

B. Admission of the Government's Exhibit Violated the Rules of Evidence

1. Standard of Review and Preservation of Error

Timely objected to evidentiary rulings are reviewed for abuse of discretion and harmless error. United States v. Johnson, 860 F.3d 1133, 1139 (8th Cir. 2017).

Ledvina timely objected to the admission of the exhibit at trial. R. Doc. 99 at 11. Error was preserved.

2. The Rules of Evidence Were Violated

In addition to violating the stipulation, admission of Government Exhibit 1 violated the Rules of Evidence.

The ATF Form 4473's are hearsay, which are generally inadmissible. See Rule of Evidence 802. Normally they may be admitted under the business records exception in Rule of Evidence 803(6). United States v. Banks, 514 F.3d 769, 778 (8th cir. 2008). However, the government did not lay a foundation by calling a witness from any one of the businesses the forms were kept to establish they were kept in the course of regularly conducted activity, ruling out that exception. Id. This leaves Rule 807's residual exception as the only Rule the forms could be admitted under. Id. at 777.

However, admission of the forms failed to comply with Rule 807(b)'s notice requirement. It requires "the proponent gives an adverse party reasonable notice of intent to offer the statements." Rule of Evidence 807(b). "Congress intended this Rule to be used very rarely and only in exceptional circumstances." United States v. Bruguier, 961 F.3d 1031, 1033 (8th Cir. 2020). That means the exception should be narrowly construed and not allowed to be abused.

In the Government's Reply to Ledvina's Trial Brief they justify this late introduction by saying the forms were in discovery. R. Doc. 60 at 6 n.2. This is not enough to satisfy Rule 807(b)'s notice requirement.[6] Neither is the eve of trial reasonable, particularly considering the briefs were due and filed days prior without any mention of the introduction and the language of the stipulation at issue in Section III(A).[7]

6 See United States v. Cheatham, 500 F. Supp. 2d 525, 534-35 (W.D. Pa. 2007) ("open file policy" is insufficient notice "because it does not specify which evidence the Government intends to use at trial"); United States v. Taylor, No. 2:10cr192, 2011 U.S. Dist. LEXIS 163530 *2-7 (E.D. Va. Mar. 3, 2011) (ATF form inadmissible under Rule 807 because "although the Government appears to have provided the ATF trace Form to defense counsel in advance of trial as part of its 'open file' policy, it was not until just before trial that the Government indicated its intent to introduce such document")

The admission of the forms clearly "had more than a slight influence on the verdict." Johnson, 860 F.3d at 1139. The District Court's finding of mens rea was based solely on speculation and conjecture regarding text messages from the parties Joint Trial Exhibit (R. Doc. 52-1) that were equivocal at best and a "warning" on the forms in question. R. Doc. 64 at 10-12.

The warning being on the forms is also not an indisputable fact which judicial notice may be taken. The ATF Form 4473 has gone through many revisions. The original never even asked if one was an "unlawful user" but placed above the signature block a certification that the transferee was not prohibited by the GCA following the language of 27 C.F.R. § 478.124(c)(1). See United States v. Squires, 440 F.2d 859, 862 (2nd Cir. 1971). Other subsequent versions either have a certification as the original but enumerates the list of prohibited persons or actually ask in question form but omit a warning that marijuana use is unlawful like those in the disputed exhibit. See Id. at 863 n.7. Because no regulation mandates a specific version of the form be completed, it is open to dispute if the particular forms Ledvina completed contained a warning absent the exhibit.

Thus, the District Court abused its discretion admitting the forms and the error was not harmless. The error was clear and would not survive even plain error review.

C. Whether the Stipulation was Entered Knowingly and Voluntarily

1. Standard of Review and Preservation of Error

Whether a stipulation agreement was entered knowingly and voluntarily is

7 See United States v. Cole, No. 22-cr-98-JFH, 2022 U.S. Dist. LEXIS 233609 *4-7 (E.D. Ok. Dec. 30, 2022) (notice 12 days before trial in trial brief was not "reasonable" under Rule 807 and therefore excluded); United States v. Thomas, No. 23-cr-232 (DWF/DJF), 2023 U.S. Dist. LEXIS 178696 *5-6 (D. Mn. Oct. 4, 2022) (requiring 28 days before trial to comply with Rule 807(b)).

a mixed question of law and fact reviewed de novo. See United States v. Gray, 152 F.3d 816, 819 (8th Cir. 1998).

Ledvina asserted his understanding of the agreement at the time he signed it in a timely objection at trial. R. Doc. 99 at 11. Error was preserved.

2. Constructively Amended Agreement Was Not Entered Knowingly and Voluntarily

If the agreement is construed to not preclude the introduction of evidence outside the stipulation, then Ledvina did not enter the agreement knowingly and voluntarily. The language of the agreement led Ledvina to believe that he was waiving his rights to a jury trial and have the facts in the stipulation proved beyond a reasonable doubt by having a trial only on the facts in the stipulation, with neither party able to introduce outside evidence. Essentially, Ledvina was led to believe the bench trial was to test whether the stipulated to facts were legally sufficient to convict on the charged offenses and test his own legal challenges to the statutes and their application to this known set of facts.

Even the government's own trial brief repeats the "without further evidence being offered language" and doesn't even hint to any intent to introduce further evidence. R. Doc. 55. It wasn't until after reading Ledvina's trial brief and realizing a hole in their case they decided to introduce the forms in an unusual reply to the trial brief well after the briefs were due. R. Doc. 60.

In interpreting the agreement, the District Court first disregards the fundamental rule that ambiguities are construed against the government and instead construed it against Ledvina. R. Doc. 99 at 12:10-23. The Court then constructively amends the agreement by incorporating apparent discussions that took place at a status conference (R. Doc. 50) that Ledvina was neither

present for nor made aware of until they were discussed at trial. R. Doc. 99 at 12:23-13:5.

Ledvina cannot fairly be said to have knowingly and voluntarily entered an agreement that incorporates extra-textual discussions he was not aware of at the time he signed it. Nor can he be said to have knowingly and voluntarily entered an agreement that was constructively amended post hoc.

Further, the District Court made no inquiry into the voluntariness of entering into the stipulation. The Court only made a short colloquy with Ledvina asking only if he consents to the bench trial. R. Doc. 99 at 3:22-4:4. This was done before any discussion about the outside evidence and at no other point was Ledvina's consent inquired into afterward.

Ledvina's trial brief and objection make clear his understanding of the agreement he signed. If the agreement is as construed post hoc by the District Court, then it was not entered into knowingly and voluntarily, requiring a reversal.

IV. Insufficient Evidence To Support Conviction

A. Standard of Review and Preservation of Error

A denial of a motion for judgment of acquittal and a sufficiency of the evidence challenge is reviewed de novo. See United States v. Clark, 668 F.3d 568, 573 (8th Cir. 2012).

Ledvina had a bench trial (R. Doc. 62) and moved for a judgment of acquittal (R. Doc. 99 at 24). Error was preserved.

B. Insufficient Evidence of Mens Rea

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970).

The only elements in dispute at trial were whether Ledvina was or "knew he

belonged to the category of persons barred from possessing a firearm." Rehaif v. United States, 588 U.S. 225, 237 (2019). In other words, whether he was or knew he was an "unlawful user" as alleged in the indictment. Proof of both these facts beyond a reasonable doubt are required for a conviction in either count. See Tucker, 47 F.4th at 261.

Whether someone is an "unlawful user" can be broken down into two elements: (1) whether someone is a "user" of controlled substances and (2) whether their use of controlled substances is "unlawful." Proving knowledge of being an "unlawful user" involves proving 3 components: (1) a person knew what qualifies as a "user," (2) they knew the facts that would qualify them as a "user," and (3) they knew the "use" of controlled substances is "unlawful."

Section II focused on whether Ledvina was an unlawful user--particularly whether he unlawfully used controlled substances. As shown there, he was not and this fact alone requires reversal. This section focuses on whether the government proved he subjectively knew he was an unlawful user--assuming he was. Particularly, it will be shown that the government's evidence neither proved that he knew what the law classifies as a "user" nor that he knew that the use of controlled substances was "unlawful."

The Court in Rehaif made clear that the "ignorance of the law" maxim has no place in this case, the question of whether a defendant is an "unlawful user" is a "'collateral' question of law." 558 U.S. at 234-35. Such knowledge of the law is a question of fact to be proven, just as in Liparota v. United States, 471 U.S. 419 (1985) the Court "required the Government to prove that the defendant knew that his use of food stamps was unlawful." Rehaif, 558 U.S. at 234.

Importantly, what must be proven is a defendant's "knowledge and subjective beliefs--not [] what an objectively reasonable person may have known or

believed." United States ex rel Schutte v. SuperValu Inc., 598 U.S. 739, 749 (2023). Further, "the evidence of knowledge must be clear, not equivocal." Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943). In a case "where the government's evidence is equally strong to infer innocence of the crime charged as it is to infer guilt ... the court has a duty to direct an acquittal." United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971) (emphasis added).

This case was decided solely on the government's evidence. There was no direct testimony nor did Ledvina adduce any evidence at trial. "It was the duty of the government to prove knowledge on the part of the appellant, and not the duty of appellant to prove that [he] had no such knowledge." Fulbright v. United States, 91 F.2d 210, 213 (8th Cir. 1937). The evidence consisted of the stipulation of facts (R. Doc. 52), Joint Exhibit 1 (R. Doc. 52-1) and Government Exhibit 1 (R. Doc. 61)--which as discussed in Section III should be considered sticken and disregarded for this analysis.

This evidence fails to prove beyond a reasonable doubt that Ledvina either knew what is considered a "user" under law or knew the "use" of controlled substances is "unlawful."

1. Knowledge of Being a User

In order to knowingly be an "unlawful user" one would need to know what is considered a "user as caselaw defines that term." United States v. Cook, 970 F.3d 866, 884 (7th Cir. 2020) (emphasis added).

As Ledvina argued both in his trial brief (R. Doc. 57 at 10-12) and at trial (R. Doc. 99 at 27), one could reasonably understand "addicted to" as defining "user," meaning "user" is synonymous with "addict." See Herrera, 313 F.3d at 890-91 (DeMoss, J., dissenting) (discussing possibility the terms define each other); McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1088 (11th Cir. 2017) (en banc) ("The word 'or' commonly

introduces a synonym or 'definitional equivalent.'") (citing Antonin Scalia & Bryan Garner, Reading Law: An Interpretation of Legal Texts 122 (2012)). With this understanding, not believing himself to be an addict, Ledvina reasonably may not have believed himself to be considered a "user."

The government's only argument on this point is that "commonsense" would tell a person the "or" in the statute is disjunctive. R. Doc. 99 at 31-32. The District Court on this point relies on 27 C.F.R. § 478.11 and projects their interpretation of the grammar and how "people commonly understand the word 'or'" on Ledvina's subjective knowledge. R. Doc. 64 at 15-16.

There are two issues with this logic. First, instead of proof of Ledvina's own subjective knowledge and belief, it relies on speculation regarding "what an objectively reasonable person," in their opinion, "may have known or believed." SuperValu, 598 U.S. at 749. Second, the record--even if including the unlawfully admitted exhibit--is totally devoid of any evidence Ledvina was aware of § 478.11 or put on actual notice that the terms are not interpreted to be synonymous.

Courts generally read a temporal nexus into the statute which focuses on frequency of use in a constitutionally suspect effort to avoid rendering it void for vagueness. See United States v. Patterson, 431 F.3d 832, 839 (5th Cir. 2005). Thus, there must be an evidentiary showing that a defendant "knew he was an unlawful user as caselaw defines that term. Particularly in view of the regularity and contemporaneity components of unlawful use, it is possible for any given user to think that his use falls outside the range of regular, ongoing use." Cook, 970 F.3d at 884. Not a single piece of evidence shows any subjective knowledge of how caselaw defines "user" nor that Ledvina understood his use to fall under that definition at the time he made the representation he was not an unlawful user.

The government's proof on this point is not just insufficient, but totally non-existent. Thus, a judgment of acquittal must be entered on this ground alone.

2. Knowledge of Use Being Unlawful

In order for one to know they are an unlawful user, one must have subjective knowledge "that his use was 'unlawful.'" Id. at 882.

The government relied on only two things on this point. First is the warning on the forms that, as per Section III, should not be considered in this analysis. R. Doc. 99 at 16:23-17:12; 30:19-31:6. The second is not evidence but projecting what they consider "commonsense" onto Ledvina's subjective knowledge and belief.[8] Id. at 30:21-22. That Ledvina "ought to have known his use was unlawful would not suffice to convict him; he had to **actually know** his use was unlawful." Cook, 970 F.3d at 884 (emphasis kept).

The lawfully admitted evidence at trial lacked anything that actually put Ledvina on notice, such as previous interactions with law enforcement.[9] In fact, the stipulation lists an interaction where Ledvina invited an officer into his home who smelled the odor of marijuana coming from his residence but did not indicate in any way to Ledvina he was doing anything wrong; which would further lead him to believe its use is not unlawful. R. Doc. 52 at ¶3. Ledvina has never been even charged with a crime involving controlled substances prior to the instant case.

In convicting Ledvina the District Court relied on two things. One was

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8 See United States v. Parrilla Bonilla, 648 F.2d 1373, 1382-83 (1st Cir. 1981) ("there are obvious limits to the extent which 'common sense and experience' ... can substitute for proof in a criminal trial")

9 See, e.g., United States v. One Sig Sauer, Civ. Act. No. 18-4802, 2020 U.S. Dist. LEXIS 243589 (E.D. Pa. Dec. 28, 2020) (previous case alleged claimant was "an unlawful user of marijuana" which "put claimant on notice that his marijuana use was unlawful"); United States v. Dunnigan, No. 2:20-cr-00198, 2021 U.S. Dist. LEXIS 53453 (S.D. W.V. Mar. 22, 2021) (agent's statement to defendant that he was an unlawful user during previous encounter is necessary to prove knowledge under Rehaif)

the unlawfully admitted forms. R. Doc. 64 at 12, 16. The other was speculation and conjecture that text messages from Joint Exhibit 1 involved use of "coded language." Id. at 10-12.

The Court first erred in making this finding by violating the "principle of party presentation" and "adopting theories of a plaintiff's case that he does not advance." Ivey v. Audrain Cty., 968 F.3d 845, 851 (8th Cir. 2020) (citing United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020)). Nowhere does the theory of "coded language" appear in the government's briefs or argument at trial. The government only used this evidence to show Ledvina was involvod with the use of controlled substances. R. Doc. 99 at 24. The District Court abandoned its role of "neutral arbiter" in advancing this theory for the government when in "criminal cases, departures from the party presentation priciple have usually occurred 'to protect a pro se litigant's rights.'" Sineneng-Smith, 140 S. Ct. at 1579 (citation omitted).

Second, it is nothing more than speculation and conjecture. There was no testimony, expert or otherwise, attesting to the messages being code or their purpose. Nor was this stipulated to. The District Court substituted reliance on such evidence with projecting facts from inapposite cases totally outside the record at trial. R. Doc. 64 at 10-11. Such "speculation on the basis of evidence does not [make] a reasonable inference." United States v. Harris, 420 F.3d 467, 474 (5th Cir. 2005).

For there even to be a reasonable inference of "coded language" the messages would have needed to be "unintelligible to anyone who does not have the key."[10] The fact the District Court could discern it absent any

10 Black's Law Dictionary 11th Ed. (2019) definition for "coded communications"

testimony clarifying it demonstrates it wasn't code. This is such a terrible "code" in fact that this would be the poster child of an unreasonable inference. It is slang that has been part of the modern vernacular decades before Ledvina was even born.[11] Under the logic of the District Court a person using "booze" for alcohol or "squares" for cigarettes must be trying to hide what they are talking about because alcohol and tobacco are illegal to use--despite the fact they are not illegal to use. The District Court, put simply, strained to read something into it that just wasn't there.

For the sake of argument, lets assume that the messages being code is a reasonable inference. This is still at most "equally consistent" with innocence or the uncharged conduct," meaning "a conviction cannot stand." United States v. Boesen, 491 F.3d 852, 857 (8th Cir. 2007) (emphasis added).

The District Court found that the "coded language" could support guilty knowledge of either the unlawful "use" or "distribution of drugs." R. Doc. 64 at 12. It is at most equivocal as to which knowledge it shows. In other words, it is at most "proof of a general malevolence" which is "not sufficient in a case of this character." Fulbright, 91 F.2d at 213. "General malevolence is not enough if the specific knowledge required by the statute is lacking." Id. at 212. "Upon the record," even under the coded language theory, Ledvina's "actual knowledge with respect to" the unlawfulness of use "remains a matter of speculation and conjecture." Id. at 213.

Ledvina must know "use" is unlawful to be guilty of "the crime charged," not that distributing is unlawful. Kelton, 446 F.2d at 671 (emphasis added). The evidence under this theory is equivocal to either. It "fall[s] short of

11 See United States v. Brown, 584 F.2d 252, 265 (8th Cir. 1978) ("Blow is a frequent slang term for cocaine"); Lott v. United States, 218 F.2d 265, 677 n.3 (5th Cir. 1955) (referring to marijuana as "weed"); Record Museaum v. Lawrence Township, 481 F. Supp. 768, 770 (D. N.J. 1979) (referring to a piece of marijuana as "bud")

establishing ... that such sense of guilt was connected with knowledge that" use is unlawful. Fulbright, 91 F.2d at 213-14. It "may be sufficient to raise speculation," but "there is a critical line between suspicion of guilt and reasonable doubt." United States v. Hernandez, 301 F.3d 886, 893 (8th Cir. 2002).

Finally, even including the unlawfully admitted forms, there is still insufficient proof of subjective knowledge. The stipulation only shows that Ledvina represented he was not an unlawful user or addicted to a controlled substance. R. Doc. 52 at ¶6. It does not establish that he read the "warning." Absent any testimony or other evidence he read the warning, whether it actually put him on notice remains a matter of speculation. From the evidence, it very well could be that he filled in the form and simply signed it without ever reading the warning.

In the case of United States v. Bledsoe, this Court in reversing a false statement conviction held that "the issue of knowledge was extremely close" where the government's evidence consisted of testimony from the gun store clerk stating they had the defendant look at the form, that they believed he understood the form and that they read the question to him, and testimony from an agent and an exhibit showing prior convictions. 531 F.2d 888, 892 (8th Cir. 1976). In Ledvina's case, there was no such testimony regarding the purchase or prior arrests.

In the case of United States v. Carlson, the Court found the defendant not guilty of providing false information on the form because they entertained a reasonable doubt they read the question. No. 1:18-cr-00210-RBJ, 2018 U.S. Dist. LEXIS 130683 (D. Co. Aug. 3, 2018). The evidence showed the defendant was educated, articulate, filled the form out himself and had also filled out the form many times before. In the instant case, there is no evidence that

Ledvina ever read the warning on the illegally admitted forms and, like the defendant in Carlson, Ledvina could have easily answered the question without reading the warning.

Further, assuming he did read the warning, like the many well-respected jurists--and the government in Hernandez-Munoz, 718 Fed. Appx. at 512 n.1--cited in Section II(B)(1), Ledvina likely believes that use itself is not unlawful. Absolutely no evidence contradicts this and one cannot knowingly make a false representation when they believe it to be true. The warning on the form says the "use or possession" not "use and possession." That means if possession is unlawful but use is not, the warning remains a true statement. Thus, Ledvina never having heard of someone being arrested for merely using a controlled substance before, most likely believed using a controlled substance is not unlawful at the time the representation was made. The government produced absolutely no evidence to show otherwise. "It was the duty of the government to prove" this subjective belief, "and not the duty of" Ledvina to prove he didn't believe use is unlawful. Fulbright, 91 F.2d at 213.

Because "a conscientious mind would have to have entertained a reasonable doubt" that Ledvina subjectively believed using a controlled substance is unlawful, the conviction must be reversed. United States v. Ramos, 852 F.3d 747, 755 (8th Cir. 2017).

3. Knowledge of Information Required to Be Kept

As Ledvina argued in his trial brief (R. Doc. 57 at 12), the government had to show he knew the question he allegedly lied on is "information required to be kept by this chapter" to convict him of 18 U.S.C. § 924(a)(1)(A). This is because there is a "presumption that the mens rea 'knowing' applies to all subsequently listed elements in a statute." United States v. Maria-Brava, 56 F.4th 568, 572 (8th Cir. 2022). Because it "defines the behavior

that the statute calls a violation of Federal law," it is a substantive element. Torres v. Lynch, 578 U.S. 452, 457 (2016). Simply lying to someone is not normally treated as a crime--what separates this "otherwise innocent conduct" is that it pertains to "information required to be kept" by Chapter 44 of Title 18. Rehaif, 558 U.S. at 229.

The District Court erroneously held that because whether the representation is "information required to be kept" is a question of law, such knowledge is not an element of the offense. R. Doc. 64 at 14. However, this is a "'collateral' question of law" regarding knowledge of a substantive element just like knowledge of status in § 922(g). Rehaif, 558 U.S. at 234-35.

As such, because the trial record contains no evidence on this regard, the § 924(a)(1)(A) conviction must be reversed.

4. Conclusion

The government's evidence on Ledvina's subjective knowledge of what is considered a "user" under caselaw is non-existent. The lawfully admitted evidence regarding subjective knowledge of "use" being unlawful is at most equivocal with "innocence of the crime charged" and leaves the matter to speculation and conjecture. Kelton, 446 F.2d at 671. Even including the unlawfully admitted evidence, "a conscientious mind would have to have entertained a reasonable doubt." Ramos, 852 F.3d at 755. Thus, the conviction on both counts must be reversed as the District Court had a "duty to direct an acquittal." Kelton, 446 F.2d at 671.

V. The Forfeiture Was Contrary To Law

A. Standard of Review and Preservation of Error

Questions of statutory interpretation are reviewed de novo. See Rodriguez, 581 F.3d at 796.

Ledvina raised this issue in his Resistance to Forfeiture. R. Doc. 68.

The District Court ignored the argument and entered a preliminary order of forfeiture. R. Doc. 71. Error was preserved.

B. The Forfeiture Was Time Barred

In the Forfeiture Bill of Particulars (R. Doc. 46), the government relied on 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) for authority to forfeit the firearms and ammunition. Additionally, the request for hearing motion by the government referred not only to § 924(d) but also F. R. Crim. P. 32.2(B)(1)(A) for such authority. R. Doc. 65.

Section 2461(c) relies on the authority of another statute to have any effect:

> "If a person is charged in a criminal case with a violation of an Act of Congress for which civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure."

The government citing § 924(d) as the authorization means the forfeiture is subject to any limitation in the statute. There are two important limitations that apply in this case. First, § 924(d)(1) states:

> "Provided, that upon acquittal of the owner or possessor, or dismissal of charges against him ... the seized or relinquished firearms or ammunition shall be returned forthwith."

This means that upon success of the issues relating to the convictions in this case the property must be returned, so the forfeiture should have been stayed pending appeal.

Second, § 924(d)(1) also explicitly states:

> "Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within 120 days of such seizure."

That time ran out 120 days after August 11, 2022 or December 9, 2022. The proceeding for the forfeiture--the superseding indictment (R. Doc. 32)--was not commenced until July 25, 2023, long after this deadline.

Other courts dismissed forfeitures for not complying with this rule: United States v. 14 Various Firearms, 899 F. Supp. 875 (E.D. Va. 1995) (dismissing judicial forfeiture because it did not commence within 120 days despite notice of administrative forfeiture within this period). The Court cited the plain text of § 924(d)(1) and it's legislative history. In United States v. 52 Firearms, the Court reached the same conclusion and added to its finding that in the 11th Circuit "forfeitures are not favored." 362 F. Supp. 2d 1308, 1321 (M.D. Fl. 2005) (citing United States v. One 1936 Model Ford, 307 U.S. 219, 226 (1939)). The 11th Circuit even cited 52 Firearms favorable recently by holding "it is not the role of the judiciary to change the plain meaning of a statute, or to rebalance public policy weighed by Congress." Bucks v. Fewless, 886 F.3d 1088, 1092 n.3 (11th Cir. 2018) (citing 52 Firearms, 362 F. Supp. 2d at 1315)).

This Court also shares this view on forfeitures. "Forfeitures are disfavored and should only be enforced within both the letter and the spirit of the law." Mohammad v. DEA, 92 F.3d 648, 654 (8th Cir. 1996); see also United States v. 7215 Longboat Drive, 750 F.3d 968 (8th Cir. 2014) (construing relevant procedural law in favor of claimants).

Thus, consistent with § 924(d)(1), the government is time barred from forfeiting the firearms and ammunition and the Order of Forfeiture (R. Doc. 71; R. Doc. 96) must be vacated. Even if Ledvina does not succeed in reversing his convictions, that he would still be a felon as a reason to let the forfeiture stand is precluded by Supreme Court precedent. See Henderson v. United States, 575 U.S. 622 (2015).

VI. Section 922(g)(3) Exceeds the Scope of the Commerce Clause and Violates the 10th Amendment

A. Standard of Review and Preservation of Error

The constitutionality of a statute is reviewed de novo. See Rodriguez, 581 F.3d at 796.

Prior to the indictment, the ATF tried to administratively forfeit the firearms and ammunition. In the Matter of the Search and Seizure Warrants, No. 1:22-mj-00162-CJW-MAR-1, Doc. 6-1. (N.D. Iowa) (hereafter Search Warrants).

Ledvina challenged the legality of the forfeiture in a pre-indictment Motion for Return of Property pursuant to Fed. R. Crim. P. 41(g). Search Warrants, Doc. 3. In it Ledvina raised, among others, the issue that § 922(g)(3) exceeds the scope of the Commerce Clause and violates the 10th Amendment. Id. at 42-45, 66. It was further argued in Ledvina's Amended Reply to the Government's Resistance to Return of Property. Search Warrants, Doc. 21 at 37-39.

The District Court granted in part and denied in part Ledvina's motion, in so doing denied the constitutional challenges to § 922(g)(3). Search Warrants, Doc. 28. Error was preserved.

B. Section 922(g)(3) Exceeds Congress's Enumerated Powers

Ledvina acknowledges that this argument appears to be precluded by this Court's precedent. See United States v. Bates, 77 F.3d 1101 (8th Cir. 1995). He raises the issue here to preserve it for further review. See United States v. Rahimi, 144 S. Ct. 1889, 1940 n.6 (2024) (Thomas, J., dissenting) ("The majority correctly declines to consider Rahimi's Commerce Clause challenge because he did not raise it below ... That said, I doubt that § 922(g)(8) is a proper exercise of Congress's power under the Commerce Clause.") (citing Lopez, 514 U.S. at 585 (Thomas, J., concurring)).

As understood by those who enumerated it, § 922(g)(3) exceeds the scope of the Commerce Clause. The mere possession of a firearm is an intrastate

activity that by no means is a form of commerce. Lopez, 514 U.S. at 561.

The Framers included the Clause to prevent discriminatory trade practices between the states that had occurred under the Articles of Confederation. See Federalist Papers No. 42. It "grew out of the abuse of the power by the importing States, in taxing the non-importing; and was intended as a negative & preventative provision [against] injustice among the States themselves; rather than as a power to be used for the positive purposes of the General [Government]." James Madison to Joseph C. Cabell, 13 February 1829. In other words, it was not understood as a catch-all to give the federal government nearly unfettered police powers by those who enumerated it.

This remained the understanding until relatively recent revisionism. "[B]efore the New Deal Revolution, Congress was powerless to regulate gun possession and use." Range v. Garland, 69 F.4th 96, 108 (3rd Cir. 2023) (en banc) (Porter, J., concurring). As the highly influential founding era constitutional scholar put it: "No clause in the constitution could by any rule of construction be conceived to give to Congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature." William Rawle, A View of the Constitution of the United States of America 121-22 (1825). "The landscape changed in 1937, when the Supreme Court adopted an expansive conception of the Commerce Clause." Range, 69 F.4th at 108 (Porter, J., concurring) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). See Nicholas J. Johnson, The Power Side of the Second Amendment Question, 70 Hastings L. J. 717, 750-58 (2019).

This revisionism began to be scaled back by the holding in Lopez. 514 U.S. at 561. Lately, the Court has made clear that constitutional provisions are "enshrined with the scope they were understood to have when the people adopted them."

Bruen, 142 S. Ct. at 2119. "Historical evidence that long predates or post dates" the time of adoption does not "illuminate the scope" of the Clause. Id.

Thus, because § 922(g)(3) is inconsistent with this nation's history and tradition of regulation under the Commerce Clause, it unconstitutionally exceeds its scope.

The powers given to the federal government were "few and defined," not many and undefined. Federalist Papers, No. 45.

Further, the 10th Amendment declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This reflects "the vertical separation of powers, more commonly known as federalism." Voigt v. Coyote Creek Mining Co., 980 F.3d 1191, 1204 (8th Cir. 2020) (Strass, J., dissenting), overruled 999 F.3d 555 (8th Cir. 2021).

"A criminal act committed wholly within a State cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress." Bond, 572 U.S. at 854 (quotes and citation omitted). "For nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally." Id. (quotes and citation omitted). To "permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines" would be "[s]uch an expansion of federal authority" as to "trespass on state police powers." Alderman v. United States, 178 L. Ed. 2d 799, 802 (2011) (Thomas, J., dissenting from denial of cert.).

Thus, because § 922(g)(3) exceeds Congress's authority under the Commerce Clause it is an unconstitutional violation of the 10th Amendment. Therefore, any indictment under it must be dismissed and the statute must be dismissed and the statute must be treated as void in deciding any further legal questions

consistent with Section I(C). Any seized property that rightfully belongs to Ledvina must be returned.

CONCLUSION AND REQUESTED RELIEF

For the above stated reasons, Appellant Alexander Wesley Ledvina respectfully requests the Court to reverse his conviction, sentence and the forfeiture and to remand to the District Court to either enter a judgment of acquittal or dismiss the case.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 7, 2025, I, Alexander W. Ledvina, Defendant-Appellant, placed the foregoing Brief in the prison mailbox addressed to the Clerk of Court for the United States Court of Appeals for the Eighth Circuit for filing, which will send notice to all parties separately represented or proceeding pro se, including AUSA Adam Vander Stoep, counsel for the United States. As per Local Rule 28A(c) such notice will constitute service of Brief on registered users.

Alex Ledvina

Alexander Ledvina

CERTIFICATE OF COMPLIANCE

The undersigned Appellant certifies that this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this Brief contains approximately 1255 lines of text, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f). 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 monospaced typeface using a typewriter in Courier 10 font.

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