No. 22-5119

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER PAUL HASSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction under 18 U.S.C. 922(g)(3) -- which makes it unlawful for any person "who is an unlawful user of or addicted to any controlled substance" to possess a firearm -- should be set aside based on his claim that the statute would be unconstitutionally vague in some other circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 26 F.4th 610. The opinion of the district court (Pet. App. 35a-54a) is not published in the Federal Supplement but is available at 2019 WL 4573424.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2022. A petition for rehearing was denied on March 22, 2022 (Pet. App. 33a-34a). On June 9, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 19, 2022. The petition for a writ of

certiorari was filed on July 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Maryland, petitioner was convicted of possessing an unregistered firearm silencer, in violation of 26 U.S.C. 5861(d); possessing a firearm silencer lacking a serial number, in violation of 26 U.S.C. 5861(i); possessing a firearm as an unlawful user or addict of a controlled substance, in violation of 18 U.S.C. 922(g)(3); and possessing a controlled substance, in violation of 21 U.S.C. 844(a). Judgment 1-2. He was sentenced to 160 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-32a.

1. Petitioner worked at U.S. Coast Guard Headquarters in Washington, D.C. Pet. App. 3a. He is a self-avowed "'White Nationalist'" and former "'skinhead'" who "contemplated * * * 'instituting a bombing/sniper campaign'"; "researched the movements and whereabouts of political figures," including Members of Congress and of the Judiciary; "amassed weapons and tactical gear"; and trained in long-distance shooting. Id. at 4a-9a (brackets omitted). From 2016 to 2019, he obtained at least 4650 pills of Tramadol, a Schedule IV controlled substance, from illegal distributors in Mexico. Presentence Investigation Report (PSR)

¶ 12. Petitioner personally consumed most of the pills, including during the workday. PSR ¶ 13. He also visited websites discussing Tramadol addictions. PSR ¶¶ 14-15.

Federal agents arrested petitioner in February 2019. Pet. App. 3a. The agents found 196 Tramadol pills in his backpack and 106 pills in his work desk; they also subsequently found 122 pills in his home. Ibid. A blood sample taken from petitioner after he was arrested showed the presence of Tramadol in his bloodstream. Ibid. A search of petitioner's home also uncovered 15 firearms, two unregistered firearm silencers, and hundreds of rounds of ammunition. Ibid.

2. A federal grand jury in the District of Maryland charged petitioner with possessing an unregistered firearm silencer, in violation of 26 U.S.C. 5861(d); possessing a firearm silencer lacking a serial number, in violation of 26 U.S.C. 5861(i); possessing a firearm as an unlawful user of or addict to a controlled substance, in violation of 18 U.S.C. 922(g)(3); and possessing a controlled substance, in violation of 21 U.S.C. 844(a). D. Ct. Doc. 71, at 1-4 (Aug. 14, 2019).

Petitioner moved to dismiss the Section 922(g)(3) charge. Pet. App. 46a-47a. He argued that Section 922(g)(3) -- which makes it a crime for anyone "who is an unlawful user of or addicted to any controlled substance" to possess a firearm, 18 U.S.C. 922(g)(3)

-- is unconstitutionally vague. Pet. App. 46a-47a,. The district court denied petitioner's motion. Id. at 46a-51a.

The district court observed that Section 922(g)(3) was not vague as applied to petitioner, because petitioner's conduct "falls squarely within the confines" of the statute. Pet. App. 50a. And the court rejected petitioner's contention that Section 922(g)(3) was vague on its face, explaining that, outside the First Amendment context, "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." Id. at 47a (citation omitted).

Petitioner thereafter pleaded guilty on all counts and reserved the right to appeal the district court's order denying his motion to dismiss. Pet. App. 10a. The court sentenced petitioner to 160 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-32a.

The court of appeals observed that petitioner had "abandoned" the contention that Section 922(g)(3) was vague as applied to his conduct and had instead argued only that the statute was "unconstitutionally vague on its face." Pet. App. 11a. Quoting this Court's instruction in Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), 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," and citing other decisions of this Court to like effect, the court of appeals explained that petitioner could not prevail on his facial vagueness claim. Pet. App. 11a (quoting Humanitarian Law Project, 561 U.S. at 18-19) (brackets omitted). The court rejected petitioner's contention that subsequent decisions of this Court, such as Johnson v. United States, 576 U.S. 591 (2015), had implicitly overruled that principle, and explained that dispensing with it "would untether the vagueness doctrine from its moorings" in the Constitution. Pet. App. 16a; see id. at 12a-19a.

ARGUMENT

Petitioner renews his claim (Pet. 12-33) that 18 U.S.C. 922(g)(3) is unconstitutionally vague. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. This Court has repeatedly held that, at least outside the context of laws that restrict speech, a person "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 Law Project, 561 U.S. 1, 18-19 (2010) (citation omitted); see Chapman v. United States, 500 U.S. 453, 467 (1991); Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982); United States v. Mazurie, 419 U.S. 544,

550 (1975); Parker v. Levy, 417 U.S. 733, 756 (1974). Here, the district court determined that Section 922(g)(3) "clearly prohibit[s]" petitioner's conduct, Pet. App. 51a, and petitioner "d[id] not dispute" that determination on appeal, id. at 11a. This Court's precedents therefore squarely foreclose petitioner's vagueness challenge.

In any event, a criminal statute is impermissibly vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" or "is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304 (2008). A statute is not unconstitutionally vague simply because its applicability is unclear at the margins, see id. at 306, or because reasonable jurists might disagree about where to draw the line between lawful and unlawful conduct in particular circumstances, see Skilling v. United States, 561 U.S. 358, 403 (2010).

Gauged by those standards, Section 922(g)(3) raises no constitutional problem. The statute, in prohibiting a person who "is an unlawful user of or addicted to any controlled substance" from possessing a firearm, 18 U.S.C. 922(g)(3), uses plain-language terms ("unlawful user" and "addicted to") that make it "reasonably clear" what the statute forbids, United States v. Lanier, 520 U.S. 259, 267 (1997). And to the extent that close cases might arise, the statute provides an "ascertainable standard

for inclusion and exclusion," Smith v. Goguen, 415 U.S. 566, 578 (1974), that does not turn on "wholly subjective judgments," Williams, 553 U.S. at 306.

2. Petitioner errs in arguing (Pet. 24-33) that the decision below conflicts with this Court's decisions in Johnson v. United States, 576 U.S. 591 (2015), Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and United States v. Davis, 139 S. Ct. 2319 (2019).

In Johnson, this Court held unconstitutional a statutory provision that required courts to determine whether the offense defined by a particular criminal statute "involves conduct that presents a serious potential risk of physical injury to another." 576 U.S. at 594 (quoting 18 U.S.C. 924(e)(2)(B)(ii)) (emphasis omitted). Similarly, in Dimaya and Davis, the Court held unconstitutional statutory provisions that required a similarly-worded inquiry into whether a given crime "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Dimaya, 138 S. Ct. at 1211 (quoting 18 U.S.C. 16(b)); see Davis, 139 S. Ct. at 2324 (quoting 18 U.S.C. 924(c)(3)(B)).

In each of those cases, the challenged statute required a court to apply a qualitative standard ("serious" or "substantial" risk), not to the conduct in which the defendant actually engaged, but to an "idealized ordinary case of the crime." Johnson, 576 U.S. at 597; see Davis, 139 S. Ct. at 2326; Dimaya, 138 S. Ct. at

1213. The Court reasoned that application of such a qualitative standard to a "judge-imagined abstraction" resulted in impermissible vagueness because "'the elements necessary to determine the imaginary ideal [we]re uncertain both in nature and degree of effect.'" Johnson, 576 U.S. at 598, 604 (citation omitted).

At the same time, the decisions in all three cases emphasized that the application of such a qualitative standard to a defendant's conduct, rather than to a hypothetical ordinary case, would raise no such vagueness problems. See Davis, 139 S. Ct. at 2327 ("[A] case-specific approach would avoid the vagueness problems that doomed the statutes in Johnson and Dimaya"); Dimaya, 138 S. Ct. at 1214 ("Many perfectly constitutional statutes use imprecise terms[.] * * * The problem c[omes] from layering such a standard on top of the requisite 'ordinary case' inquiry."); Johnson, 576 U.S. at 603-604 ("[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct.")

In contrast to the statutes in Johnson, Dimaya, and Davis, Section 922(g)(3) does not require a court to imagine an "idealized ordinary case of the crime." Johnson, 576 U.S. at 597. It instead requires a jury to evaluate the defendant's own conduct and to determine whether the defendant was "an unlawful user of or

addicted to any controlled substance." 18 U.S.C. 922(g)(3). On Johnson's, Dimaya's, and Davis's own terms, such a statute is "perfectly constitutional." Dimaya, 138 S. Ct. at 1214.

Petitioner suggests (Pet. 5-10) that Johnson and its follow-on cases, while not expressly addressing the issue, nevertheless implicitly overruled this Court's precedents holding that a litigant whose conduct is clearly prohibited by a statute may not challenge it as vague. That is incorrect. Among other things, Johnson itself stated that the challenged statute left considerable "uncertainty" about whether it covered the defendant's crime. 576 U.S. at 600; see Dimaya, 138 S. Ct. at 1214 n.3 (noting that the "completed burglary at issue here illustrates * * * forcefully" that "supposedly easy applications" of the provision "might not be 'so easy after all'" (citation omitted); see also Davis, 139 S. Ct. at 2326-2327 (noting that "the government acknowledges" that if the provision at issue were interpreted like the provisions in Johnson and Dimaya, it "must be held unconstitutional too").

In addition, Johnson and its successor cases turned on "the peculiar double-indeterminacy posed by applying * * * imprecise qualitative standards to the judicially imagined ordinary case of a crime." Pet. App. 19a (citation and quotation marks omitted); see pp. 7-8, supra. As the court of appeals observed, no comparable indeterminacy exists here. Pet. App. 19a. And

petitioner's suggestion (Pet. 26-28) that this Court has effectively reconceptualized the vagueness doctrine such that any defendant may raise a facial vagueness claim, irrespective of whether the statute is vague as to him, cannot be squared with this Court's recent reaffirmation that someone whose acts are "clearly proscribed cannot raise a successful vagueness claim." Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151-1152 (2017) (citation omitted).

3. No circuit conflict exists on the question presented. Every court of appeals to consider a facial vagueness challenge to Section 922(g)(3) has rejected it. See Pet. App. 12a-20a; United States v. Patterson, 431 F.3d 832, 836 (5th Cir. 2005), cert. denied, 547 U.S. 1138 (2006); United States v. Cook, 970 F.3d 866, 877-878 (7th Cir. 2020); United States v. Purdy, 264 F.3d 809, 811-813 (9th Cir. 2001); see also United States v. Lundy, No. 20-6323, 2021 WL 5190899, at *5-*6 (6th Cir. Nov. 9, 2021); United States v. Monroe, 233 Fed. Appx. 879, 881 (11th Cir. 2007) (per curiam).

Petitioner cites (Pet. 17) a case in which a district court held Section 922(g)(3) unconstitutionally vague. See United States v. Morales-Lopez, No. 20-cr-27, 2022 WL 2355920 (D. Utah June 30, 2022), appeal pending, No. 22-4074 (10th Cir.). But the government has appealed that decision, and a district-court decision in any event does not establish a circuit conflict that

warrants this Court's review. See Sup. Ct. R. 10(a) (stating that, in deciding whether to grant review, this Court considers whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals").

Petitioner errs in asserting (Pet. 14-23) a circuit conflict on whether a defendant who engages in conduct clearly prohibited by a statute may challenge its vagueness as applied to others. As the decision below observed (Pet. App. 18a-19a), every court of appeals to consider the question has rejected the contention that Johnson abrogated the principle that (at least outside the First Amendment context) a person who engages in conduct clearly prohibited by a statute is foreclosed from a claim that relies solely on the statute's asserted vagueness as potentially applied to others. See id. at 12a-20a; Peulic v. Garland, 22 F.4th 340, 349 (1st Cir. 2022); United States v. Requena, 980 F.3d 30, 40-43 (2d Cir. 2020), cert. denied, 141 S. Ct. 2761 (2021); United States v. Westbrooks, 858 F.3d 317, 325 (5th Cir. 2017), vacated on other grounds, 138 S. Ct. 1323 (2018); Cook, 970 F.3d at 877-878 (7th Cir.); United States v. Bramer, 832 F.3d 908, 909 (8th Cir. 2016); Kashem v. Barr, 941 F.3d 358, 376-377 (9th Cir. 2019); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1190 (10th Cir. 2021), cert. granted in part, 142 S. Ct. 1106 (2022); United States v. Jones, No. 20-11841, 2022 WL 1763403, at *2 n.1 (11th Cir. June 1, 2022) (per

curiam); Bowling v. McDonough, 38 F.4th 1051, 1061-1062 (Fed. Cir. 2022).

The decisions cited by petitioner (Pet. 17-20) do not show otherwise. To the extent that he relies on district-court decisions, or decisions of intermediate state courts, such decisions would not provide a basis for further review in this Court. See Sup. Ct. R. 10. He cites a Ninth Circuit decision, United States v. Kuzma, 967 F.3d 959, cert. denied, 141 S. Ct. 939 (2020), but acknowledges that it is inconsistent with other Ninth Circuit decisions, and that the Ninth Circuit "currently treats" the issue "as an open question." Pet. 19 n.1; see Pet. App. 18a-19a. He also cites a Fifth Circuit decision, which involved the same statute that this Court later held void for vagueness in Davis, but acknowledges that it was subsequently vacated and that later Fifth Circuit opinions are in accord with the decision below. See Pet. 19-20 & n.2. And the only other federal circuit decision that he cites (Pet. 17) in support of his position involved the regulation of speech, which is subject to distinct rules. See Act Now to Stop War & End Racism Coalition & Muslim Am. Soc'y Freedom Found. v. District of Columbia, 846 F.3d 391, 396 (D.C. Cir.), cert. denied, 138 S. Ct. 334 (2017); see also Virginia v. Hicks, 539 U.S. 113, 118 (2003) (discussing the "exception to [the] normal rule regarding the standards for facial challenges" applicable in First Amendment cases).

Petitioner also favorably cites two decisions of state courts of last resort, but both involved, at least in part, vagueness challenges under state constitutions. See Commonwealth v. Curry, 607 S.W.3d 618, 620 (Ky. 2020) ("due process provisions of the United States and Kentucky Constitutions"); State v. Harris, 467 P.3d 504, 507 (Kan. 2020) (applying "our federal and state constitutions"). State courts need not interpret state constitutional provisions to be coextensive with similar provisions in the U.S. Constitution. See Michigan v. Long, 463 U.S. 1032, 1041 (1983).

In all events, this case would be a poor vehicle for considering whether petitioner may bring a facial challenge to Section 922(g)(3). Even if he may bring such a challenge, the challenge would fail, because Section 922(g)(3) is not vague on its face. See pp. 6-7, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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