IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ELESHIA OWENS, Defendant.	No. 23-CR-22-CJW-MAR **ORDER**

I. INTRODUCTION

This matter is before the Court on defendant's Motion to Dismiss. (Doc. 16). The government filed a timely resistance. (Doc. 18). On May 11, 2023, the Court presided over a hearing on the motion at defendant's request. (Doc. 22). For the following reasons, the Court **denies in part and holds in abeyance in part** defendant's motion.

II. RELEVANT BACKGROUND

On March 22, 2023, a grand jury charged defendant with two counts of possession of a firearm by an unlawful drug user in violation of Title 18, United States Code, Section 922(g)(3). (Doc. 3). The first count alleges defendant possessed a Glock handgun on November 9, 2021, as an unlawful user of marijuana. (*Id.*, at 1). Count 2 alleges defendant possessed another Glock handgun on December 8, 2021, as an unlawful user of marijuana. (*Id.*, at 2).

III. DISCUSSION

Defendant advances three theories for why she asserts the charges against her are unconstitutional. First, she argues that the charges violate the Second Amendment right to bear arms, particularly in light of the Supreme Court's recent decision in *N.Y. State*

Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022). (Doc. 16-1, at 2-11). Defendant also argues that Section 922(g)(3) is unconstitutionally vague on its face as to the meaning of the words "user" and "addict." (*Id.*, at 11-14). Last, defendant argues that Section 922(g)(3) is unconstitutional as applied to her because the statute would not have put her on notice that the conduct she actually engaged in was illegal. (*Id.*, at 14-15). The Court will address all three grounds.

A. Whether Section 922(g)(3) Violates the Second Amendment

The Court finds that Section 922(g)(3) does not violate the Second Amendment and denies defendant's motion to dismiss on that ground. In arriving at this conclusion, the Court first finds that Section 922(g)(3) implicates conduct protected by the Second Amendment. Second, the Court concludes that Section 922(g)(3) is consistent with the Nation's traditional regulation of possession of firearms by a criminal posing a danger to society.

1. Section 922(g)(3) Implicates the Second Amendment

The Second Amendment to the United States Constitution provides "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Title 18, United States Code, Section 922(g)(3), however, provides that "[i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) . . . to . . . possess in or affecting commerce, any firearm or ammunition . . .." The question here is whether Section 922(g)(3) unconstitutionally infringes upon defendant's right to keep and bear arms guaranteed to persons under the Second Amendment.

In *Bruen*, the United States Supreme Court explained that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating

that it is consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2129-30. Only after the government makes that showing "may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* at 2130 (internal quotation marks omitted). In *Bruen*, the United States Supreme Court held unconstitutional a State of New York's penal code provision making it a crime to possess a firearm outside the home without a license, when licensing required applicants to satisfy a "proper cause" for possessing a firearm by "demonstrat[ing] a special need for self-protection distinguishable from that of the general community." 142 S. Ct. at 2117 (second quotation omitted). The Supreme Court determined that all lower courts had erred in applying means-end scrutiny of statutes regulating firearms, finding that statutes regulating conduct protected by the Second Amendment are presumptively unconstitutional unless the government can show that "it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. Because the State of New York only issued public-carry licenses when an applicant demonstrated a special need for self-defense, the *Bruen* Court found "the State's licensing regime violates the Constitution." *Id.* at 2122. "*Bruen* transformed and left uncharted much of the legal landscape" of Second Amendment jurisprudence. *United States v. Charles*, 22-CR-00154, 2022 WL 4913900, at *1 (W.D. Tex. Oct. 3, 2022).

Under *Bruen*, the threshold question a court must address is whether the statute in question regulates conduct protected by the Second Amendment. Here, Section 922(g)(3) criminalizes possession of a firearm, which is conduct expressly protected by the Second Amendment. The text of the Second Amendment does not qualify who may possess firearms, but rather uses the word "people." Thus, as a textual matter, the plain reading of the Second Amendment covers defendant who is a person under the Constitution. *See United States v. Perez-Gallan*, 22-CR-00427-DC, 2022 WL 16858516, at *8-9 (W.D. Tex. Nov. 10, 2022) (finding the Second Amendment applies to members of the political

community and is not limited to law-abiding citizens). Thus, the Court answers the threshold question in the affirmative.

2. Section 922(g)(3) is Consistent with the Nation's Tradition of Firearm Regulation

Having found that Section 922(g)(3) implicates conduct protected by the Second Amendment, the next question is whether it is consistent with the Nation's historical tradition of firearm regulation. The second prong of *Bruen* requires the Court to determine "if there is a history and tradition of keeping guns from those engaged in criminal conduct"; if so, then the law is constitutional "whether the Second Amendment right belongs to all Americans or just to ordinary, law-abiding citizens." *Fried v. Garland*, Case No. 4:22-cv-164-AW-MAF, 2022 WL 16731233, at *5 (N.D. Fla. Nov. 4, 2022) (quoting *Heller*, 554 U.S. at 581; *Bruen*, 142 S. Ct. at 2122) (internal quotation marks and citations omitted).

The Supreme Court's holding in *Bruen* did not overturn *District of Columbia v. Heller*, in which the Court recognized the importance of "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. 570, 627 (2008) (citations omitted). In fact, the *Bruen* Court expressly stated that its opinion was "consistent with *Heller* and *McDonald [v. City of Chicago*, 561 U.S. 742 (2010)]." 142 S. Ct at 2122. As in *Heller* and *McDonald*, the issue in *Bruen* concerned "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. The *Bruen* Court noted that it was undisputed that the petitioners were "two ordinary, law-abiding, adult citizens" who are "part of 'the people' whom the Second Amendment protects." *Id.* at 2134. In the first paragraph of the *Bruen* opinion, the Court framed the issue as follows:

> In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 561 U.S. 742 (2010), we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding

> citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald*, that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.

Id. at 2122 (parallel citations omitted). In the concluding paragraph of the majority opinion, the Court repeated that the right to bear and keep arms belonged to "law-abiding citizens with ordinary self-defense needs." *Id.* at 2156.

Thus, it is abundantly clear that the *Bruen* Court did not disturb the conclusions in *Heller* and *McDonald* in which the Justices made it plain that it left undisturbed government regulations prohibiting felons from possessing firearms. *Id.* at 2162 (Kavanaugh, J., concurring). It follows that, since *Bruen*, lower courts have consistently held as constitutional Section 922(g)(1) which makes it an offense for felons to possess firearms. *See United States v. Price*, No. 22-cr-00097, 2022 WL 6968457, at *8 (S.D. W.Va. Oct. 12, 2022) (collecting cases). The broader question the Supreme Court left open is the extent to which statutes prohibiting other categories of people from possessing firearms is supported by the historic regulation of firearm possession.

In *Heller*, the Supreme Court emphasized that despite its holding that the Second Amendment conferred an individual right to bear arms, it was not undertaking "an exhaustive historical analysis . . . of the full scope of the Second Amendment, [and that] nothing in our opinion should be taken to cast doubt on longstanding 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*, 554 U.S. at 626-27. The *Heller* Court explained: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." 554 U.S. at 627

n.26. Later, in *McDonald v. Chicago*, 561 U.S. 742, 785-87 (2010), the Supreme Court reaffirmed the sentiment that *Heller* was not meant to create doubt about the regulations that prohibited firearm possession by certain groups of people or in certain places.

After *Heller* but prior to *Bruen*, the Eighth Circuit Court of Appeals held that Section 922(g)(3) was a lawful exception to the Second Amendment—an exception consistent with the historical understanding of the amendment's protections. In *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010), the Eighth Circuit rejected a facial constitutional challenge to Section 922(g)(3). The Eighth Circuit explained:

> Nothing in Seay's argument convinces us that we should depart company from every other court to examine § 922(g)(3) following *Heller*. Further, § 922(g)(3) has the same historical pedigree as other portions of § 922(g) which are repeatedly upheld by numerous courts since *Heller*. *See* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. Moreover, in passing § 922(g)(3), Congress expressed its intention to "keep firearms out of the possession of drug abusers, a dangerous class of individuals." *United States v. Cheeseman*, 600 F.3d 270, 280 (3d Cir. 2010), *pet. for cert. filed*, 78 U.S.L.W. 3731 (U.S. June 1, 2010) (No. 09-1470). As such, we find that § 922(g)(3) is the type of 'longstanding prohibition[ ] on the possession of firearms' that *Heller* declared presumptively lawful. *See* 128 S. Ct. at 2816–17. Accordingly, we reject Seay's facial challenge to § 922(g)(1).

Id. (alteration in original).

To be sure, the *Seay* Court did not conduct the type of historic analysis the Supreme Court contemplated in *Bruen*. Nevertheless, as the Honorable Stephen H. Locher, United States District Court Judge for the Southern District of Iowa, reasoned:

> All the same, nothing in *Bruen* expressly repudiates the holding of *Seay*. To the contrary, in a concurring opinion in *Bruen*, Justice Kavanaugh (joined by Chief Justice Roberts) reiterated the earlier admonitions of Justices Scalia (in *Heller*) and Alito (in *McDonald*) that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . ." *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring (quoting *Heller*, 554 U.S. at 626, 128 S.Ct. 2783)). As *Seay* relied heavily on the same "longstanding

> prohibition" language in affirming the facial constitutionality of § 922(g)(3), *see* 620 F.3d at 925, it is difficult for this Court to conclude *Seay* is no longer good law. Instead, the proper course is to treat *Seay* as binding and "leav[e] to [the Eighth Circuit] the prerogative of overruling its own decisions." *United States v. Coonce*, 932 F.3d 623, 641 (8th Cir. 2019) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)); *see also United States v. Wendt*, --- F. Supp. 3d ----, ----, 2023 WL 166461, at *5 (S.D. Iowa Jan. 11, 2023) (declining to interpret *Bruen* as having invalidated firearm restrictions under the Bail Reform Act absent "much clearer guidance from higher courts").

United States v. Le, No. 4:23-cr-00014-SHL-HCA, 2023 WL 3016297, at *2 (S.D. Iowa April 11, 2023).

Here, the Court agrees with Judge Locher's reasoning. Absent the Eighth Circuit itself finding that *Bruen* overturned its holding in *Seay*, this Court must treat *Seay* as binding precedent. For that reason, the Court would deny defendant's motion to dismiss on the ground that Section 922(g)(3) violates the Second Amendment. *See also Gilpin v. United States*, Civil No. 22-04158-CV-C-RK-P, 2023 WL 387049, at *4 (W.D. Mo. Jan. 3, 2023) (rejecting a post-*Bruen* challenge to Section 922(g)(3), finding that *Bruen* did not overturn binding precedent in *Seay*).

Regardless, even if the Court did not find *Seay* binding, under the more robust historic analysis demanded by *Bruen*, the Court is persuaded that Section 922(g)(3) withstands a constitutional attack. In *United States v. Bena*, 664 F.3d 1180, 1183-84 (8th Cir. 2011), the Eighth Circuit conducted a more thorough historic analysis of the regulation of firearms as it relates to dangerous people during the Founding era in rejecting a constitutional challenge to Section 922(g)(8), which criminalizes firearm possession by persons subject to a court order of protection for domestic abuse. There, the Eighth Circuit concluded there was "a common-law tradition that permits restrictions directed at citizens who are not law-abiding and responsible." 664 F.3d at 1183.

Further, as Justice Barrett, who was then sitting as a judge on the Seventh Circuit Court of Appeals, noted, there is ample evidence from the Founding era that firearms were restricted from those who were deemed dangerous to society. *See Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) ("The historical evidence does, however, support a different proposition: that the legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety. This is a category simultaneously broader and narrower than 'felons'—it includes dangerous people who have not been convicted of felonies but not felons lacking indicia of dangerousness."). Congress considered drug abusers to be a "dangerous class of individuals." *Seay*, 620 F.3d at 925. Congress made it illegal for unlawful drug users to possess firearms for the common sense and obvious reason that someone using illegal drugs, in possession of a firearm, poses a real danger to the community. *See United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) ("[H]abitual drug abusers, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms."). It follows, then, that barring unlawful drug users who pose a danger to society is consistent with the history of firearm regulation at the time the Second Amendment was adopted.

This Court is not alone in reaching the conclusion that Section 922(g)(3) does not violate the Second Amendment. Numerous other district courts have reaffirmed the conclusion that Section 922(g)(3) is constitutional after *Bruen*. *See, e.g.*, *Le*, 2023 WL 3016297, at *5 (rejecting a post-*Bruen* constitutional challenge to Section 922(g)(3)); *United States v. Posey*, Case No. 2:22-CR-83 JD, 2023 WL 1869095 (N.D. Ind. Feb. 9, 2023) (denying as applied and facial post-*Bruen* challenge to Section 922(g)(3)); *United States v. Lewis*, Case No. CR-22-368-F, Case No. CR-22-395-F, 2023 WL 187582, at *4 (W.D. Okla. Jan. 13, 2023) (rejecting a post-*Bruen* constitutional challenge to Section 922(g)(3)); *United States v. Sanchez*, W-21-CR-00213-ADA, 2022 WL 17815116, at *3

(W.D. Tex. Dec. 19, 2022) (holding that Section 922(g)(3) is "consistent with this Nation's historical tradition of firearm regulation"); *Fried*, 2022 WL 16731233, at *7 ("At bottom, the historical tradition of keeping guns from those the government fairly views as dangerous—like alcoholics and the mentally ill—is sufficiently analogous to modern laws keeping guns from habitual users of controlled substances . . .. The challenged laws are consistent with the history and tradition of this Nations' [sic] firearm regulation."); *United States v. Seiwert*, Case No. 20 CR 443, 2022 WL 4534605, at *2 (N.D. Ill. Sept. 28, 2022) (holding that Section "922(g)(3) is relevantly similar to regulations aimed at preventing dangerous or untrustworthy persons from possessing and using firearms, such as individuals convicted of felonies or suffering from mental illness"); *United States v. Daniels*, 610 F.Supp.3d 892, 897 (S.D. Miss. 2022) (finding Section 922(g)(3) constitutional after determining that "analogous statutes which purport to disarm persons considered a risk to society—whether felons or alcoholics—were known to the American legal tradition").

True, some other district courts have found Section 922(g)(3) violates the Second Amendment. *See, e.g.*, *United States v. Connelly*, 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). The Court has reviewed these non-binding decisions and, with respect, simply disagrees with the narrow view these courts took of the historic precedent of regulating firearm possession by dangerous and unlawful citizenry. The Court is persuaded that Section 922(g)(3) is a constitutional restriction consistent with historical tradition.

Defendant urges the Court to consider the recent trend toward legalization of marijuana and the executive branch's pardoning of some marijuana offenders. (Doc. 16-1, at 7-11). The *Connelly* and *Harrison* courts were receptive to this argument, but this Court is not. First, it is inconsistent with the *Bruen* focus on history during the

Founding era, not current views of what should and should not be illegal. Second, Section 922(g)(3) criminalizes possession of firearms by unlawful drug users generally, not marijuana users specifically. The Court cannot find the statute itself violates the Second Amendment because the recent trend is toward legalization of one of the many drugs that come under the scope of this statute. If the federal government legalizes the recreational use of marijuana someday, then use of marijuana will not prohibit firearm ownership. Until and unless that happens, though, Section 922(g)(3) does not distinguish between the types of illegal drugs used.

Thus, the Court denies defendant's motion to dismiss, finding Section 922(g)(3) does not violate the Second Amendment.

B. Unconstitutionality As Applied Challenge

Second, defendant argues that Section 922(g)(3) is unconstitutionally vague as applied to her because she asserts the evidence will show only that she was in constructive possession of a firearm and marijuana. (Doc. 16-1, at 14-15). Defendant acknowledges that her as-applied challenge must await presentation of evidence at trial. (*Id.*, at 15). She is correct. *See United States v. Turner*, 842 F.3d 602, 605 (8th Cir. 2016) (finding an as-applied challenge must await trial); *United States v. Stupka*, 418 F. Supp. 3d 402, 405 (N.D. Iowa 2019) (same).

Thus, the Court holds in abeyance its ruling on defendant's motion to dismiss on this ground.

C. Unconstitutionally Vague Facial Challenge

Defendant alleges Section 922(g)(3) is unconstitutionally vague because the terms "user" and "addict" are vague. (Doc. 16-1, at 11-14). Defendant suggests that she must know that her conduct made her a user or addict and, in defendant's somewhat tortured interpretation of the statute, it was possible that a person could be confused in determining whether her use was serious enough to qualify as a user covered by the statute. (*Id.*).

Until recently, a challenger raising "[a] facial challenge to a legislative Act" was required to "establish that no set of circumstances exists under which the Act would be valid." *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987). But in *Johnson v. United States*, the Supreme Court clarified that a vague criminal statute is not constitutional "merely because there is some conduct that falls within the provision's grasp." 576 U.S. 591, 602 (2015). Then, in *United States v. Bramer*, the Eighth Circuit Court of Appeals further clarified that a challenger raising a facial challenge must "show that the statute is vague as applied to h[er] particular conduct." 832 F.3d 908, 909 (8th Cir. 2016) (finding the defendant, who signed plea agreement admitting guilt to Section 922(g)(3) violation, could not show vagueness when he argued Section 922(g)(3) was facially unconstitutional based on the allegedly vague terms "unlawful user" and "addicted to").

The cumulative effect of *Johnson* and *Bramer* is somewhat confusing. Reading these decisions together, it is difficult to tell when and why a defendant would argue that a statute is unconstitutional on its face as opposed to unconstitutional as applied to her, specifically. *See Stupka*, 418 F.Supp.3d at 407 ("If a defendant is able to show that a law is unconstitutionally vague as applied—as required by *Bramer*—there would be no need for that defendant to show, or a court to decide, that the law is unconstitutional on its face. But if a defendant could not show that the law is unconstitutional as applied, then he or she would always be prohibited from challenging a law as being void for vagueness on its face."). It is also unclear whether the Court should address defendant's facial challenge now. *See id.*, at 408 ("What distinguishes the cases in which a facial challenge is appropriate without regard to an as-applied challenge from those cases in which a defendant may make only an as-applied challenge? If there is a discernible and articulable distinction, on which side does this case fall? If Stupka's facial challenge is appropriate without regard to an as-applied challenge, then *Bramer* is not controlling and

the facial challenge should be addressed now. If Stupka must show that the law is unconstitutional as applied, then *Bramer* controls and any facial review must await the results of the pending as-applied challenge.").

Nevertheless, this Court has previously rejected a constitutional challenge to Section 922(g)(3) on grounds of facial vagueness under circumstances similar to those presented here. *See Stupka*, 418 F. Supp. 3d at 412-13 (denying motion to dismiss indictment on Section 922(g)(3) charge as facially unconstitutional); *see also United States v. Gantt*, Case No. 20-cr-2020-CJW, 2020 WL 6821020, at *13-14 (N.D. Iowa, Sept. 2, 2020), *report and recommendation adopted*, 2020 WL 5653983 (N.D. Iowa Sept. 23, 2020). (adopting reasoning in *Stupka* and denying motion to dismiss indictment on Section 922(g)(3) charge as facially unconstitutional).

In *Stupka*, the Court found there were certain situations in which facial challenges were permissible "regardless of whether the law would be found unconstitutional as applied"; specifically, when the law infringes on fundamental rights and when the law lacks sufficiently clear guidelines or is vague in a manner that poses a high risk of arbitrary enforcement. 418 F. Supp. 3d at 411-12. The Court then found the defendant's arguments did not warrant a facial review. First, the Court found Section 922(g)(3) did not infringe upon a fundamental right, because "possession of firearms by certain parties, such as felons, has been found to be outside the Constitution's protections." *Id.* at 412. Second, the Court found the defendant argued the language of Section 922(g)(3) was imprecise, not that its enforcement was arbitrary, and did not attack the statute's process. *Id.* Thus, the Court found a facial challenge was not appropriate in *Stupka*. *Id.* at 413.

The circumstances here are very similar to those in *Stupka*. Again, Section 922(g)(3) does not infringe upon a fundamental right, and defendant's argument focuses on allegedly arbitrary language, not process or arbitrary enforcement. (Doc. 16-1, at 13-14) ("[O]n one hand, [Section 922(g)(3)] prohibits an 'addict' from possessing a firearm,

and on the other hand, [it] also prohibits a 'user' from possessing a firearm."). Thus, for the reasons explained in *Stupka*, the Court again rejects a facial challenge to Section 922(g)(3).

Thus, the Court denies defendant's motion to dismiss on this ground.

IV. CONCLUSION

For the reasons stated, defendant's motion to dismiss is **denied** as to the grounds that Section 922(g)(3) violates the Second Amendment and that it is unconstitutional because it is facially vague. The Court **holds in abeyance** its ruling on defendant's motion to dismiss on the ground that the statute is unconstitutionally vague as applied to her.

IT IS SO ORDERED this 22nd day of May, 2023.

C.J. Williams
United States District Judge
Northern District of Iowa