APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 20-4126

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER PAUL HASSON,

Defendant-Appellant.

———————

Appeal from the United States District Court for the District of Maryland, at Greenbelt. George J. Hazel, District Judge. (8:19-cr-00096-GJH-1)

———————

Argued: March 12, 2021 Decided: February 22, 2022

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Before MOTZ, DIAZ, and RUSHING, Circuit Judges.

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Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Motz and Judge Diaz joined.

ARGUED: Cullen Oakes Macbeth, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greenbelt, Maryland, for Appellant. Thomas Patrick Windom, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee. ON BRIEF: James Wyda, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Baltimore, Maryland, for Appellant. Robert K. Hur, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

RUSHING, Circuit Judge:

After unsuccessfully challenging the statute as unconstitutionally vague, Christopher Hasson pleaded guilty to violating 18 U.S.C. § 922(g)(3) by possessing firearms as someone "who is an unlawful user of or addicted to any controlled substance," in addition to three related counts. At sentencing, the district court increased Hasson's Guidelines range pursuant to U.S.S.G. § 3A1.4 upon concluding that his offense was intended to promote a federal crime of terrorism, and the court sentenced him to 160 months' imprisonment. On appeal, Hasson contends that Section 922(g)(3) is facially vague. He also argues that Section 3A1.4 cannot apply because he was not convicted of a federal crime of terrorism and,

in any event, the district court clearly erred in applying the provision. We affirm his conviction and sentence.[1]

I.

A.

In February 2019, federal authorities arrested Hasson as he arrived for work at the United States Coast Guard Headquarters in Washington, D.C. At the time, Hasson was a lieutenant in the Coast Guard. The sworn criminal complaint charged Hasson with unlawfully possessing Tramadol, an opioid pain reliever and Schedule IV controlled substance, and possessing firearms and ammunition as an unlawful user or addict of a controlled substance. *See* 21 U.S.C. § 844(a); 18 U.S.C. § 922(g)(3). Arresting agents found 196 Tramadol pills in Hasson's backpack and another 106 in his work desk. A simultaneous search of Hasson's residence uncovered another 122 Tramadol pills; 15 firearms; an unregistered, assembled firearm silencer; an unregistered, disassembled firearm silencer; and hundreds of rounds of ammunition. A blood sample drawn from Hasson that day showed Tramadol in his bloodstream.

In a motion to detain Hasson pending trial, the Government claimed the charges were "the proverbial tip of the iceberg." J.A. 25. According to the Government, its investigation revealed that Hasson was "a do-

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[1] We also deny Hasson's motion to supplement his claims on appeal, which he filed three months after oral argument. *See United States v. Leeson*, 453 F.3d 631, 638 n.4 (4th Cir. 2006) (finding argument waived when it was available to the defendant at the time of his opening brief yet was raised for the first time in a notice of supplemental authority and was "wholly different" than the argument advanced in the opening brief).

mestic terrorist, bent on committing acts dangerous to human life." J.A. 25.

The Government claimed that a draft email dated June 2, 2017—which it calls a "manifesto"—provided insight into Hasson's worldview. In it, Hasson wrote that he was "dreaming of a way to kill almost every last person on the earth" and contemplated "biological attacks followed by attack on food supply" and "[i]nstitut[ing] a bombing/sniper campaign." J.A. 879. Hasson continued:

> I don't think I can cause complete destruction on my own, However if I could enlist the unwitting help of another power/country would be best. Who and how to provoke???
>
> . . . .
>
> Liberalist/globalist ideology is destroying traditional peoples esp white. No way to counteract without violence. It should push for more crack down bringing more people to our side. Much blood will have to be spilled to get whitey off the couch. For some no amount of blood will be enough. They will die as will the traitors who actively work toward our demise. Looking to Russia with hopeful eyes or any land that despises the west's liberalism. . . .
>
> Need to come off TDL, clear my head. Read and get education have to move to friendly area and start to organize. Get leadership within the community, sheriff, city manager, mayor, lawyer? Not sure but start now. Be ready.
>
> Stockpile 5 locations. Pack, food, GN, supporos ao, clothing, gear. Comb/exp for defense. Extras

> mortar recoilless, learn basic chemistry, start small.
>
> By land put 3 homes and multiple hides. Have way to get out and start hitting back. Use lines of drift.
>
> Have to take serious look at appropriate individual targets, to bring greatest impact. Professors, DR's, Politian's, Judges, leftists in general.
>
> Look up tactics used during Ukrainian civil war. During unrest target both sides to increase tension. In other words provoke gov/police to over react which should help to escalate violence. BLM protests or other left crap would be ideal to incite to violence.
>
> Gun rights people will never rise, need religious to stand up. Please send me your violence that I may unleash it onto their heads. Guide my hate to make a lasting impression on this world. So be it. I don't know if there truly is a "conspiracy" of ((((People)))) out to destroy me and mine, but there is an attack none the less. For that reason I will strike, I can't just strike to wound I must find a way to deliver a blow that cannot be shaken off. Maybe many blows that will cause the needed turmoil.
>
> . . . .

J.A. 879.

Hasson penned similar sentiments in a September 2017 letter to Harold Covington, founder of a group advocating for a white ethnostate in the Pacific Northwest. Hasson identified himself as "a long time White Nationalist, having been a skinhead 30 plus years ago before

my time in the military." J.A. 874. Hasson voiced dissatisfaction with "mass protest or wearing uniforms marching around provoking people with swastikas," stating instead, "I was and am a man of action you cannot change minds protesting like that. However you can make change with a little focused violence." J.A. 874. Hasson hoped to "open a dialogue" with Covington "to coordinate efforts" in establishing a white homeland. J.A. 874.

Hasson's own writings were not the only ones to raise flags. He compiled the manifestos of mass murderers and terrorists the likes of Ted Kaczynski, Eric Rudolph, and Anders Breivik. He sent himself a Home Workshop Explosives handbook, The Anarchist Cookbook, a guide on how to make the plastic explosive Semtex, the U.S. Army Improvised Munitions Handbook, and The Terrorist's Handbook, which discussed methods of buying, preparing, and detonating various explosive substances.

Hasson's internet search history showed a similar preoccupation with violence, white nationalism, and anti-government views. He routinely sought information about groups harboring white-supremacist, militant, and anti-government beliefs. He queried information about explosives, including homemade incendiaries, plastic explosives, ricin, homemade biological weapons, explosively formed penetrators, and shaped charges, including discussions about materials for making the latter two devices. He viewed hundreds of webpages related to firearms, ammunition, and firearms accessories.

Hasson also researched the movements and whereabouts of political figures. He searched for "where do senators live dc," "do senators have ss protection," "how often are senators in dc," "how do senators and con-

gressman get around dc," "are supreme court justices protected," "where does justice kagan live," and "where does Sonia Sotomayor live." S.J.A. 454, 1048. After viewing a headline in which Joe Scarborough (television host and former U.S. Congressman) called former President Trump "the worst ever," Hasson spent several minutes reviewing Scarborough's Wikipedia page before searching "where is morning joe filmed." S.J.A. 1077–1078. His searching led him to the address for Scarborough's home, which Hasson then viewed in Google Maps.

In the Government's telling, Hasson's inquiries about specific individuals drew inspiration from Breivik's manifesto. On January 3, 2019, Hasson searched within the manifesto (saved on his Coast Guard computer) for "category A." Breivik classifies traitors as Category A, B, or C as a means of identifying priority targets. "Category A" includes influential and high-profile individuals, including political, media, cultural, and industry leaders. Two weeks later, Hasson spent three hours compiling a list of prominent politicians, activists, political organizations, and media personalities. The list contained 22 entries. That same day, Hasson searched the Internet for "best place in dc to see congress people" and "where in dc to [sic] congress live." S.J.A. 1089.

Hasson allegedly followed Breivik's manifesto in other ways too. He visited an internet forum on energetic materials and reviewed discussions on manufacturing explosives. He searched the manifesto for "steroids" and reviewed a section encouraging assailants to use them in preparation for attacks. In the same spreadsheet containing his list of individuals and organizations, Hasson devised a possible steroid cycle. Agents searching Hasson's home recovered over thirty bottles labeled as human growth hormone inside a locked container, five vials

of testosterone, and mestanolone (an anabolic steroid) in both pill and powder form.

Hasson also amassed weapons and tactical gear. In addition to the 15 firearms authorities found at Hasson's home, in a three-year period Hasson spent roughly $12,000 on holsters, knives, ammunition magazines, ammunition, handguards, camping supplies, Meals-Ready-to-Eat, body armor plates, plates carriers, tactical vests and pouches, firearm repair kits, firearm components, and smoke grenades. Among those purchases were metal parts with pre-indexed holes ready to be drilled and assembled into unlawful silencers. Hasson purchased a drill press and fully assembled one of the silencers, which he test-fired at least once.

In December 2017, Hasson registered for an online sniper and sharpshooter forum, purchased scopes for precision long-range shooting, and bought a Bergara Hunting and Match Rifle, outfitting it with one of the scopes and a bipod. An FBI sniper testified that the Bergara rifle "can be used to precisely target large animals including human beings from long distances, particularly with the addition of a scope to enable precision sighting at distance and a bipod to stabilize the rifle while shooting." S.J.A. 657. Hasson's rifle was chambered in "one of the most commonly used calibers of rifle employed by U.S. military and especially law enforcement snipers both for its accuracy as well as its terminal effectiveness in the body." S.J.A. 657.

The necessary instruments in hand, Hasson educated himself on precision long-range shooting. While at work, Hasson reviewed a document authored by a well-known expert on sniper training and operations. The document taught readers how to use a scoped rifle to precisely engage targets up to hundreds of yards away.

Hasson obtained examples of a "sniper data book," which, according to the FBI sniper, shooters use to document the performance of a particular rifle in different shooting conditions. He then took his rifle to a gun range, test fired it from various distances, and recorded his observations in a journal. Hasson later conducted further research on distance shooting, searching for "how to use trig to calculate distance," "size of door usa," "size of garage usa," and "stop sign height." J.A. 885; S.J.A. 1032. As the FBI sniper explained, these searches reference methods a trained sniper may use to quickly determine his distance from a target. Hasson also sent himself a ballistics calculator spreadsheet, which assists in accurately hitting an intended target at a given distance.

B.

The Government's forecast of additional, more serious charges did not come to fruition. A grand jury ultimately indicted Hasson for unlawful possession of unregistered firearm silencers, 26 U.S.C. § 5861(d); unlawful possession of firearm silencers unidentified by serial number, 26 U.S.C. § 5861(i); possession of firearms by an unlawful user of and addict to a controlled substance, 18 U.S.C. § 922(g)(3); and possession of a controlled substance, 21 U.S.C. § 844(a).

Hasson moved to dismiss the Section 922(g)(3) charge, arguing that the statutory phrases "unlawful user" and "addicted to" were unconstitutionally vague on their face. The district court denied the motion. *United States v. Hasson*, No. GJH-19-96, 2019 WL 4573424, at *6–7 (D. Md. Sept. 20, 2019). As the court recognized, our precedent forecloses facial vagueness challenges by defendants whose conduct a statute clearly proscribes. *Id.* at *6 (citing *United States v. Hosford*, 843 F.3d 161,

170 (4th Cir. 2016)). Hasson did not "seem to contest that his alleged conduct falls squarely within the confines of the statute," and the district court found that Hasson's conduct was "clearly prohibited by § 922(g)(3)'s prohibition on possession of firearms by an individual whose drug use is consistent, prolonged, and close in time to his firearm possession." *Id.* at *7; *see United States v. Sperling*, 400 Fed. App. 765, 767 (4th Cir. 2010) ("To sustain a conviction [under Section 922(g)(3)], the government must prove that the defendant's drug use was sufficiently consistent, prolonged, and close in time to his gun possession to put him on notice that he qualified as an unlawful user under the terms of the statute." (internal quotation marks omitted)). Thereafter, Hasson pleaded guilty to all counts but reserved the right to appeal his sentence and the order denying his motion to dismiss.

The district court held a full-day sentencing hearing. Of note here, the court resolved the Government's request to enhance Hasson's Guidelines range under U.S.S.G. § 3A1.4. The Section 3A1.4 adjustment directs courts to increase a defendant's offense level and criminal-history category "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4(a). The district court applied the adjustment over Hasson's objection upon concluding that his crimes were "designed to promote" a crime under 18 U.S.C. § 351, which, in relevant part, criminalizes "attempting to kill or kidnap" any member of Congress, any Supreme Court Justice, and certain executive officials. S.J.A. 951–955. Applying the adjustment increased Hasson's offense level by 12 points and his criminal-history category from I to VI. The district court, however, agreed with Hasson that the increase overstated his criminal history and departed downward

to category I. In the end, the adjustment increased Hasson's Guidelines range from 41–51 months to 151–188 months. The court sentenced Hasson to 160 months' imprisonment.

II.

On appeal, Hasson again challenges 18 U.S.C. § 922(g)(3) as unconstitutionally vague on its face. But Hasson does not dispute the district court's holding that his conduct "falls squarely within the confines of [Section 922(g)(3)]." *Hasson*, 2019 WL 4573424, at *7. He has, consequently, abandoned any contention to the contrary. *See Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 290 (4th Cir. 2018) ("'[C]ontentions not raised in the argument section of the opening brief are abandoned.'" (quoting *United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004))).

That abandonment dooms Hasson's vagueness challenge. The Supreme Court and this Court have repeatedly held that we must "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18–19 (2010) (alteration in original) (quoting *Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982)); *see Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151–1152 (2017) ("A plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim." (brackets and internal quotation marks omitted)); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."); *United States v. Moriello*, 980 F.3d 924, 931 (4th Cir. 2020) ("[A] plaintiff who en-

gages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (internal quotation marks omitted)); *Hosford*, 843 F.3d at 170 (same); *United States v. Jaensch*, 665 F.3d 83, 89 (4th Cir. 2011) (same); *Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir. 1985) (same). In criminal cases, then, "if a law clearly prohibits a defendant's conduct, the defendant cannot challenge, and a court cannot examine, whether the law may be vague for other hypothetical defendants." *Hosford*, 843 F.3d at 170.

Hasson counters that this longstanding rule is no longer the law. According to Hasson, in *Johnson v. United States*, 576 U.S. 591 (2015), and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court repudiated this principle, and those decisions so "clearly undermined" our Court's precedents that they no longer bind this panel, *United States v. Battle*, 927 F.3d 160, 166 n.7 (4th Cir. 2019) (internal quotation marks omitted).[2]

To resolve this issue, it is helpful to review *Johnson* and *Dimaya*. *Johnson* involved a vagueness challenge to the Armed Career Criminal Act of 1984 (ACCA). *See* 576 U.S. at 593. ACCA mandates a 15-year minimum

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[2] Although our Court has applied the rule forbidding a defendant from challenging a statute as vague if it clearly prohibits his own conduct in the years since *Johnson* and *Dimaya*, the Court has never considered whether those decisions undermined that rule. *See*, *e.g.*, *Fusaro v. Howard*, 19 F.4th 357, 374 (4th Cir. 2021); *Moriello*, 980 F.3d at 931; *Hosford*, 843 F.3d at 170. It is therefore appropriate for us to do so now. *See Mays v. Sprinkle*, 992 F.3d 295, 302 n.4 (4th Cir. 2021); *United States v. Dodge*, 963 F.3d 379, 383–384 (4th Cir. 2020).

sentence for a defendant convicted of a firearms offense who has three or more prior convictions for either a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1). In part, the statute defines "violent felony" as a crime punishable by a year or more in prison that "is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*." *Id.* § 924(e)(2)(B)(ii) (emphasis added). Courts apply the categorical approach to determine whether a crime qualifies as a violent felony, including under the italicized "residual clause." *Johnson*, 576 U.S. at 596. Doing so requires assessing the predicate crime "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Id.* (internal quotation marks omitted).

Two aspects of this "wide-ranging inquiry" led the Supreme Court to hold the residual clause unconstitutionally vague. *Id.* at 597. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real world facts or statutory elements." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," for "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 598. Nine years of the Court's fruitless efforts to "craft a principled and objective standard out of the residual clause confirm[ed] its hopeless indeterminacy." *Id.* "Each of the uncertainties in the residual clause may be tolerable in isolation," the Court reasoned, but "their sum makes a task for us which at best

could be only guesswork." *Id.* at 602 (internal quotation marks omitted).

In reaching its conclusion, the Court found unpersuasive the contention that "a statute is void for vagueness only if it is vague in all its applications." *Id.* at 603 (internal quotation marks omitted). The Court explained that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at 602.

In *Dimaya*, the Court relied on *Johnson* to hold a residual clause in a different statute unconstitutionally vague. 138 S. Ct. at 1223. Justice Thomas authored an extensive dissent. Among other grounds for his dissent, Justice Thomas adhered to his view, also expressed in *Johnson*, that "a law is not facially vague . . . if there is an unmistakable core that a reasonable person would know is forbidden by the law." *Id.* at 1252 (Thomas, J., dissenting) (internal quotation marks omitted); *see Johnson*, 576 U.S. at 623 (Thomas, J., concurring in the judgment). He also dissented on the separate ground that the statute was not vague as applied to the respondent. *See Dimaya*, 138 S. Ct. at 1250 (Thomas, J., dissenting). As Justice Thomas explained, the Supreme Court's precedents "recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him" and "*Johnson* did not overrule these precedents." *Id.* at 1250; *see id.* (explaining that the *Johnson* Court concluded ACCA's residual clause was unconstitutional as applied to the crime at issue there). "While *Johnson* weakened the principle that a facial challenge requires a statute to be vague 'in *all* applications,'" he reasoned, "it did not address whether a statute must be vague as applied to the per-

son challenging it." *Id.* (quoting *Johnson*, 576 U.S. at 603).

In a footnote, the *Dimaya* majority responded that *Johnson* "anticipated and rejected a significant aspect of Justice Thomas's dissent," namely his assertion that "a court may not invalidate a statute for vagueness if it is clear in any of its applications." *Id.* at 1214 n.3. *Johnson* did so, the majority explained, by "ma[king] clear that our decisions 'squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Id.* (quoting *Johnson*, 576 U.S. at 602). Put another way, the Court reiterated that a statute need not be vague in all its applications to be unconstitutional. But the Court did not address the precedents Justice Thomas cited to demonstrate that "a challenger must prove that the statute is vague as applied to him," *id.* at 1250 (Thomas, J., dissenting), much less the principle that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness," *Parker*, 417 U.S. at 756.

Hasson claims that the rule prohibiting vagueness challenges by those whose conduct a statute clearly prohibits perished alongside the rule requiring a statute to be vague in all its applications. To Hasson, the latter provides the theoretical underpinning for the former. *Johnson* having jettisoned that underpinning, Hasson argues, "a defendant may raise a facial vagueness challenge without regard to whether the statute is vague as applied to him." Opening Br. 20.

We disagree. First, Hasson is wrong about the rationale for the rule prohibiting vagueness challenges by those whose conduct a statute clearly prohibits. The rule shares its foundation with the vagueness doctrine itself,

which is based on the concept "'that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.'" *Parker*, 417 U.S. at 757 (quoting *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32–33 (1954)); *see Hoffman Ests.*, 455 U.S. at 495 n.7. Put simply, the vagueness doctrine requires that a criminal statute "provide a person of ordinary intelligence fair notice of what is prohibited" and not be "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). When the challenged statute clearly proscribes a defendant's conduct, neither of these rationales is implicated. It would untether the vagueness doctrine from its moorings to permit a facial vagueness challenge in such a case.

Another foundational pillar for the rule prohibiting vagueness challenges by those whose conduct a statute clearly prohibits is the limited nature of judicial power:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of

> adjudicating rights in particular cases between the litigants brought before the Court[.]

Broadrick v. Oklahoma, 413 U.S. 601, 610–611 (1973) (citations omitted); *see United States v. Raines*, 362 U.S. 17, 21 (1960) ("Kindred to the[] rules [limiting federal courts to deciding only the cases and controversies properly before them] is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); *Kashem v. Barr*, 941 F.3d 358, 375–376 (9th Cir. 2019) (quoting *Broadrick*); *see also United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011). Respect for our circumscribed role is one reason "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (brackets and internal quotation marks omitted).

These foundations are independent of the substantive standard for judging a facial vagueness challenge. *See Kashem*, 941 F.3d at 375. That standard—which formerly required a law to be vague in all its applications—speaks to the degree of vagueness a law must exhibit to be found facially unconstitutional. *See Hoffman Ests.*, 455 U.S. at 494–495; *cf. United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act . . . [requires] the challenger [to] establish that no set of circumstances exists under which the Act would be valid."). Consequently, *Johnson* and *Dimaya*'s rejection of the vague-in-all-its-applications standard does not undermine the rule prohibiting defendants whose conduct a statute clearly proscribes from bringing vagueness challenges.

Further, *Johnson* and *Dimaya* did not purport to jettison the latter rule, and it is "the Supreme Court's 'prerogative alone to overrule one of its precedents.'" *Payne v. Taslimi*, 998 F.3d 648, 654 (4th Cir. 2021) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)). Neither *Johnson* nor *Dimaya* "explicitly question[ed] the rule that a litigant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge." *Kashem*, 941 F.3d at 376. Indeed, any suggestion that *Johnson* discarded that rule is foreclosed by *Expression Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), in which, the term after *Johnson*, the Court applied the rule to deny a vagueness claim. *See Expression Hair Design*, 137 S. Ct. at 1151–1152 (holding that the plaintiffs could not raise a successful vagueness claim because the challenged law clearly proscribed their intended speech). We find the Court's application of the rule after *Johnson*—in the speech context no less, where "a heightened vagueness standard applies," *Humanitarian L. Project*, 561 U.S. at 20—dispositive that the *Johnson* Court did not silently overrule its precedents prohibiting vagueness challenges by those whose conduct a statute clearly prohibits.

Consistent with that finding, whatever "*Johnson* . . . anticipated and rejected," *Dimaya*, 138 S. Ct. at 1214 n.3, it was not the rule foreclosing a litigant whose conduct is clearly prohibited by a statute from bringing a vagueness challenge. Consequently, we cannot read footnote three of *Dimaya*, which relied on *Johnson*, as quietly abandoning that rule. Indeed, no court of appeals to consider the question has concluded that *Johnson* or *Dimaya* worked such a change. *See United States v. Requena*, 980 F.3d 30, 40–43 (2d Cir. 2020); *United States v. Westbrooks*, 858 F.3d 317, 325 (5th Cir. 2017), *cert. granted & judgment vacated on other grounds*, 138

S. Ct. 1323 (2018); *United States v. Cook*, 970 F.3d 866, 877–878 (7th Cir. 2020); *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016); *Kashem*, 941 F.3d at 376 (9th Cir.); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1190 (10th Cir. 2021).

Even if we were to view *Johnson* and *Dimaya* as instances in which the Court bypassed as-applied challenges to proceed directly to facial vagueness, *but see Johnson*, 576 U.S. at 600 (finding that "the residual clause yields no answers" to the many questions incident to determining whether unlawful possession of a short-barreled shotgun is a violent felony); *Dimaya*, 138 S. Ct. at 1214–1215 & n.3 (finding that burglary is not an "easy application[] of the residual clause" because countless questions attend the "ordinary case" inquiry required by the categorical approach), their unique context sets them apart. *See Requena*, 980 F.3d at 41–43; *Cook*, 970 F.3d at 876–877; *Kashem*, 941 F.3d at 376–377; *cf. Crooks v. Mabus*, 845 F.3d 412, 417 (D.C. Cir. 2016). Indeed, the Court was at pains to emphasize the peculiar double-indeterminacy posed by applying the residual clauses' imprecise qualitative standards to the "judicially imagined 'ordinary case' of a crime" required by the categorical approach. *Johnson*, 576 U.S. at 597–598, 135 S. Ct. 2551; *see Dimaya*, 138 S. Ct. at 1215–1216. In a routine vagueness challenge, by contrast, a court is called upon to apply a statutory prohibition to a defendant's real-world conduct. *See United States v. Davis*, 139 S. Ct. 2319, 2327 (2019) ("[A] case-specific approach would avoid the vagueness problems that doomed the statutes in *Johnson* and *Dimaya*."). That inquiry is fully compatible with a traditional as-applied vagueness analysis.

For these reasons, we conclude that *Johnson* and *Dimaya* "did not alter the general rule that a defendant

whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge." *Cook*, 970 F.3d at 877. It follows that neither decision clearly undermined our precedents espousing that rule. And any exceptions must originate from the Supreme Court, whose longstanding precedents supply the rule's foundation. Because Hasson does not contest that Section 922(g)(3) clearly applies to his conduct, his attempt to assert a facial vagueness challenge fails.

III.

Hasson also appeals his sentence—specifically, application of the terrorism adjustment, which more than tripled his Guidelines range.[3] Hasson mounts two challenges. First, he believes that U.S.S.G. § 3A1.4 is ultra vires to the extent it encompasses defendants not convicted of a federal crime of terrorism. Second, he contends that the district court summarily disregarded his expert's findings and opinion that Hasson did not present a risk of violence and so the adjustment should not apply to him. We disagree with both contentions and therefore affirm Hasson's sentence.

A.

Section 3A1.4 applies "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4. The district court rejected Hasson's argument that the adjustment requires a completed terrorism offense. In a separate case, we subsequently agreed, holding that the adjustment does not "require that a defendant be convicted of

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[3] The increase would have been greater, but the district court departed downward to criminal history category I.

a federal crime of terrorism" but instead "applies whenever a defendant's offense of conviction or relevant conduct was 'intended to promote' a federal crime of terrorism." *United States v. Kobito*, 994 F.3d 696, 701–702 (4th Cir. 2021). On appeal, Hasson switches gears and argues that, because Section 3A1.4 applies to defendants who were not convicted of a federal crime of terrorism, it contravenes a 1996 congressional directive to the United States Sentencing Commission and is therefore invalid. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997) (holding that if a Guidelines provision "is at odds with [a statutory directive's] plain language, it must give way"). We review legal conclusions de novo but unpreserved arguments only for plain error. *Kobito*, 994 F.3d at 701. Hasson concedes that he did not raise the question of Section 3A1.4's validity below yet disputes that plain error is the correct standard of review.[4] Because the district court did not err in applying the terrorism adjustment, we conclude that Hasson's argument fails regardless of the standard of review we apply.

Grasping Hasson's argument requires understanding Section 3A1.4's history. Before 1995, the Sentencing Guidelines permitted a "Terrorism" upward departure where "the defendant committed the offense in furtherance of a terroristic action." U.S.S.G. § 5K2.15 (1994). In

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[4] We reject the Government's contention that Hasson invited any error. "The invited error doctrine recognizes that a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." *United States v. Sanya*, 774 F.3d 812, 817 n.2 (4th Cir. 2014) (internal quotation marks omitted). Hasson did not ask the district court to apply the terrorism adjustment, therefore the doctrine is inapplicable.

the Violent Crime Control and Law Enforcement Act of 1994, Congress directed the Sentencing Commission "to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. 103-322, § 120004, 108 Stat. 1796, 2022 (1994). The Sentencing Commission responded by replacing the upward-departure provision with a new "International Terrorism" adjustment at Section 3A1.4. U.S.S.G. app. C, amend. 526. Section 3A1.4 took effect on November 1, 1995. The inaugural version read:

> § 3A1.4. International Terrorism
>
> (a) If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

U.S.S.G. § 3A1.4 (1995). The Commentary defined "international terrorism" with reference to that term's definition in 18 U.S.C. § 2331. *Id.* cmt. n.1.

Less than two years later, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress instructed the Sentencing Commission to "amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code." Pub. L. 104-132, § 730, 110 Stat. 1214, 1303. In response, the Sen-

tencing Commission retitled Section 3A1.4 simply "Terrorism" and replaced the reference to "international terrorism" with "a federal crime of terrorism," as reflected below:

> § 3A1.4. ~~International~~ Terrorism
>
> (a) If the offense is a felony that involved, or was intended to promote, ~~international terrorism~~ a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Compare U.S.S.G. § 3A1.4 (1996) *with* U.S.S.G. § 3A1.4 (1995); *see also* U.S.S.G. app. C, amend. 539 (1997). The Commentary defined "federal crime of terrorism" with reference to that term's definition in 18 U.S.C. § 2332b(g). U.S.S.G. § 3A1.4 cmt. n.1 (1996). For purposes of this case, Section 3A1.4 has remained materially unaltered ever since. *See* U.S.S.G. § 3A1.4 (2021).

Hasson contends that the Sentencing Commission misread Congress's 1996 directive. According to Hasson, Congress intended to restrict Section 3A1.4 to cases where the defendant is *convicted* of an offense listed in 18 U.S.C. § 2332b(g)(5), which defines "federal crime of terrorism." Under Hasson's reading of the directive, the Commission should have amended the adjustment as follows:

> § 3A1.4. ~~International~~ Terrorism
>
> (a) If the offense is ~~a felony that involved, or was intended to promote, interna-~~

~~tional terrorism~~ a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Hasson argues that the directive's use of the word "only" compels his interpretation. § 730, 110 Stat. at 1303. In his view, "only" shows Congress intended to narrow the adjustment in some way. But in the same directive, Congress expanded the scope of the adjustment to include cases involving solely domestic terrorism. Hasson argues that limiting the adjustment's application to *convictions* for federal crimes of terrorism is the sole way to effectuate the narrowing quality of the word "only," given the expansion that results from replacing "international terrorism" with "federal crime of terrorism."

We disagree. "As in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 376 (2013) (brackets and internal quotation marks omitted). Admittedly, the 1996 directive is ambiguous. But "[r]ecognizing that the Commission 'brings expertise to the implementation of its mandate'" to formulate sentencing guidelines, "we must defer to the Commission's interpretation of a congressional directive as long as that interpretation is not 'at odds with the plain language' of the directive." *United States v. Murphy*, 254 F.3d 511, 512 (4th Cir. 2001) (brackets omitted) (quoting *United States v. Kennedy*, 32 F.3d 876, 889 (4th Cir. 1994), and *LaBonte*, 520 U.S. at 757).

Our review convinces us that the 1996 directive readily supports Section 3A1.4. Congress directed the Sentencing Commission to amend Section 3A1.4—which then applied "[i]f the offense is a felony that involved, or was intended to promote, international terrorism"—so that it "only applies to Federal crimes of terrorism, as defined in [18 U.S.C. §] 2332b(g)." § 730, 110 Stat. at 1303. That direction is reasonably read as instructing the Commission to edit the type of terrorism to which the adjustment applies by replacing "international terrorism" with "federal crimes of terrorism," which the Commission did. The word "only" clarified that Congress intended for "federal crimes of terrorism" to supplant "international terrorism," rather than supplement it such that the adjustment covered both "international terrorism" and "federal crimes of terrorism." Had Congress omitted "only," the Commission may well have preserved the adjustment's application to "international terrorism." Congress obviated that ambiguity by including "only" in its instructions.

Context further supports the Commission's interpretation. Less than two years before the 1996 directive, Congress instructed the Commission to apply Section 3A1.4 to "any felony . . . that involves *or* is intended to promote international terrorism," and the Commission did so. § 120004, 108 Stat. at 2022 (emphasis added). As we have explained, that disjunctive phrase creates two ways in which the adjustment can be triggered: (1) by an offense that "involves" terrorism, or (2) by an offense "intended to promote" terrorism. *See Kobito*, 994 F.3d at 702. The 1996 directive did not purport to reduce these two options to one; indeed, it said nothing about the offenses to which the adjustment applies or their relationship to the crime of terrorism. If Congress had intended to completely rewrite the precise language it had

dictated less than two years prior, we expect it would have done so more clearly. Instead, Congress's 1996 directive focused on the nature of the terrorism involved, which is but one facet of Section 3A1.4, and the Commission changed that aspect of the adjustment in response.

Attempting to overcome the Commission's reasonable interpretation, Hasson argues that legislative history supports his reading. He quotes AEDPA's Conference Report, which says that "[t]his section of the bill will make that new provision applicable only to those specifically listed federal crimes of terrorism, *upon conviction of those crimes* with the necessary motivational element to be established at the sentencing phase of the prosecution." H.R. Rep. No. 104-518, at 123 (1996) (emphasis added). In Hasson's view, the emphasized portion confirms that Congress intended for Section 3A1.4 to apply only upon a defendant's conviction for an enumerated offense.

But "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). Only the statute itself underwent the constitutionally required process of bicameralism and presentment. Therefore "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *see also City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 337 (1994) ("But it is the statute, and not the Committee Report, which is the authoritative expression of the law[.]"). And the statute here supports the Commission's interpretation.

Moreover, even if we were to consider it, the Conference Report does not compel the meaning Hasson attaches to it. Although one could read Hasson's selected quotation as requiring a conviction for a federal crime of

terrorism, one could also read it as stating a sufficient, but not necessary, condition for applying the adjustment. *Cf. United States v. Tankersley*, 537 F.3d 1100, 1113 (9th Cir. 2008) ("Based on this legislative history, we conclude that through the terrorism enhancement Congress wanted to impose a harsher punishment on any individual who committed an offense that involved or intended to promote one of the enumerated terrorist acts, and intended, through that offense, to influence the conduct of others."). The ambiguous Conference Report provides Hasson no refuge.

In sum, applying Section 3A1.4 absent a conviction for a federal crime of terrorism does not impermissibly contravene Congress's directive. That being so, Hasson has failed to demonstrate that the district court erred—plainly or otherwise—in applying the adjustment as written by the Commission.

B.

In the alternative, Hasson contends that the district court disregarded the findings and opinions of his "violence risk assessment" expert and therefore erroneously concluded that Hasson's conduct satisfied Section 3A1.4. Finding no clear error, we affirm.

1.

To apply the terrorism adjustment, the district court was required to find that at least one of Hasson's offenses "involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4(a). A "federal crime of terrorism" is an offense that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," 18 U.S.C. § 2332b(g)(5)(A), and that violates one of the statutes listed in 18 U.S.C. § 2332b(g)(5)(B). *See Kobito*, 994 F.3d at 700; *United States v. Hassan*,

742 F.3d 104, 148 (4th Cir. 2014). An offense is "intended to promote" a federal crime of terrorism "whenever the defendant commits a felony with a goal or purpose to bring or help bring into being a crime listed in 18 U.S.C. § 2332b(g)(5)(B), even if the defendant has not necessarily completed, attempted, or conspired to commit the crime." *Kobito*, 994 F.3d at 702 (citations, ellipsis, and internal quotation marks omitted). "[A] court deciding whether to impose the terrorism enhancement must resolve any factual disputes that it deems relevant to application of the enhancement, and then, if it finds the requisite intent, should identify the evidence in the record that supports its determination." *Hassan*, 742 F.3d at 148 (internal quotation marks omitted); *see also United States v. Chandia*, 514 F.3d 365, 376 (4th Cir. 2008). The Government must prove by a preponderance of the evidence that the adjustment applies. *Kobito*, 994 F.3d at 701.

The district court concluded that Hasson's firearms offenses were designed to promote 18 U.S.C. § 351, which, in relevant part, criminalizes "attempts to kill or kidnap" any member of Congress, any Supreme Court Justice, and certain executive officials. 18 U.S.C. § 351(a), (c). The court also found that Hasson committed his crimes "for the purpose of coercing the Government and retaliating against them." S.J.A. 955. The court meticulously detailed the facts underlying its conclusion, noting they were "just a thumbnail of the voluminous materials that the Government has submitted." S.J.A. 951. We rehearse the court's findings briefly here.

The court first cited Hasson's writings identifying himself as "a white nationalist for over 30 years" and advocating "a little focussed [sic] violence" to "make change." S.J.A. 951–952. It noted his 2017 draft email indicating "that he had to take a serious look at appro-

priate individual targets to bring greatest impact. Professors, DR's, politicians, judges, leftists in general." S.J.A. 952. The court then recounted Hasson's endeavor to become proficient in long-range precision marksmanship: He registered for an online sniper and sharpshooter forum; purchased the Bergara rifle, which he outfitted with high-end scopes; searched for and began his own sniper logbook; researched distance shooting; and obtained a ballistics calculator spreadsheet. The court described Hasson's efforts to learn where he could locate prominent political figures. He "searched for where do most senators live in D.C., do senators have SS protection, and are Supreme Court justices protected." S.J.A. 953 (internal quotation mark omitted). He searched "Maxine Waters[,] D.C."; "how do senators get around D.C."; "how do senators and congressmen get around D.C. private subway"; "best place in D.C. to see congress people"; and "where in D.C. do Congress [sic] live." S.J.A. 953–954. He also searched for where Justices Sotomayor and Kagan live. Those inquiries corresponded to Hasson's searches within the Breivik manifesto for "category A, which refers to a category of traitors who are most influential and includes political leaders." S.J.A. 953. "[J]ust two weeks after reviewing the Breivik manifesto," Hasson "compiled a list that included prominent congressional leaders, among other potential targets." S.J.A. 954.

The court also recounted the evidence seized during the search of Hasson's residence. Authorities recovered testosterone, anabolic steroids, and human growth hormone, which corresponded to his query for "steroids" in the Breivik manifesto, where Breivik "suggest[ed] that an assailant begin a steroid cycle once the preparation phase for an attack begins." S.J.A. 953–954. The search also "revealed an enormous array of weapons and am-

munition consistent with someone planning to carry out just the sort of attacks that are described." S.J.A. 954.

In the end, "[a]ll of these actions taken together convince[d] the [c]ourt . . . well beyond the preponderance standard[] that [Hasson] was, in fact, intending to promote a federal crime of terrorism." S.J.A. 954. And his "choice of targeting politicians indicate[d] that he was, in fact, doing this or planning to do this . . . for the purpose of coercing the Government and retaliating against them." S.J.A. 955. The court reasoned that Hasson's rhetoric and weaponry viewed separately would not justify applying the terrorism adjustment, but in combination they revealed "that he was actually in the process of formulating a plan that makes this a case where the terrorism enhancement [applies]." S.J.A. 954–955.

2.

We review the factual findings underlying the district court's application of the terrorism adjustment for clear error. *Kobito*, 994 F.3d at 701. In so doing, we "'ask whether, on the entire evidence,'" we are "'left with the definite and firm conviction that a mistake has been committed.'" *United States v. Wooden*, 693 F.3d 440, 451 (4th Cir. 2012) (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). Such a conviction may "be based upon a conclusion that, without regard to what the actual facts may be, the findings under review . . . were made without properly taking into account substantial evidence to the contrary," *Miller v. Mercy Hosp., Inc.*, 720 F.2d 356, 361 (4th Cir. 1983) (internal quotation marks omitted), such as when a district court fails to "acknowledge," "account for," or "consider" substantial contradictory evidence, *Wooden*, 693 F.3d at 453–454.

Hasson urges us to find clear error in the district court's treatment of his expert's opinions and testimony. In anticipation of sentencing, Hasson commissioned a "violence risk assessment" from Stephen D. Hart, Ph.D., whose experience includes consulting with law-enforcement agencies "regarding risk for serious violence, including terrorism, mass casualty violence, and targeted violence." J.A. 782. After interviewing Hasson and reviewing evidence in the case, Dr. Hart prepared a report in which he opined that the evidence "does not support the government's theory that Mr. Hasson intends (or intended) to commit acts dangerous to human life," "that he is (or was) a domestic terrorist," or that he "pose[s] a risk of serious violence." J.A. 785. Dr. Hart also testified at Hasson's sentencing hearing, where the Government cross-examined him. Hasson claims that the district court summarily dismissed Dr. Hart's opinions, did not acknowledge several of his key conclusions, and did not account for or explain why it disagreed with aspects of his testimony.

We discern no clear error in the district court's consideration of Dr. Hart's opinions. The court directly addressed Dr. Hart's conclusions and explained why it gave them little credit. For example, the court noted that cross-examination revealed "serious questions" about Dr. Hart's methodology. S.J.A. 955. The court further identified particular evidence that it believed contradicted Dr. Hart's findings.[5] This is wholly unlike the cases on which Hasson relies, where courts entirely failed to consider or address substantial evidence.

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[5] The district court did, however, "give some of Dr. Hart's comments consideration under [18 U.S.C. §] 3553." S.J.A. 956.

Nor does the absence of contrary expert testimony undermine the district court's findings. "[T]he trier of facts is not required to accept uncontradicted testimony," where, as here, it finds that the evidence in the record undermines or discredits that testimony. *Am. Mfg. Assocs., Inc. v. N.L.R.B.*, 594 F.2d 30, 34 (4th Cir. 1979). The district court weighed Dr. Hart's opinion testimony against a truly voluminous record of documentary evidence and found the conclusions Dr. Hart drew from that record unpersuasive. That was its prerogative as the finder of fact and was not clear error.

IV.

Because Hasson does not contest that 18 U.S.C. § 922(g)(3) clearly prohibited his conduct, he cannot challenge the statute as unconstitutionally vague. Nor has he demonstrated that the district court legally or factually erred in applying U.S.S.G. § 3A1.4's terrorism adjustment to increase his Guidelines sentencing range. We accordingly affirm both the denial of Hasson's motion to dismiss the Section 922(g)(3) charge and the resulting sentence.

AFFIRMED.

APPENDIX B

FILED: March 22, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4126
(8:19-cr-00096-GJH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHRISTOPHER PAUL HASSON,

Defendant-Appellant.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

Case No.: GJH-19-96

UNITED STATES OF AMERICA,
Plaintiff,
v.
CHRISTOPHER PAUL HASSON,
Defendant

MEMORANDUM OPINION

Defendant Christopher Paul Hasson has been charged with Unlawful Possession of Unregistered Firearm Silencers ("Count I") and Unlawful Possession of Firearm Silencers Unidentified by Serial Numbers ("Count II") in violation of the National Firearms Act ("NFA"), 26 U.S.C. § 5801 *et seq.*; Possession of Firearms by Unlawful User of and Addict to a Controlled Substance in violation of 18 U.S.C. § 922(g)(3) ("Count III"); and Possession of a Controlled Substance in violation of 21 U.S.C. § 844(a) ("Count IV"). ECF No. 71. Pending before the Court are Defendant's Motion to Dismiss Counts I and II on Second Amendment Grounds, ECF No. 62, Defendant's Motion to Dismiss

Count III on Void-for-Vagueness Grounds, ECF No. 63, and Defendant's Motion to Suppress Evidence Seized Pursuant to Search Warrants, ECF No. 66. A hearing was held on September 9, 2019. ECF No. 81. For the following reasons, Defendant's motions are denied.

I. BACKGROUND

According to the Criminal Complaint, since at least October 2016, Defendant has regularly purchased 100 to 300 milligrams of Tramadol, a Schedule IV controlled substance, every two to three months. ECF No. 1 ¶¶ 16–17.[1] He kept and used that Tramadol at, among other locations, his place of employment in Washington, D.C., where he is employed by the United States Coast Guard. *Id.* ¶¶ 21–23. Since at least late 2017, Defendant has also possessed a number of firearms, including rifles, shotguns, handguns, and revolvers, *id.* ¶ 11; ECF No. 71 at 3,[2] and in February 2019, he also possessed one assembled firearm silencer and one disassembled firearm silencer, neither of which was registered to Defendant or identified by a serial number, *id.* at 1–2.

On February 14, 2019, United States Magistrate Judge Gina L. Simms authorized a Criminal Complaint charging Defendant with Possession of Firearms by Unlawful User of and Addict to a Controlled Substance and Possession of a Controlled Substance. ECF No. 1. On February 27, 2019, a federal grand jury for the District

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[1] The core factual contentions in the Criminal Complaint and Superseding Indictment were not challenged for purposes of the motion hearing.

[2] Pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.

of Maryland returned an indictment charging Defendant with Unlawful Possession of Unregistered Firearm Silencers ("Count I") and Unlawful Possession of Firearm Silencers Unidentified by Serial Numbers ("Count II"), in addition to the counts previously charged by the Criminal Complaint ("Count III" and "Count IV," respectively). ECF No. 16. Defendant was arraigned on these charges on March 11, 2019, and he entered a plea of not guilty. ECF No. 19.[3]

On June 24, 2019, Defendant filed three motions: a Motion to Dismiss Counts I and II on Second Amendment Grounds, ECF No. 62; a Motion to Dismiss Count III on Void-for-Vagueness Grounds, ECF No. 63; and a Motion to Suppress Evidence Seized Pursuant to Search Warrants, ECF No. 66. The Government filed a consolidated opposition to Defendant's motions on August 5, 2019, ECF No. 70, and Defendant filed three separate replies on August 26, 2019, ECF Nos. 76, 77, 78.

On September 9, 2019, the Court held an evidentiary hearing on the nature, benefits, and purposes of silencers, the application process for registering and serializing silencers, and the prevalence of silencers. ECF No. 81. Defendant offered expert testimony from Gary Schaible, a recently-retired agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), and Daniel O'Kelly, a firearms consultant and former ATF agent. Mr. Schaible testified about the NFA and ATF's administration of the NFA, and Mr. Kelly testi-

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[3] A Superseding Indictment, which did not substantively change the charges, was filed on August 14, 2019, ECF No. 71, and Defendant was rearraigned on September 9, 2019, again entering a plea of not guilty to all counts, ECF No. 81.

fied about the demand for and uses of NFA-firearms, including silencers.

The Government offered expert testimony from Elizabeth A. Gillis, a firearms enforcement officer with ATF, and Ted Clutter, a legal instruments examiner supervisor with ATF. Ms. Gillis testified about the objective features of silencers and silencer parts, ATF's testing of silencers, and her report regarding the silencers in the instant case. Mr. Clutter testified about the procedure for obtaining a silencer and how ATF processes applications to make and transfer NFA-firearms, including silencers.

The evidence showed that a silencer, which is also referred to as a muffler or a suppressor, is a device that is attached to a firearm for the primary purpose of reducing the firearm's sound signature. Ms. Gillis testified that, in general, silencers can reduce a firearm's sound signature by anywhere between 2 to 35 decibels.[4] Mr. O'Kelly testified, however, that it is unlikely that a silencer will completely eliminate the sound of a gunshot unless the firearm is particularly small or the silencer is particularly large. Silencers can be commercially-manufactured or homemade from common household items such as soda bottles, magnesium light flashlights, or oil filters, but Ms. Gillis explained that commercial silencers typically cause a larger sound reduction than homemade silencers.

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[4] A firearm's sound signature is measured in decibels, which run from 0 to 180 on a logarithmic scale. Thus, if a firearm's sound level is 140 decibels and a silencer is attached that reduces that level by 10 decibels, the firearm's sound has been cut in half. If a silencer decreases the level by 20 decibels, the firearm's sound signature would be reduced to only 25% of its original level.

Silencers generally have no use independent of their attachment to a gun. They do not fire bullets on their own and do not contain a slide, trigger, firing pin, cartridge case, barrel, primer, or gunpowder. Mr. O'Kelly testified that "you can't hurt anybody with a silencer unless you hit them over the head with it." Rather, based on his conversations with gun owners, Mr. O'Kelly testified that the primary reasons for owning a silencer are hearing protection and courtesy to others. Silencers also have an incidental effect of increasing the accuracy of a firearm because their weight prevents muzzle rise. Mr. O'Kelly also explained that when he was on the ATF shooting range as an instructor, he sometimes used firearms without silencers, but he always used earmuffs or earplugs for hearing protection. Finally, Mr. O'Kelly testified that in his thirty-four years as a law enforcement officer, he never saw a case in which a silencer was used in the commission of a violent crime.

Silencers are regulated, in part, by the NFA, which requires that NFA-firearms be serialized and registered in the National Firearms Registry and Transfer Record ("NFRTR") in order to be lawfully possessed. The NFA Division of ATF administers the NFA and maintains the NFRTR. Mr. O'Kelly testified that the NFRTR is helpful in criminal investigations because it can assist law enforcement officers in tracing the control or possession of any NFA-firearm that may have been used during the commission of a crime.

Mr. Schaible testified that any individual, trust, legal entity, or government entity that wants to make or obtain an NFA-firearm, including a silencer, must apply for approval from ATF. The application process involves filling out the appropriate form, providing necessary supporting documentation, and submitting fingerprints

for the purpose of an FBI criminal background check. Applicants who want to make and register an NFA-firearm must fill out "Form 1," which is available both as a paper form and as an electronic form ("eForm"). Applicants who want to transfer and register a firearm must fill out "Form 4," which, since January 2016, has only been available as a paper form. Mr. Schaible and Mr. O'Kelly both noted that demand for silencers has consistently increased over the past ten years, and Mr. Schaible testified that when he retired in September 2018, the most in-demand NFA-firearm registrations were for silencers and short-barrel rifles.

Once an application is submitted, an ATF legal instruments examiner must process that application. Mr. Clutter testified that processing times for applications vary, but he estimated that the processing time is currently thirty days for eForm 1, seven months for paper Form 1, and eight to ten months for paper Form 4. He estimated that in February 2019, when Defendant was arrested, the processing time was less than thirty days for eForm 1 and eight months for paper Form 1. He did not have a February 2019 estimate for Form 4. Mr. Clutter also testified that making and registering an NFA-firearm pursuant to Form 4 is more popular today than it has been in ATF's history; he stated that the increased demand may correlate with the lengthy delays in processing Form 4.

After processing the application, the legal instruments examiner will determine whether to approve the application, deny the application, or ask for additional information. Mr. Schaible testified that the denial rate is low and there is little discretion as to approval or denial where a form is complete. Mr. Clutter testified that an application can be denied for a variety of reasons, including administrative error, incomplete application,

failure to provide supporting documentation or fingerprints, failure to pass the criminal background check, state law violations, or disqualifying characteristics such as unlawful drug use.

In general, the evidence demonstrated that the registration process for silencers does involve certain inefficiencies and redundancies that cause the process to take longer than certain purchasers would like.

II. MOTION TO DISMISS COUNTS I AND II

Counts I and II of the Superseding Indictment charge Defendant with possession of unregistered and unserialized silencers in violation of the NFA. Defendant contends that the NFA's registration and serialization requirements unconstitutionally infringe upon his Second Amendment rights and that Counts I and II must be dismissed. Specifically, he contends that silencers are "arms" within the meaning of the Second Amendment, and the NFA's requirements unconstitutionally burden the right of law-abiding citizens to possess silencers for lawful purposes. The Government responds that silencers are not arms and therefore do not fall within the Second Amendment's protections, and even if they did, the NFA does not impose an unconstitutional burden on those protections.

A. The Second Amendment

The Second Amendment 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. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment "conferred an individual right to keep and bear arms," and it observed that the Second Amendment's "core protection" is "the right of law-abiding, responsible citizens to

use arms in defense of hearth and home." 554 U.S. at 595, 634–35 (invalidating a District of Columbia statute banning handgun possession in the home).

The *Heller* Court recognized, however, that "the right secured by the Second Amendment is not unlimited," in that it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. It also cautioned that its ruling should not "cast doubt" on certain "longstanding prohibitions" on firearms, such as prohibitions on the possession of firearms by felons and the mentally ill or laws imposing conditions and qualifications on the commercial sale of arms. *Id.* at 626–27.

Following *Heller*, the Fourth Circuit has used a two-step approach to determine whether a challenged law violates the Second Amendment. First, the Court must determine "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment guarantee." *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017) (quoting *United States v. Chester*, 628 F.3d 672, 680 (4th Cir. 2010)) (internal quotations omitted). If the answer is no, then the challenged law is valid. *Id.* If the challenged law does impose a burden on conduct protected by the Second Amendment, the Court must "apply an appropriate form of means-end scrutiny" to determine whether the law is nonetheless constitutional. *Id.* (internal punctuation omitted). The Court will apply this approach to determine whether the NFA's requirement that silencers be registered and serialized violates the Second Amendment.

B. Application

The initial question is whether silencers are within the scope of the Second Amendment. Under *Heller*, "the Second Amendment extends, prima facie, to all instru-

ments that constitute bearable arms." 554 U.S. at 582. The "most natural reading" of the Second Amendment's right to "keep and bear Arms" is the right to "have weapons." *Id.* (internal quotations omitted). Indeed, the Second Amendment "guarantee[s] the individual right to possess and carry *weapons* in case of confrontation." *Id.* at 592 (emphasis added). *Heller* defines the "arms" protected by the Second Amendment as "[w]eapons of offence, or armour of defence" or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Id.* at 581 (citing two dictionaries from the eighteenth century and one from the nineteenth century).

The Court finds that a silencer is not an "arm" or a "weapon" because it is not inherently useful "in case of confrontation" as a "[w]eapon of offence" or an "armour of defence." A silencer is not itself used "to cast at or strike another," it does not contain, feed, or project ammunition, and it does not serve any intrinsic self-defense purpose. As Defendant's own expert testified, a silencer cannot, on its own, cause any harm,[5] and it is not useful independent of its attachment to a firearm. A silencer is not a weapon in and of itself, but simply a "firearm accessory," *see United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018), and therefore not a "bearable arm" protected by the Second Amendment.

Defendant cites to *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) in support of his contention that a silencer is nonetheless protected by the Second Amend-

[5] Putting to the side the possibility that it could be thrown at someone like a shoe or a baseball, which, most would agree, are not arms protected by the Second Amendment.

ment because it is necessary to the effective operation of a firearm. In *Ezell*, the Seventh Circuit invalidated a Chicago ordinance that prohibited all firing ranges despite the City also mandating firing-range training as a prerequisite to lawful gun ownership. 651 F.3d at 691. The Seventh Circuit reasoned that shooting ranges are not "categorically unprotected by the Second Amendment" because "[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Id.* at 704.

Defendant argues that just as the Seventh Circuit has determined that firing ranges are constitutionally protected because they are necessary to the effective exercise of the core Second Amendment right, this Court should determine that silencers are also protected because they are similarly necessary to the exercise of the core Second Amendment right. However, the firing ranges in *Ezell* are distinguishable from the silencers in the instant case. The *Ezell* Court noted that even the City "consider[ed] live firing-range training so critical to responsible firearm ownership that it mandate[d] this training as a condition of lawful firearm possession." 651 F.2d at 704–5. Indeed, under the City's ordinance, an individual could not exercise his Second Amendment right without access to the prohibited firing ranges. *See id.* at 689–90 (citing Chi. Mun. Code § 8–20–120). Here, there is no evidence that silencers are "so critical" to firearm ownership that firearms cannot be used effectively without them. Although silencers may improve the usage of a firearm, they are not necessary, and they are therefore not protected by the Second Amendment.

Defendant's citations to *Assoc. of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. of New Jersey*, 910 F.3d 106 (3d Cir. 2018) and *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014), cases involving access to and ability to use ammunition including, in *Jackson*, hollow-point bullets, fail for similar reasons. In those cases, the Third and Ninth Circuits, respectively, held that ammunition as a *category* is protected by the Second Amendment because "without bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." *Jackson*, 746 F.3d at 967; *see also Rifle & Pistol Clubs*, 910 F.3d 106 ("Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment."). Although ammunition is the means by which firearms are effective at serving their purpose as weapons and restrictions on type and usage may run afoul of the Second Amendment, the same cannot be said for silencers because a firearm remains an effective weapon without a silencer of any type attached. Thus, this Court joins every other court to consider the issue in determining that a silencer is not a weapon protected by the Second Amendment. *See, e.g.*, *Cox*, 906 F.3d at 1186 (holding that a silencer is not a "bearable arm" protected by the Second Amendment); *United States v. Stepp-Zafft*, 733 F. App'x 327, 329–30 (8th Cir. 2018) (on plain error review, finding no plain error where district court failed to dismiss unregistered silencer charge on Second Amendment grounds); *United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) (holding that silencers are not protected by the Second Amendment); *United States v. Grey*, Case No. CR-18-00412-CAS-1,

2018 WL 4403979, at *13 (N.D. Cal. Sept. 13, 2018) (following *McCartney*'s holding to deny motion to dismiss unregistered silencer charge on Second Amendment grounds); *United States v. Perkins*, Case No. 4:08CR3064, 2008 WL 4372821, at *4 (D. Neb. Sept. 23, 2008) (holding that silencers are not protected by the Second Amendment); *United States v. Garnett*, 2008 WL 2796098, at *4–5 (E.D. Mich. 2008) (finding that nothing in *Heller* "casts doubt" on the constitutionality of the NFA's regulation of silencers). The NFA does not implicate Defendant's constitutional rights, so his Motion to Dismiss Counts I and II must be denied.[6]

III. MOTION TO DISMISS COUNT III

Count III of the Superseding Indictment charges Defendant with a violation of 18 U.S.C. § 922(g)(3), which provides, in relevant part, that "[i]t shall be unlawful for any person ... who is an unlawful user of or addict 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." Defendant contends that Count III must

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[6] The evidence received by the Court at the hearing presents close calls on other aspects of the Second Amendment analysis, including whether silencers are in common use for lawful purposes, *see Heller*, 554 U.S. at 625 (stating that the Second Amendment only protects weapons "typically possessed by law-abiding citizens for lawful purposes"), and whether the regulation at issue would survive intermediate scrutiny, *see Kolbe*, 849 F.3d at 138 (applying intermediate scrutiny where a law "does not severely burden the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home"). Because the Court's determination that a silencer is not an arm subject to protection by the Second Amendment is dispositive of the motion, the Court will decline to resolve those issues.

be dismissed because § 922(g)(3) is unconstitutionally vague on its face and is therefore void. The Government responds that Defendant cannot make a facial challenge to the statute because it clearly covers his alleged conduct.

A. The Void-for-Vagueness Doctrine

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Hosford*, 843 F.3d 161, 170 (4th Cir. 2016) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (internal punctuation omitted). Vagueness challenges to statutes not threatening First Amendment interests are typically judged on an as-applied basis, *United States v. Jaensch*, 665 F.3d 83, 89 (4th Cir. 2011), but the Supreme Court has permitted facial challenges to criminal statutes "[w]hen vagueness permeates the text of such law," *see, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999).

The Fourth Circuit has recently reaffirmed that "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hosford*, 843 F.3d at 170 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010)) (internal quotations omitted). "Thus, if a law clearly prohibits a defendant's conduct, the defendant cannot challenge, and a court cannot examine, whether the law may be vague for other hypothetical defendants." *Id.* Defendant contends, however, that the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) eliminated this rule and permitted defendants to mount facial vagueness chal-

lenges regardless of whether their conduct is clearly prohibited by a statute. The Court disagrees.

In *Johnson*, the Supreme Court declared the residual clause of the Armed Career Criminal Act ("ACCA") to be unconstitutionally vague without requiring the defendant to show that the ACCA was vague as applied to his particular conduct. 135 S. Ct. at 2563. The ACCA increases the prison term of a defendant convicted of a firearms offense under § 922(g) from ten years to a minimum of fifteen years and a maximum of life where the defendant has three or more prior convictions for either a "serious drug offense" or a "violent felony." § 924(e)(1); *Johnson*, 135 S. Ct. at 2555. As was relevant in *Johnson*, "violent felony" was defined as any crime punishable by imprisonment for more than one year that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*[.]" § 924(e)(2)(B)(ii). The italicized portion of the definition is what was known as the ACCA's "residual clause." 125 S. Ct. at 2556.

As the Court held prior to *Johnson*, the ACCA requires a sentencing court to employ a categorical approach to determining whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," wherein the court will assess the generic version of the offense, rather than how the specific offender committed the crime on the particular occasion at issue. *Johnson*, 135 S. Ct. at 2557 (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). In light of this categorical approach, the *Johnson* Court concluded that the ACCA's residual clause was unconstitutionally vague because it combined the

indeterminacy of how to measure the risk posed by an idealized version of a crime with the indeterminacy of how much risk it takes for an idealized version of a crime to qualify as a violent felony when compared with the offenses expressly identified in the statute. *Id.* at 2558. This uncertainty "produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

Contrary to what Defendant argues, *Johnson* did not expand the universe of litigants who may attack statutes as facially vague. Although the *Johnson* Court rejected the notion that for a statute to be vague on its face, it must be vague in all of its applications, 135 S. Ct. at 2561, the Court's invalidation of the residual clause on vagueness grounds was tied to the "hopeless indeterminacy" caused by application of the ACCA's unique categorical approach. *Id.* at 2558; *see United States v. Cook*, 914 F.3d 545, 553 (7th Cir. 2019) ("[S]o much of the Court's analysis in *Johnson* deals with a statute that is in key respects *sui generis* . . . it was the categorical approach called for by the ACCA's residual clause . . . which the court found to be particularly vexing."). "Assessing the degree of risk posed by an idealized 'typical' version of an offense was significantly different, as the Court emphasized, from looking at the risks posed by a set of actual, concrete facts." *Cook*, 914 F.3d at 553 (citing *Johnson*, 135 S. Ct. at 2558); *see Johnson*, 135 S. Ct. at 2561.

In contrast to the ACCA, Section 922(g)(3) "does not call for the court to engage in any abstract analysis; it calls on the court to apply the statutory prohibition to a defendant's real-world conduct." *Cook*, 914 F.3d at 553 (listing cases). Thus, the uncertainty posed by the residual clause is not found in § 922(g)(3), and the Court will

apply "the general rule that a defendant whose conduct is clearly prohibited by a statute cannot be the one to make a facial vagueness challenge." *See Cook*, 914 F.3d at 554; *see also United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016) (After *Johnson*, "our case law still requires [a defendant] to show that the statute is vague as applied to his particular conduct.").

B. Application

Having determined that a facial challenge is only available when a statute is vague as applied to a defendant's particular conduct, the Court is left with the question of whether Defendant's conduct in this case is clearly prohibited by § 922(g)(3). Fourth Circuit case law makes clear that "[t]o sustain a conviction [under § 922(g)(3)], the government must prove that the defendant's drug use was 'sufficiently consistent, prolonged, and close in time to his gun possession to put him on notice that he qualified as an unlawful user' under the terms of statute." *United States v. Sperling*, 400 F. App'x 765, 767 (4th Cir. 2010) (quoting *United States v. Purdy*, 264 F.3d 809, 812 (9th Cir. 2001)). Whatever doubt there may be about the exact reach of § 922(g)(3), "this is not a borderline case," *see United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002), and even Defendant does not seem to contest that his alleged conduct falls squarely within the confines of the statute.

The Criminal Complaint states that Defendant possessed firearms since at least late 2017. ECF No. 1 ¶ 11. When he was arrested, he was in possession of seventeen different firearms. ECF No. 71 at 3. The Criminal Complaint also states that over the past three years, Defendant regularly purchased Tramadol, a Schedule IV controlled substance, ECF No. 1 ¶¶ 16–17, and he contemporaneously purchased synthetic urine, likely in an

attempt to "beat" the urinalysis tests he was subjected to as a Coast Guard employee. *Id.* ¶¶ 19–20. In its brief, the Government refers to additional evidence that Defendant had Tramadol in his bloodstream at the time of his arrest, ECF No. 70 at 20, and had admitted to relatives on recorded jail calls that he "has been using drugs for years," *id.* at 19 n.14. This alleged conduct is clearly prohibited by § 922(g)(3)'s prohibition on possession of firearms by an individual whose drug use is consistent, prolonged, and close in time to his firearm possession. Because § 922(g)(3) is not vague as applied to Defendant, he cannot mount a facial attack, so his Motion to Dismiss Count III must be denied.

IV. MOTION TO SUPPRESS

Finally, Defendant moves to suppress evidence seized pursuant to warrants dated January 11, 2019, which authorized the FBI to place a tracker on Defendant's car, seize and search two of Defendant's email accounts, and obtain information from Defendant's cellphone. *See* ECF No. 65-2; ECF No. 65-3; ECF No. 65-4; ECF No. 65-5. He also challenges subsequent warrants, but only as derivative of his challenge to the January 11, 2019 warrants. Defendant contends that the January 11, 2019 warrants were not supported by probable cause, so the evidence seized pursuant to those warrants and all derivative evidence must be excluded. The Government responds that there was probable cause for issuance of the January 11, 2019 warrants, but even if the issuing magistrate judge lacked a substantial basis to find probable cause, the good-faith exception applies.

A. Standard of Review

"As a general rule, the Fourth Amendment requires that law enforcement searches be accompanied by a warrant based on probable cause." *United States v.*

Kolsuz, 890 F.3d 133, 137 (4th Cir. 2018). "Although the concept of probable cause defies a precise definition, it exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in the place to be searched." *United States v. Richardson*, 607 F.3d 357, 369 (4th Cir. 2010) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)) (internal quotations omitted). "A probable cause assessment requires the issuing judge to decide whether, given the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)) (internal quotations omitted). A magistrate judge's determination of probable cause "is entitled to great deference," and this Court's role "is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *United States v. Drummond*, 925 F.3d 681, 687 (4th Cir. 2019) (quoting *Richardson*, 607 F.3d at 369) (internal quotations omitted).

B. Discussion

Here, the issuing magistrate judge clearly had a "substantial basis" to conclude that there was probable cause to support the January 11, 2019 warrants. In making his determination, the issuing judge relied on a detailed, 46-page affidavit submitted by FBI Agent Rachid Harrison that outlined Defendant's relevant conduct, tied the Defendant's conduct to the specific locations to be searched, and explained what evidence of criminal activity law enforcement officials expected to find at those locations. ECF No. 65-1. Specifically, the affidavit describes Defendant's extremist views, his tattoo's indicative of white supremacist and Neo-Nazi views, and a

letter he wrote in September 2017 to a known American neo-Nazi leader in which he discussed being "a long time White Nationalist" and his intention to "make change with a little focused violence." *Id.* ¶¶ 13–15. The affidavit also provides background on Norwegian citizen Anders Breivik, a far-right domestic terrorist who committed two coordinated terror attacks leading to the death of 77 Norwegian citizens, and it describes Defendant's possession and distribution of the Breivik manifesto, as well as his possession of other terrorist manifestos. *Id.* ¶¶ 16–17.

The affidavit goes on to describe strong correlations between instructions in the Breivik manifesto and Defendant's own conduct, including conducting extensive targeting research; acquiring firearms and ammunition; obtaining disguises, survival gear, and provisions for conducting terrorist attacks and escaping thereafter; studying improvised munitions; and preparing a steroid regimen. *Id.* ¶¶ 18–37. The affidavit links each of Defendant's acts to his specific use of his two email accounts, his car, and his cellphone. *Id.* ¶¶ 38–44.

Considered together, as is required by a "totality of the circumstances" analysis, these activities demonstrate at least a "substantial basis" for the issuing judge to determine that there was probable cause to support the January 11, 2019 warrants. Even if probable cause did not exist, however, the good-faith doctrine would apply to prevent suppression because law enforcement acted in objectively reasonable reliance on the warrants. *See United States v. Perez*, 393 F.3d 457, 460 (4th Cir. 2004); *United State v. Lalor*, 996 F.2d 1578, 1583 (4th Cir. 1993) (noting that the good-faith exception provides that "evidence obtained from an invalidated search warrant will be suppressed only if 'the officers were dishon-

est or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause'") (quoting *United States v. Leon*, 468 U.S. 897, 926 (1984)). Thus, there are no grounds for suppression of any evidence seized pursuant to the January 11, 2019 warrants, and because Defendant's challenges to subsequent warrants are derivative of his challenge to the January 11, 2019 warrants, those challenges fail as well. The Motion to Suppress is denied.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Counts I and II is denied, Defendant's Motion to Dismiss Count III is denied, and Defendant's Motion to Suppress is denied. A separate Order shall issue.

Date: September 20, 2019

__/s/_____
GEORGE J. HAZEL
United States District Judge

APPENDIX D

1. The Fifth Amendment to the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. § 922 provides:

(g) It shall be unlawful for any person—

. . .

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

. . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.