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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4306

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

v.

CHRISTOPHER CLARK ARTHUR,

Defendant—Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington.
James C. Dever, III, District Judge.
(7:22-cr-00005-D-1)

Argued: September 10, 2025

Decided: December 3, 2025

Before GREGORY and AGEE, Circuit Judges and Roderick C. Young, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Agee wrote the opinion in which Judge Young joined. Judge Gregory wrote a dissenting opinion.

ARGUED: Andrew DeSimone, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Joseph Patrick Minta, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** G. Alan DuBois, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Sue J. Bai, Gavan W. Duffy Gideon, Appellate Section, National Security Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Daniel P. Bubar, Acting United States Attorney, David A. Bragdon, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

AGEE, Circuit Judge:

18 U.S.C. § 842(p)(2)(B) makes it unlawful to teach "any person" how to make or use "explosive[s]," "destructive device[s]," or "weapon[s] of mass destruction," while "*knowing* that such person intends to use [that] teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence." (emphasis added).

Christopher Arthur was convicted under this statute and sentenced to 300 months in prison. He now brings a facial overbreadth challenge to §

842(p)(2)(B)'s constitutional validity—a question of first impression in this Circuit. In his view, the statute runs afoul of the First Amendment because it "regulates a substantial amount of constitutionally-protected speech." Opening Br. 3. Arthur also contends that the district court erroneously applied U.S.S.G. § 3A1.4's "terrorism enhancement" when issuing his sentence, leading it to calculate a significantly higher Sentencing Guidelines range than would otherwise have been applicable.

For the reasons discussed below, we find that § 842(p)(2)(B) is not unconstitutionally overbroad. Likewise, we find no reversible error in the district court's decision to apply the terrorism enhancement. We therefore affirm the district court's decision in full.

I.

A.

While Arthur's main appellate challenge is a facial one, we provide a brief overview of the facts[1] as relevant to his sentencing challenge and to exemplify the type of fact pattern that may lead to a § 842(p)(2)(B) prosecution.

Arthur founded Tackleberry Solutions in October 2017 and initially planned for the company to sell military gear. Later, he shifted the company's mission

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[1] Because the Government prevailed below, "we present the facts in the light most favorable to [it], drawing all reasonable inferences in its favor." *United States v. Bolden*, 325 F.3d 471, 479 n.5 (4th Cir. 2003). With respect to the sentencing issues, "we review the facts in the light most favorable to the district court's determinations." *Id.*

to "training," with the goal of "help[ing] the average person to be able to defend themselves" against "a tyrannical government of our own or an invading tyrannical government." J.A. 546–47. He published videos and sold manuals online with titles including "Fatal Funnels, Wartime Tactics, Repelling the Assault," J.A. 385, and "Quick Reaction Force, Modern Day Minutemen, Improvised Explosives," J.A. 324–25. The latter publication warned that "[t]hese are wartime tactics, not peacetime tactics. Some of these methods may be highly illegal. We do not advocate the use of this knowledge to hurt the innocent. Be sure to know the laws in your area." J.A. 325.

The FBI began investigating Arthur following a fatal incident in June 2020 involving one of his customers, Joshua Blessed. While searching Blessed's home in Richmond, Virginia, the FBI found fourteen live pipe bombs that were identical to those described in Arthur's manuals, as well as six manuals that he wrote.

Shortly thereafter, the FBI had a confidential informant—"Buckshot"—contact Arthur for training. Buckshot initiated contact with Arthur by watching the Tackleberry Solutions video, "How to Repel a Trained Military Force," and requesting a free PDF from Arthur through a link in that video. J.A. 741. Arthur provided the PDF while noting that he "had to keep parts of this information off the internet. Especially since explosives are such a touchy topic." *Id.* He also told Buckshot that there was "no digital copy of some of the things" he wanted to "share with [him]." *Id.*

Eventually, Arthur invited Buckshot to join him for in-person training, for which Buckshot would be charged a fee. Buckshot accepted his invitation and, upon his arrival, explained to Arthur that "[the] ATF's been to my house. . . . [T]hey're probably coming back. . . . [W]hen they do, I want to be ready." J.A. 38. Arthur responded that he could "guaran-damn-tee" that the agents would return and that Buckshot had two choices: "Stand and fight or be, ah, not exactly where you're supposed to be." *Id.* Once Buckshot relayed that moving was not an option, Arthur spent the next three hours teaching him how to fortify his residence against the returning federal agents.

Arthur first recommended that Buckshot train attack dogs and build an electrified fence around his property. He explained that such a setup would create a "fatal funnel" that would delay law enforcement from approaching the house, at which point Buckshot could "start lobbing . . . grenades on them with [his] freaking [shotgun]." J.A. 63. Arthur also suggested mounting cans of Tannerite[2] around the property that could be detonated with a rifle shot. In addition to this "perimeter defense," Arthur suggested that it "wouldn't be a bad idea" for Buckshot to "put[] some [improvised explosive devices (IEDs)] right up around the doors [of the house]." J.A. 56, 71. He noted that he kept such an IED on his front porch.

Arthur also suggested "a setup called the Spiderweb," which he described as "a freaking death

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[2] Tannerite is a commercially available explosive, commonly used to make exploding targets for marksmanship purposes. *See* J.A. 304.

box." J.A. 42. The "Spiderweb" involved blocking most entrances to Buckshot's house and then placing remotely operated explosives near the remaining entrances, along with a "sentry gun" that could be remotely fired. J.A. 78–80. Arthur even went so far as to offer to "help [Buckshot] design [and] build it," and later showed Buckshot how to use a lightbulb to make a detonator, to "[g]ive [him] something to start with." J.A. 84, 91–92. The detonator would allow Buckshot to wire a switch to an explosive, as Arthur had done with the IED on his own front porch. They also discussed modifying a shotgun into a "thumper" that could launch homemade grenades. *See* J.A. 94–95. Buckshot paid Arthur for the training, and the two agreed to stay in contact.

Arthur was eventually arrested in January 2022 at a gun show where he had agreed to again meet Buckshot. Around the same time, FBI agents executed a search warrant on Arthur's house and found numerous IEDs and firearms.

B.

A grand jury indicted Arthur for violating 18 U.S.C. § 842(p)(2)(B) based on the training he provided to Buckshot (Count 1). Broadly speaking, that statute prohibits "any person" from "teach[ing] or demonstrat[ing] to any person" how to make or use explosives, while "knowing that such person intends to use" the information they learned "for, or in furtherance of," a federal crime of violence. § 842(p)(2)(B). Arthur was also indicted on numerous other violations of 26 U.S.C. § 5861(d) and 18 U.S.C. § 922(k) in connection with the various explosives and

illegal firearms found during the search of his house (Counts 2-9).[3]

Arthur filed a pretrial motion to dismiss Count 1 on the ground that § 842(p)(2)(B) is facially overbroad in violation of the First Amendment. The district court ultimately rejected this argument, holding that the statute is "not overbroad and does not restrict protected speech." J.A. 142. That conclusion was

[3] Those statutes prohibit possession of unregistered firearms and receipt of firearms with obliterated serial numbers, respectively. *See* 26 U.S.C. § 5861(d); 18 U.S.C. § 922(k). Arthur was charged with the following crimes in Counts 2–9: knowing receipt and possession of an unregistered Palmetto State Armory PA-15 rifle having a barrel of less than 16 inches, in violation of 26 U.S.C. §§ 5841, 5845, 5861(d), 5871 (Count 2); knowing receipt and possession of an unregistered Gemtech Halo firearm silencer, in violation of 18 U.S.C. §§ 921(a)(3)(C) and (a)(24), and 26 U.S.C. §§ 5841, 5845(a)(7), 5861(d), 5871 (Count 3); knowing receipt and possession of an unregistered improvised explosive device rigged and wired to detonate with a 9-volt battery and switch, in violation of 26 U.S.C. §§ 5841, 5845(f), 5861(d), 5871 (Count 4); three counts of knowing receipt and possession of an unregistered improvised explosive device designed to detonate upon striking matchheads on a striking plate, in violation of 26 U.S.C. §§ 5841, 5845(f), 5861(d), 5871 (Counts 5, 6, and 7); knowing receipt and possession of an unregistered improved explosive device consisting of a green military-grade ammunition can and a 1-lb container of exploding target materials, in violation of 26 U.S.C. §§ 5841, 5845(f), 5861(d), 5871 (Count 8); and knowing possession of a Gemtech Halo firearm silencer that had been shipped and transported in interstate commerce, from which the manufacturer's (importer's) serial number had been removed, altered, and obliterated, in violation of 18 U.S.C. §§ 922(k), 924(a)(1)(B).

based, in large part, on the court's finding that § 842(p)(2)(B)'s "knowledge requirement effectively limits the scope of the statute," leading it to "more closely resemble[] a criminal aiding and abetting statute." J.A. 142; *see* J.A. 142–43 (rejecting Arthur's reliance on *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), and noting that "the Fourth Circuit limits *Brandenburg*'s protection to mere or 'abstract' advocacy. . . . Section 842(p)(2)(B) and its knowledge requirement ensure the prohibited conduct goes well beyond 'abstract advocacy'").

At the ensuing three-day trial, the Government's witnesses included five FBI special agents, an FBI chemist, an FBI explosives expert, and an ATF agent. These witnesses testified primarily about the search of Arthur's residence and the items found there. The jury also heard a recording of Arthur's meeting with Buckshot. Arthur testified in his own defense, admitting that he possessed all the items charged in Counts 2 through 9, and that he had produced Tackleberry Solution's training materials. The case was then sent to the jury, which delivered a guilty verdict on all counts after two hours of deliberations.

At sentencing, the parties disputed whether Arthur's conduct "involved, or was intended to promote, a federal crime of terrorism," thereby triggering the enhancement set forth in U.S.S.G. § 3A1.4. The district court ultimately concluded that the enhancement applied because Arthur's conduct "involve[d] distributing information knowing that it would be used to murder [or] attempt to murder an officer or employee of the United States in violation of 18 U.S.C. § 1114." J.A. 775. Alternatively, the court

concluded that the enhancement applied because Arthur's conduct was intended to promote a violation of that same section. *See* J.A. 775–76 ("The defendant was encouraging and contributing to the murder or attempted murder of the federal law enforcement officers."). The court also explicitly found that one of Arthur's purposes "was to [a]ffect the conduct of Government by coercion and to retaliate against Government conduct." J.A. 776.

After rejecting Arthur's other objections to the Presentence Investigation Report, the district court calculated his offense level to be 43 and his criminal history category to be VI, resulting in an advisory guidelines sentence of life imprisonment. Under U.S.S.G. § 5G1.2(d), this guidelines sentence was reduced to 1,140 months' imprisonment—240 months for Count 1, 120 months for each of Counts 2 through 8, and 60 months for Count 9.

The district court then weighed the sentencing factors under 18 U.S.C. § 3553(a). Based on all the evidence before it, the court determined that a downward variance from the guidelines sentence was warranted, but also emphasized that Arthur had admitted to significant criminal activity without "expressing remorse." J.A. 797 (opining that "teaching someone to kill an ATF agent is seriously wrong and worthy of just punishment"). In the end, the court sentenced Arthur to 240 months for Count 1, 120 months for each of Counts 2 through 8 (to be served concurrently), and 60 months for Count 9 (to be served consecutively), for a total sentence of 300 months' imprisonment, to be followed by a three-year term of supervised release. The court included, as part of its

sentencing pronouncement, that it would have imposed the same sentence even if it had miscalculated the guidelines range.

Arthur timely noticed this appeal, and this Court has jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

II.

Arthur raises two issues on appeal, the first relating to whether 18 U.S.C. § 842(p)(2)(B) is facially overbroad in violation of the First Amendment, and the second relating to the district court's application of a sentencing guideline enhancement.

The former issue is one that we review de novo. *See United States v. Miselis*, 972 F.3d 518, 525 (4th Cir. 2020) (utilizing de novo review for a First Amendment facial overbreadth challenge). The latter, by contrast, calls for a mixed standard of review: "In reviewing a Sentencing Guidelines application, we review factual findings for clear error and legal conclusions de novo." *United States v. Adepoju*, 756 F.3d 250, 256 (4th Cir. 2014) ("Where a Guidelines application involves a mixed question of law and fact, the applicable standard turns on the nature of the circumstances at issue.").

III.

Arthur's primary argument is that 18 U.S.C. § 842(p)(2)(B) is facially overbroad in violation of the First Amendment. The Government disagrees, contending that Arthur failed to meet his burden of showing that § 842(p)(2)(B) "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep." Resp. Br. 14 (quoting *United States*

v. Hansen, 599 U.S. 762, 770 (2023)). In our view, the Government is correct. To explain why, we first provide a brief outline of First Amendment overbreadth principles, before applying those principles to the case at bar.

A.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Here, Arthur does not argue that the First Amendment protects the communications for which *he* was prosecuted. Instead, he raises an overbreadth challenge: that § 842(p)(2)(B) punishes "so much protected speech that it cannot be applied to *anyone*, including him." *Hansen*, 599 U.S. at 769 (emphasis in original); *see* Opening Br. 1.

Overbreadth challenges are unusual. To begin, "litigants typically lack standing to assert the constitutional rights of third parties." *Hansen*, 599 U.S. at 769. What's more, "litigants mounting a facial challenge to a statute normally 'must establish that *no set of circumstances* exists under which the [statute] would be valid.'" *Id.* (emphasis in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Departing from both of these rules, the overbreadth doctrine instructs courts "to hold a statute facially unconstitutional even though it has lawful applications, and even at the behest of someone to whom the statute *can* be lawfully applied." *Id.* (emphasis added).

Courts have typically justified the overbreadth doctrine on the ground that "it provides breathing room for free expression." *Id.* The idea being, overbroad laws "'may deter or "chill" constitutionally

protected speech,' and if would-be speakers remain silent, society will lose their contributions to the 'marketplace of ideas.'" *Id.* at 769–70 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)). To shield against these harms, "the overbreadth doctrine allows a litigant (even an undeserving one) to vindicate the rights of the silenced, as well as society's broader interest in hearing them speak." *Id.* at 770.

Because invalidation for overbreadth inevitably "destroys some good along with the bad," it is a "strong medicine" that should not be "casually employed." *Id.* (cleaned up). "To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *Id.*; *see N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988); *see Miselis*, 972 F.3d at 531. In the absence of such a lopsided ratio, courts must handle unconstitutional applications in the typical manner—case-by-case. *Hansen*, 599 U.S. at 769.

B.

Overbreadth challenges usually proceed in several steps. First, a court must determine the scope of the challenged provision. *Miselis*, 972 F.3d at 532. In doing so, it "must seek to avoid any 'constitutional problems' by asking whether the statute is 'subject to [] a limiting construction.'" *Id.* at 531 (quoting *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982)).

Next, "[it] must . . . determine whether, so construed, the statute 'criminalizes a substantial amount of protected expressive activity.'" *Id.* (quoting *United States v. Williams*, 523 U.S. 285, 297 (2008)). The overbreadth challenger bears the "burden of

demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Hicks*, 539 U.S. at 122 (cleaned up). A statute's overbreadth must not only be substantial "in an absolute sense, but also relative to [its] plainly legitimate sweep."

Miselis, 972 F.3d at 531 (quoting *Williams*, 553 U.S. at 292). Additionally, at this step, the court must consider whether the proscribed speech falls within one of the few categories of *unprotected* speech. *Id.* at 532; *see also Stevens*, 559 U.S. at 468-69 (recognizing "obscenity, defamation, incitement, and speech integral to criminal conduct" as among the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (cleaned up)).

Finally, if the statute "proves 'impermissibly overbroad,' [the court] must assess whether 'the unconstitutional portion' is 'severable' from the remainder[.]" *Miselis*, 972 F.3d at 531 (quoting *Ferber*, 458 U.S. at 769 n.24). If so, only that portion of the law should be invalidated. *Ferber*, 458 U.S. at 769 n.24.

Altogether, "these efforts to preserve a statute from facial invalidation reflect the notion" that the overbreadth doctrine should only be applied as a last resort, "in cases where it is 'truly warranted.'" *Miselis*, 972 F.3d at 531 (quoting *Ferber*, 458 U.S. at 769); *see also id.* at 530 (describing facial overbreadth challenges as "disfavored").

C.

With the above principles as our guide, we turn to Arthur's challenge. The statute he seeks to invalidate—18 U.S.C. § 842(p)(2)(B)—provides:

> It shall be unlawful for any person . . . to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

This language is straightforward and substantially resolves step one of the overbreadth inquiry (i.e., determining what the statute covers): § 842(p)(2)(B) prohibits individuals from teaching or otherwise disseminating information relating to making and using explosives, destructive devices, and weapons of mass destruction.[4] But that prohibition exists only when the teacher/distributor of that information

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[4] "[E]xplosive," "destructive device," and "weapon of mass destruction" are defined elsewhere in the United States Code. See 18 U.S.C. § 842(p)(1)(A)–(C) (defining these terms by reference to other statutory provisions). The dissent makes much of these definitions, arguing that they broaden § 842(p)(2)(B)'s scope. *See* Diss. Op. 34–35. But even if that's true, § 842(p)(2)(B)'s reach is still substantially limited by its knowledge requirement, as discussed below.

knows that its recipient ("such person") intends to use it for, or in furtherance of, a federal crime of violence. In other words, Congress narrowed § 842(p)(2)(B)'s potentially broad scope by including a mens rea requirement of knowledge within it.

Having established the scope of conduct covered by § 842(p)(2)(B), we now turn to the second step of the overbreadth analysis: "determin[ing] whether, so construed, the statute 'criminalizes a substantial amount of protected expressive activity.'" *Miselis*, 972 F.3d at 531 (quoting *Williams*, 523 U.S. at 297). Because we conclude that the answer to this question is no, Arthur's overbreadth challenge fails.

To begin, it is not at all clear that § 842(p)(2)(B) prohibits *any* "protected expressive activity," let alone a substantial amount. *Id.* That's because the speech and "expressive" activity it proscribes fall largely within one of the "well-defined and narrowly limited classes of [unprotected] speech": speech integral to criminal conduct. *Stevens*, 559 U.S. at 468-69 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

The "speech integral to criminal conduct" exception arose in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). There, unions planned to picket to force a distributor into an agreement that violated state anti-trade restraints law, but a state court prevented them from doing so. *Id.* at 491–92. The Supreme Court upheld the state court's ruling, concluding that "the constitutional freedom for speech and press" does not "extend[] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 498. On this point, the Court observed

that the First Amendment does not prohibit legislatures from "mak[ing] a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502. To hold otherwise would make it "practically impossible" to enforce laws against speech-adjacent conduct "deemed injurious to society." *Id.*

Since *Giboney*, the speech integral to criminal conduct exception has been held to encompass a wide variety of crimes that are often committed through speech. Those crimes include—but are not limited to—conspiracy, solicitation, perjury, extortion, and aiding and abetting. *See Rice v. Paladin Enters.*, 128 F.3d 233, 244 (4th Cir. 1997) (collecting examples and noting that "[w]ere the First Amendment to bar or [] limit government regulation of such speech brigaded with action, the government would be powerless to protect the public from countless of even the most pernicious criminal acts and civil wrongs" (cleaned up)); *see also Hansen*, 599 U.S. at 783 (collecting examples including promotion of contraband, solicitation of unlawful employment, and illegal picketing).

Here, we have little trouble concluding that § 842(p)(2)(B) falls within the speech integral to criminal conduct exception. Simply put, one who teaches another how to make "explosive[s]," "destructive device[s]," or "weapon[s] of mass destruction," while *knowing* that the recipient of that information intends to use it to commit a federal crime of violence, has effectively facilitated the commission of the other's crime. 18 U.S.C. § 842(p)(2)(B). That is,

but for the proscribed communications, the other person would lack the means to commit their intended crime. *See id.* (prohibiting "teach[ing]," "demonstra[ting]," and "distribut[ing]" certain information when it is known that the recipient "intends to use the teaching, demonstration, or information for, or in furtherance of, . . . a federal crime of violence"). Those communications are therefore necessary—or "integral"—to the other person's intended crime. *See Integral*, Cambridge English Dictionary (last accessed Sept. 16, 2025) https://dictionary.cambridge.org/us/dictionary/english/integral [https://perma.cc/A7WM-KQ7Q] (defining "integral" as "necessary and important as a part of a whole"); *Integral*, Merriam-Webster's Dictionary (last accessed Sept. 16, 2025) https://www.merriam-webster.com/dictionary/integral [https://perma.cc/5HHE-8T5F] (defining integral as "essential to completeness"). The facts in this case illustrate that general point: Buckshot told Arthur he wanted to kill ATF agents who were bothering him, but he needed Arthur's guidance to make that a reality. Arthur, in turn, provided Buckshot with all the information he needed to accomplish that objective. Arthur's actions were thus integral to Buckshot's intended crime.[5] In effect, but for Arthur's instruction, Buckshot could not commit his intended crime.

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[5] To be clear, Arthur raises only a facial challenge. The facts of this case merely illustrate how and why the speech integral to criminal conduct exception applies in the context of a § 842(p)(2)(B) prosecution.

An additional hypothetical helps to crystallize this point. Suppose that, rather than seek out guidance on how to make explosives, Buckshot went to Arthur in search of the explosives themselves. Suppose also that Buckshot relayed his nefarious intent to murder federal agents to Arthur, and that Arthur provided Buckshot with the explosives he needed to carry out his plot. Under those circumstances, Arthur's provision of the explosives would certainly be deemed integral to Buckshot's intended crime. After all, he needed explosives to commit the crime, and Arthur provided them. The facts here—and under § 842(p)(2)(B) more generally—are functionally no different. Arthur taught Buckshot everything he needed to know to create the explosives he desired, and he did so knowing that Buckshot intended to use those explosives to commit a federal crime of violence. Arthur's teachings were thus integral to Buckshot's intended crime. *See Rice*, 128 F.3d at 243 ("[I]t is . . . well established that speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.").

Further bolstering this conclusion is this Court's decision in *United States v. Miselis*. There, the appellant brought a First Amendment facial overbreadth challenge to the Anti-Riot Act. *Miselis*, 972 F.3d at 525. While our analysis largely hinged on *Brandenburg*, 395 U.S. 444, and its incitement-related progeny, we made an additional observation that is instructive here. Namely, we noted that

"[s]peech taking some form 'other than abstract advocacy,' . . . such as that which 'constitutes . . . aiding and abetting of criminal conduct,' doesn't implicate the First Amendment." *Id.* at 533 (quoting *Rice*, 128 F.3d at 239, 242–43). In doing so, we "effectively recognize[d] a second category of unprotected speech"— aiding and abetting, and other crimes of its ilk—"which may be proscribed without regard to whether it's directed [at] and likely to produce imminent lawlessness." *Id.*

The speech and activities prohibited by § 842(p)(2)(B) are simply a far cry from the sort of protected "abstract advocacy" contemplated in *Miselis* and *Brandenburg*. *See id.*; *Williams*, 553 U.S. at 299–300 (suggesting that *Brandenburg* only protects "abstract advocacy"). Instead, the statute's prohibitions are much more akin to the type of "aiding and abetting of criminal conduct" that this Court has held may be limited without running afoul of the First Amendment. *Miselis*, 972 F.3d at 533; *see Rice*, 128 F.3d at 244–45. In fact, the only real difference between aiding and abetting, on the one hand, and the conduct proscribed by § 842(p)(2)(B), on the other, is that the former requires the abettor to share the same criminal intent as the principal perpetrator. *See, e.g.*, *Rosemond v. United States*, 572 U.S. 65, 71 (2014) ("As at common law, a person is liable . . . for aiding and abetting a crime if . . . he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."). Section 842(p)(2)(B), by contrast, requires knowledge that the recipient of the bombmaking information intends to commit a crime. *See* 18 U.S.C. § 842(p)(2)(A). But for

purposes of the First Amendment, this is a distinction without a difference. That's because, practically speaking, someone violating § 842(p)(2)(B) is aiding—i.e., facilitating—the underlying crime by intentionally sharing the specified information with someone that they know intends to use it to commit a proscribed crime. And because that sort of facilitation is undoubtedly "integral" to the underlying crime, it is unprotected speech. *See Hansen*, 599 U.S. at 783.[6]

The only other circuit to have considered a First Amendment challenge similar to that raised here rejected it. In *National Mobilization Committee to End War in Viet Nam v. Foran*, the Seventh Circuit considered a facial challenge to 18 U.S.C. § 231(a)(1)—a statute with language akin to that in § 842(p)(2)(B).[7] 411 F.2d 934 (7th Cir. 1969). In rejecting the facial challenge raised, the court held that the challengers improperly "ignore[d] the 'knowing, or having reason to know or intending' language of the statute." *Id.* at 937. The court went on to state that "[t]he requirement of intent of course narrows the scope of

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[6] In any event, it seems plausible that § 842(p)(2)(B), when implicated, will apply in aiding and abetting situations because of its knowledge requirement. And as noted above, aiding and abetting crimes have explicitly been recognized as falling within the speech integral to criminal conduct exception. *See, e.g.*, *Rice*, 128 F.3d at 244.

[7] Section 231(a)(1) prohibits "teach[ing] or demonstrat[ing] to any other person the use, application, or making of any firearm or explosive or incendiary device, . . . knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder."

the enactment by exempting innocent or inadvertent conduct from its proscription." *Id.* So too here. Section 842(p)(2)(B)'s knowledge requirement restricts its reach and ensures that one who disseminates bombmaking information to another *without* knowledge of the recipient's illegal motives remains protected by the First Amendment. *See* Model Penal Code § 2.02(7) ("A person acts knowingly with respect to a material element of an offense when: if the element involves . . . the attendant circumstances, he is *aware* that . . . such circumstances exist." (emphasis added)).[8]

Finally, we reiterate that "[t]o justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and . . . substantially disproportionate to the statute's lawful sweep." *Hansen*, 599 U.S. at 770. For the reasons discussed above (and below), we hold that many, if not all, of § 842(p)(2)(B)'s applications fall within the "speech integral to criminal conduct" exception and thus outside the First Amendment's ambit.[9] But even if

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[8] The Fifth Circuit faced a somewhat similar First Amendment challenge in *United States v. Featherston*, 461 F.2d 1119 (5th Cir. 1972) (relying, in part, on *Foran* to reject a vagueness challenge to 18 U.S.C. § 231(a)). However, because Featherston primarily concerned a vagueness challenge rather than an overbreadth one, it is not on all fours with this case.

[9] Some applications of § 842(p)(2)(B) may even fall within the incitement exception discussed in *Brandenburg* and *Miselis*, particularly in factual scenarios like Arthur's. The potential application of that exception further broadens the

some of its applications theoretically do not fall within that exception, Arthur has still fallen well short of carrying his burden of showing that the number of purportedly unconstitutional applications of this statute is "substantially disproportionate to [its] lawful sweep." *Id.* (cleaned up).

To recap, there are several longstanding exceptions to the protections afforded by the First Amendment. One such exception relates to "speech integral to criminal conduct." Because the communications proscribed by § 842(p)(2)(B) are primarily that sort of unprotected speech, Arthur's facial overbreadth challenge must fail.

D.

Arthur raises various arguments in an attempt to support his facial overbreadth challenge, but none have merit.[10]

First, he argues that the "speech integral to criminal conduct" exception does not save § 842(p)(2)(B) from invalidation because the "examples of [such speech] . . . [all] require the defendant's specific intent to commit a crime, which is absent from this statute." Reply Br. 4; *see* Reply Br. 4–9. It is correct that many of the examples of speech integral to criminal conduct include some sort of specific intent to commit an underlying crime. *See, e.g.*, *Hansen*, 599 U.S. at 771

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scope (and relative share) of unprotected speech prohibited by the statute.

[10] The dissent raises many of the same points as Arthur. *See, e.g.*, Diss. Op. 35–43. Suffice it to say, those arguments fall flat for the same reasons that Arthur's do, as explained herein.

(noting that "aiding and abetting . . . is the provision of assistance to a wrongdoer with the intent to further an offense's commission"). But Arthur overstates the import of this observation, as neither the Supreme Court nor this Court has ever limited this exception to *only* apply where the defendant possesses a specific intent to commit an underlying crime. *See, e.g.*, *Rice*, 128 F.3d at 248 (recognizing that "the First Amendment *may in some contexts* stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused," but expressly declining to "engage in an extended discussion of the existence or scope" of any such "intent-based limitation" (emphasis added)). And with good reason—it operates as a relatively flexible exception. *See Giboney*, 336 U.S. at 688–89; *Rice*, 128 F.3d at 243–44 (acknowledging the various scenarios in which the speech integral to criminal conduct exception has been extended); *United States v. Osinger,* 753 F.3d 939, 950 (9th Cir. 2014) (Watford, J., concurring) (noting that the boundaries of this exception "have not been clearly defined," leaving its "precise scope . . . unsettled"). The main limiting principle for this exception is in its substance—that is, whether the speech was truly *integral* to the criminal conduct in question. And for the reasons already discussed, that requirement is plainly met with § 842(p)(2)(B).

Arthur also contends that the Government "regularly proves guilty knowledge" with ease. Reply Br. 17; *See* Reply Br. 17–23. It is therefore problematic, his argument goes, that § 842(p)(2)(B) requires only "knowledge" of another's intent to

commit a federal crime of violence. There are at least two defects with this line of argument. First, it's not at all clear that the sort of knowledge proscribed by § 842(p)(2)(B) is as easy to prove as Arthur suggests. *See Flores-Figueroa v. United States*, 556 U.S. 647, 655 (2009) (acknowledging the "difficulty in many circumstances of proving beyond a reasonable doubt that a defendant has the [requisite] knowledge" to be convicted). After all, this case presents an issue of first impression. If guilty knowledge was so easy to prove in this context, it seems likely this issue would have arisen previously in the subsections 26-year history. But as counsel acknowledged at argument, this appears to be one of the first ever prosecutions under § 842(p)(2)(B). *See* Oral Arg. 2:20:52. And second, nearly all of the cases marshalled by Arthur in support of this point arose *after* a guilty verdict. *See* Reply Br. 17-23. The appellate court in each instance therefore needed to draw all inferences in favor of the guilty verdict. In other words, the deck was stacked against reversal. But at a trial in the first instance, it won't be axiomatic that a relatively weak prosecution will lead to a guilty verdict. By relying on cases in this posture, Arthur overstates any potential chilling effect of § 842(p)(2)(B).

Next, Arthur argues that two of the main cases cited by the Government— *Featherston* and *Foran*—are distinguishable because they (1) did not deal with the precise issue raised here and (2) involved a limited analysis of the legal issues. On this point, he's somewhat correct. *Featherston* held only that a similar statute (18 U.S.C. § 231(a)) was "sufficiently definite to apprise men of common intelligence of its

meaning and application." 461 F.2d at 1122. That is, it rejected a *vagueness* challenge, not a facial overbreadth one. *See id. Foran*, by contrast, *did* involve a facial overbreadth challenge to § 231(a). And there, the court held that the statute passed constitutional muster: "[Appellants] ignore[] the knowing, or having reason to know or intending language of the statute. The requirement of intent of course narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription." *Foran*, 411 F.2d at 937 (internal quotations and citation omitted). This language suggests that the "intent" requirement of § 231(a) was relevant to the court's holding in *Foran*, but as Arthur points out, § 842(p)(2)(B) does *not* have a separate intent requirement.

Nonetheless, the main reason Arthur's challenge fails—the speech integral to criminal conduct exception—was not at issue, much less addressed, in either decision. So those decisions have little bearing here. Moreover, *Foran*'s language about an intent requirement "narrow[ing] the scope of the enactment" *does* support our conclusion. *Id.* In that respect, § 842(p)(2)(B)'s "knowledge" requirement narrows its scope, just as § 231(a)(1)'s intent requirement narrowed its scope.

Finally, Arthur unleashes a barrage of hypotheticals to argue that § 842(p)(2)(B) is facially overbroad in violation of the First Amendment. *See, e.g.*, Opening Br. 16–17; Reply Br. 16–17; Oral Arg. 2:24:30–2:30:50. His hypotheticals can be broken down into two categories: (1) those raised in his briefing, and (2)

those raised at oral argument. Neither group moves the needle in his favor.

Beginning with the briefing hypotheticals, Arthur rightly conceded at argument that they were unpersuasive. Recall that for facial invalidation to be warranted, "a law's unconstitutional applications must be realistic, not fanciful, and . . . substantially disproportionate to the statute's lawful sweep." *Hansen*, 599 U.S. at 770. Recall also that Arthur bears the burden of making this showing. *Id.* He failed to do so, offering only farfetched hypothetical scenarios in his briefing. *See id.*; *see, e.g.*, Opening Br. 16–17 (suggesting that § 842(p)(2)(B) will "chill military instructors' willingness to teach necessary information out of fear that, if any class member is later revealed to be a member of a gang or extremist group, the instructor could be prosecuted"); *id.* at 17 (arguing that physics teachers "may well refrain from teaching their students basic concepts related to explosions" out of concern that their students may "use that information to commit violence"). And in any event, none of these hypotheticals implicate the statutory "knowledge" element.

The hypotheticals Arthur raised for the first time at argument are no more persuasive. In each instance, he posited a factual scenario in which the speaker taught or otherwise disseminated bombmaking information to a broad audience. *See* Oral Arg. 22:24:42–2:30:50. He further posited that, at some point after dissemination, the original speaker became aware of at least one individual who intended to use that information to commit a crime. Arthur contends that this state of affairs would leave the

speaker with a Hobson's choice: face criminal liability under § 842(p)(2)(B), or recall the information in question and, in doing so, have their speech chilled.

While these hypotheticals are marginally less fanciful than those raised in Arthur's briefing, they remain unconvincing. For one, in each instance, the speaker did not disseminate the relevant information *with knowledge* that another person intended to use it to commit a crime of violence. Rather, that knowledge only came about afterward. So, the speaker's original "teach[ings] or "demonstrat[ions]" would not be covered by the statute. *See* § 842(p)(2)(B).

Moreover, it's not clear that failing to take the information down after the fact would lead to criminal liability. Again, § 842(p)(2)(B) contemplates that the speaker knows—at the time they "teach or demonstrate . . . the making or use of an explosive, [] destructive device, or [] weapon of mass destruction," or "distribute . . . information pertaining to" the same—that a specific person intends to use that specific information to commit a crime of violence. 18 U.S.C. § 842(p)(2)(B). But in the later hypotheticals Arthur provided, the speaker did not know of the other person's intent until after the fact. In other words, the speaker's "teach[ing]" and "distribut[ion]" had effectively concluded before the other individual obtained the requisite knowledge. And because § 842(p)(2)(B) requires that knowledge to exist *at the time* of the proscribed teaching or distribution, a

prosecution would not be successful under such circumstances.[11, 12]

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[11]An example helps to illustrate this point. Imagine Person A sends a book on bombmaking to a group of ten people. Afterward, one of those people—Person B— contacts Person A to let him know that he plans to use the information in the book to commit a crime of violence. In this situation, Person A has not violated § 842(p)(2)(B). At the time he "taught" the group, he did not know that Person B intended to use the information to commit a crime of violence. And once he did know, his "teaching" had concluded (i.e., he'd already sent the book). Because the teaching and knowledge did not happen or exist simultaneously, Person A did not violate § 842(p)(2)(B). The same would be true under the hypotheticals raised by Arthur.

[12] Briefly, the Government argues that § 824(p)(2)(B)'s statutory counterpart—§ 842(p)(2)(A)—is the more applicable provision for the broad dissemination contemplated by Arthur's hypotheticals at oral argument. While we need not reach the issue, the Government raises a good point.

Section 842(p)(2)(A) broadly prohibits "any person" from "teach[ing] or demonstrat[ing] the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to . . . the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of," a federal crime of violence.

By contrast, § 842(p)(2)(B) prohibits "any person" from "teach[ing] or demonstrating *to any person*" the making or use of those same weapons, and "distribut[ing] *to any person*, by any means, information pertaining to . . . the manufacture or use" of those weapons, while "knowing that *such person* intends to use the teaching, demonstration, or information

In the end, Arthur is unable to carry his burden of proving that § 842(p)(2)(B) is facially overbroad. We therefore reject his First Amendment facial overbreadth challenge.

IV.

Arthur's second appellate challenge relates to the district court's imposition of a terrorism enhancement under U.S.S.G. § 3A1.4. The district court concluded that this enhancement applied because Arthur's conduct "involve[d] distributing information knowing that it would be used to murder [or] attempt to murder an officer or employee of the United States in violation of 18 U.S.C. § 1114." J.A. 775. It alternatively concluded that the enhancement applied because Arthur's conduct was intended to promote a violation of that same section. We discern no reversible error in these conclusions.

U.S.S.G. § 3A1.4 instructs district courts to increase a defendant's offense level and criminal-history category "[i]f the offense is a felony that involved, or

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for, or in furtherance of," a federal crime of violence. (emphasis added)

Even setting aside the obvious distinction between the two statutes—the differing mens rea requirements—there is another crucial difference: § 842(p)(2)(B) requires that the teaching, demonstration, or dissemination of information be "*to any person*," with the knowledge that "such person" will use it improperly. This suggests that the conduct proscribed by § 842(p)(2)(B) must be directed toward some specified person(s), rather than just sent out into the ether. Section 842(p)(2)(A) contains no such limiter, and thus more naturally reads as being aimed at the sort of broad dissemination Arthur posits in his hypotheticals.

was intended to promote, a federal crime of terrorism." A "federal crime of terrorism," in turn, "consist[s] of two elements: (1) the commission of one of a list of specified felonies . . . and (2) a specific intent requirement, namely, that the underlying felony was 'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.'" *United States v. Chandia*, 514 F.3d 365, 376-77 (4th Cir. 2008) (quoting 18 U.S.C. § 2332b(g)(5)); *see also* U.S.S.G. § 3A1.4 cmt. n.1 (instructing that "federal crime of terrorism" in the Guidelines has the meaning given the term in 18 U.S.C. § 2332b(g)(5)).

Here, all agree that the federal crime of violence that Arthur knew Buckshot intended to commit—the murder or attempted murder of federal law enforcement officers—qualifies as a federal crime of terrorism (via 18 U.S.C. §§ 1114 and 2332b(g)(5)). Opening Br. 24; Resp. Br. 35. The only question remaining is whether Arthur's offense, 18 U.S.C. § 842(p)(2)(B), "involved, or was intended to promote" Buckshot's federal crime of terrorism.

To reiterate, there are two ways in which the § 3A1.4 enhancement can be triggered: (1) if the defendant's offense is a felony that "involved" a "federal crime of terrorism," or (2) if the defendant's offense is a felony that "intended to promote[] a federal crime of terrorism." U.S.S.G. § 3A1.4; *see United States v. Kobito*, 994 F.3d 696, 702 (4th Cir. 2021). As this Court recognized in *Kobito*, the "'involve' prong . . . suggests that the predicate offense and related conduct must include a federal crime of terrorism." 994 F.3d at 702. The "intended to promote" prong has

a slightly different sweep, applying "whenever the defendant commits a felony with 'a goal or purpose . . . to bring or help bring into being a [federal crime of terrorism]' . . . even if the defendant 'has not necessarily completed, attempted, or conspired to commit [that] crime.'" *Id.* (first quoting *United States v. Mandhai*, 375 F.3d 1243, 1248 (11th Cir. 2004); and then quoting *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2001)). The district court correctly recognized that either prong applies on the facts of this case.

First, the "involve" prong. Arthur's crime necessarily "involved" a federal crime of terrorism because he provided Buckshot with information integral to Buckshot's intended federal crime of terrorism. Not only that, but Arthur did so with the knowledge that Buckshot would use that information to commit that crime. Indeed, the government had to—and did—prove a close link between the training that Arthur gave Buckshot and Buckshot's purported intent to murder federal officials. Arthur's crime therefore "involved" or "ha[d] within or as part of itself" Buckshot's intended federal crime of terrorism. *Id.*

Arthur's offense also "intended to promote" a federal crime of terrorism for essentially the same reasons. That is, he violated § 842(p)(2)(B) by teaching Buckshot how to create certain bombs and explosives. And the record reflects that he did so "with 'a goal or purpose . . . to help bring into being'" Buckshot's intended federal crime of terrorism (again, 18 U.S.C. § 1114). *Id.* The facts bear this out: Buckshot told Arthur what his intentions were, and Arthur

knowingly taught him how to bring his plans to fruition. *See* J.A. 776 (finding that Arthur's offense intended to promote a violation of 18 U.S.C. § 1114 by "encouraging and contributing to the murder of . . . federal law enforcement officers," insofar as he taught Buckshot how to build explosives that he described variously as "stupid lethal" and a "'freaking death box' for ATF agents"); *see also id.* (finding that Arthur "reasonably foresaw the use of [those explosives and] tactics to kill ATF agents"); *Graham*, 275 F.3d at 518–19 (holding that the defendant's 18 U.S.C. § 371 conspiracy was "intended to promote" a federal crime of terrorism where the targets of the latter crime "were reasonably foreseeable to the defendant").[13]

Arthur resists this conclusion, but his arguments are meritless. For instance, he argues that his crime "did not involve a crime of terrorism because it did not *include* a crime of terrorism." Opening Br. 26. But that's not true. His crime *did* such a crime: Buckshot's intention to kill federal law enforcement agents, in violation of 18 U.S.C. § 1114. That offense, and Arthur's knowledge thereof, is necessarily included—i.e., "involved"—in the offense Arthur committed. *See* 18 U.S.C. § 842(p)(2)(B).

Arthur also argues that the district court failed to make certain findings relevant to its conclusion on the "intended to promote" prong of U.S.S.G. § 3A1.4. *See* Opening Br. 27 ("[T]he district court found [only] that

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[13] And under *Kobito*, it is irrelevant that Arthur himself did "not . . . complete[], attempt[], or conspire[] to commit [a federal] crime [of terrorism]." *Kobito*, 994 F.3d at 702 (cleaned up).

Mr. Arthur's 'purpose, among others, in teaching the confidential human source about how to make IEDs was to [a]ffect the conduct of Government by coercion and to retaliate against Government conduct.' But crucially, the district court never made the requisite finding that Mr. Arthur *intended* for his teaching to be used to kill ATF agents." (emphasis in original)). Yet this argument relies on a misreading of the record, as the district court *did* make the requisite findings. First, it found that Arthur intended "to [a]ffect the conduct of Government by coercion and to retaliate against Government conduct[,]" satisfying 18 U.S.C. § 2332b(g)(5)'s specific intent requirement. J.A. 776. And the district court further found that Arthur "help[ed] bring into being" a violation of 18 U.S.C. § 1114 by "*encouraging* and *contributing* to the murder or attempted murder" of federal law enforcement officials. J.A. 776 (emphasis added); *see Kobito*, 994 F.3d at 702.

Finally, even assuming Arthur is correct that the district court erred in applying § 3A1.4's terrorism enhancement, any error was harmless. A guidelines error is harmless if the record shows that "(1) 'the district court would have reached the same result even if it had decided the Guidelines issue the other way,' and (2) 'the sentence would be reasonable even if the Guidelines issue had been decided in the defendant's favor.'" *United States v. Mills*, 917 F.3d 324, 330 (4th Cir. 2019).

Here, there's no dispute that the first requirement is satisfied, as the district court explicitly stated it would have "impose[d] the same sentence as an alternative variant sentence if [it] ha[d] in any way

miscalculated the advisory guidelines range." J.A. 799–800. The second requirement calls for slightly more analysis, as we must "examine[] the totality of the circumstances"—including the extent of any variance—"to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [18 U.S.C.] § 3553(a)." *Mills*, 917 F.3d at 331 (quoting *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014)). And in doing so, we must "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

Applying these principles to the facts of this case, we find that the district court's individualized application of the § 3553(a) factors supports its conclusion that, even if the applicable advisory range was instead 168-210 months,[14] a variance to a 300-month sentence was "necessary to satisfy the basic aims of sentencing." *Id.* To that end, the record reflects that the district court walked through all the relevant factors and properly exercised its discretion in fashioning Arthur's sentence. *See* J.A. 793–800 (considering, among other things, the nature and circumstances of the offense, Arthur's history and characteristics, and the need to promote respect for the law and provide just punishment). Under these circumstances, we have little issue concluding that Arthur's sentence "would

[14] The parties agree that this would be the proper guidelines range if the terrorism enhancement did not apply. *See* Resp. Br. 41; Reply Br. 29

be reasonable even if the Guidelines issue had been decided in [his] favor." *Mills*, 917 F.3d at 330. Any error attending the Guidelines issue raised by Arthur is therefore harmless.

In sum, Arthur advances a cramped reading of both the record and U.S.S.G. § 3A1.4's "involved" or "intended to promote" requirement. The district court correctly rejected his arguments on its way to applying § 3A1.4's enhancement. And even if it had erred, any error was harmless for the reasons just stated. We therefore affirm the sentence imposed by the district court.

V.

For the foregoing reasons, the district court's judgment is

AFFIRMED.

GREGORY, Circuit Judge, dissenting:

Christopher Clark Arthur brings this challenge to 18 U.S.C. § 842(p)(2)(B), arguing that the statute is facially overbroad in violation of the First Amendment. Because I have concerns about the wide range of speech encompassed by the statutory language as well as the novelty of criminalizing speech when the speaker lacked specific intent to commit a crime, I cannot agree with my colleagues that this statute should survive overbreadth analysis.

I.

Given the concern that overbroad laws "may deter or chill constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions," courts allow First Amendment facial challenges "based merely on hypothetical applications of the law to nonparties . . . even if the law is constitutional as applied to the plaintiff." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Preston v. Leake*, 660 F.3d 726, 738–39 (4th Cir. 2011).

The first step in a facial overbreadth analysis "is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). Section 842(p)(2)(B) prohibits "distribut[ing] to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction" so long as the distributor "know[s]" that a recipient intends to use the information in furtherance of a federal crime of violence. 18 U.S.C. § 842(p)(2)(B). The majority asserts that Arthur's conduct—which

involved instructing a confidential informant how to set up deadly explosive defenses on his property—"exemplif[ies] the type of fact pattern that may lead to a § 842(p)(2)(B) prosecution." Majority Op. at 4. But as the majority recognizes, Arthur does not bring a challenge to the statute as applied to his own conduct; our task is to determine whether the law on the whole "criminalizes a substantial amount of protected activity." *Williams*, 553 U.S. at 293.

To appreciate the full scope of the statute, we must consider how it defines the terms "explosive" and "destructive device." The term "explosive" means

> gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. §§ 842(p)(1), 844(j). We have held that gasoline, even outside a pressurized container, qualifies as an explosive for the purpose of this section, *United States v. Lee*, 726 F.2d 128, 130-31 (4th Cir. 1984), and several of our sister circuits have

issued even more expansive holdings. *See, e.g.*, *United States v. Hepp*, 656 F.2d 350, 352 (8th Cir. 1981) (holding that releasing methane into the air creates an "explosive" under this statute). The section defining "destructive device" lists a number of particular items which that category comprises, but it also includes a catchall provision that incorporates into the definition "any combination of parts either designed or intended for use in converting any device into any destructive device." 18 U.S.C. §§ 842(p)(1), 921(a)(4). While the facts of Arthur's case might imply that the statute is solely concerned with bombs, the reality of the statutory language is that it applies to far more common and less threatening items.

The breadth of these definitions is exacerbated by the breadth of the rest of Section 842(p)(2)(B). The statute does not restrict criminal punishment only to those who publish assembly instructions for explosives and destructive devices. Section 842(p)(2)(B) prohibits distributing information "pertaining to, in whole or in part, the manufacture or use" of an explosive or destructive device. 18 U.S.C. § 842(p)(2)(B) (emphasis added). The law is hardly cabined to those who communicate bombmaking instructions; the statute prohibits discussion of anything *pertaining*, *in part* to an explosive or destructive device. Consider a discussion about the production of methane gas, which our sister circuits have held need only be released into the air to create an "explosive." By the plain language of the statute, that discussion qualifies as "pertaining . . . in part, to the manufacture . . . of an explosive." 18 U.S.C. § 842(p)(2)(B). Or consider a university professor giving

a lecture on simple physics topics; the language of the statute is likely to cover this speech as well, since the concepts of potential and kinetic energy easily "pertain[] to" incendiary applications. A statute that couples vague definitions with strict prohibitions leaves enormous discretion in the hands of the government to penalize speech.

II.

Since the statute prohibits a wide range of speech, we must consider whether the *mens rea* requirement sufficiently narrows its scope to ensure it does not penalize too much protected speech.

A conviction for violating Section 842(p)(2)(B), requires the perpetrator "know[]" that a recipient of the information "intends" to use it "for, or in furtherance of, an activity that constitutes a Federal crime of violence." 18 U.S.C. § 842(p)(2)(B). Whether mere knowledge—without intent—establishes the speaker's sufficient culpability so as to justify withholding First Amendment protection has not been squarely decided by this Court. The only case on this point cited by the majority is *National Mobilization Committee to End War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969), in which the Seventh Circuit devoted one paragraph to a similar question. But that opinion was issued before the Supreme Court's seminal decision in *Brandenburg v. Ohio* clarified that the First Amendment protects advocacy of lawlessness. 395 U.S. 444 (1969). Until today, this Court has refrained from deciding whether a speaker's mere knowledge of a listener's criminal intent is sufficient to permit civil liability. *See Rice v. Paladin Enters.*, 128 F.3d 233, 247 (4th Cir. 1997)

("[T]he First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be used for an impermissible purpose."). When the law imposes criminal sanctions, our First Amendment scrutiny is even more exacting. *Hicks*, 539 U.S. at 119.

Knowledge is too readily proven during prosecution to sufficiently winnow this broad statute. To show knowledge, the prosecution generally must present evidence that the speaker is "aware" that a recipient intends to use the information in furtherance of a federal crime of violence. *Barnes v. United States*, 412 U.S. 837, 845 (1973). But adjudicators may "impute the element of knowledge" when "the evidence supports an inference of deliberate ignorance." *United States v. Ruhe*, 191 F.3d 376, 384 (1999). Criminal defendants can satisfy a knowledge requirement for failure to investigate suspicious circumstances, as with a pharmacist purchasing medication at below-market rate, or a recipient of funds from illegal activities who failed to inquire about the source of suspicious deposits. *United States v. George*, 233 F. App'x 402, 404 (5th Cir. 2007); *United States v. Olla*, 754 F. App'x 168, 171 (4th Cir. 2018).

This low bar for criminal knowledge, combined with the broad language of the statute, imperils First Amendment protection for much valuable speech. Consider, for instance, the university professor discussed above, who is scheduled to give a lecture on the physics of combustion, or even simply on the topic of potential energy, which surely constitutes a "part" of information about explosives. If the professor had

reason to believe a listener would weaponize this information—perhaps a potential attendee sent a letter outlining malicious intentions, or an audience member wore a t-shirt suggesting an affinity for violence—then the professor could conceivably be prosecuted under Section 842(p)(2)(B) for providing restricted information knowing that an audience member intended to use that information for nefarious purposes. The same could be said for a publisher of an instructional manual for safe use of explosives in construction and demolition. If the publisher received prior notice of a potential reader's inclination to weaponize the manual's information, the publisher would be at risk of prosecution under Section 842(p)(2)(B). In both examples, protected and socially valuable speech is stifled because of the possibility that a rogue audience member would misuse the information provided, even if the speaker did not intend such misuse.

My colleagues in the majority may quibble with whether these examples, or numerous others that fit into a similar pattern, would satisfy the knowledge requirement to permit liability under Section 842(p)(2)(B). While I believe that they would, the more pertinent question is whether they constitute speech that might be *chilled* under this statute, especially "given the ordinary citizen's predictable tendency to steer wide of the unlawful zone." *Counterman v. Colorado*, 600 U.S. 66, 77–78 (2023) (internal citation omitted). If ordinary citizens become aware that they can be punished for providing information they anticipate will aid a crime, they will surely hesitate to provide information when they believe there is some

small chance of criminal activity. As a result, even if the majority is correct about the difficulty of proving knowledge to a jury, an ordinary citizen aware of the risks will refrain from protected speech. *See Counterman*, 600 U.S. at 75 ("A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is self-censorship of speech that could not be proscribed . . . ." (internal citations omitted)).

At its core, this statute brings the First Amendment into new territory, where speech is prohibited not because of the intent of the speaker, but because of the intent of the listener. When a criminal statute requires the speaker to have a criminal intent, First Amendment concerns are lessened. *United States v. Hansen*, 599 U.S. 762, 783 (2023). The chilling effect of a criminal statute premised upon the intent of the speaker has minimal chilling effect, because the speaker will always know whether they have the requisite intent. When the speech is criminalized as a result of the *listener's* intent, however, the speaker is in a far more precarious position. As a result, the prudent speaker who is unsure about the motivations of an audience will refrain from speech. An "important tool to prevent that outcome—to stop people from steering wide of the unlawful zone—is to condition liability on the [government]'s showing of a culpable mental state." *Counterman*, 600 U.S. at 75. For this statute, the knowledge requirement insufficiently establishes culpability.

I do not doubt that this statute restricts some legitimately proscribable speech; the circumstances of Arthur's case demonstrate that this statute has at least some constitutional applications. But the reduced *mens rea* requirement, in combination with the broad language of the statute, creates an unacceptably high risk of chilling protected expression. Conditioning liability on a more culpable mental state—as Section 842(p)(2)(A) does— "will shield some otherwise proscribable . . . speech . . . . But the added element reduces the prospect of chilling fully protected expression." *Counterman*, 600 U.S. 66, 75 (2023).

The government assures us that cases like Arthur's are emblematic of the types of Section 842(p)(2)(B) cases they intend to prosecute, and speech outside this narrow band of conduct bears no additional risk. But "we would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010). "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *Id.*

III.

The statute restricts information based on its content, and as such is "presumptively invalid" unless the government meets its burden to rebut that presumption. *United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 817 (2000). The majority concludes that the government has met its burden by demonstrating that the entire law only proscribes speech "integral to criminal conduct," a band of speech

which receives no First Amendment protection. Maj. Op. at 14.

However, the majority misconstrues this "historic and traditional categor[y]" of unprotected speech. *Stevens*, 559 U.S. at 468. As we have described it, speech which is "tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes." *Rice*, 128 F.3d at 243. For instance, the crimes of extortion, perjury, and solicitation all contain speech components, but an extortionist does not earn the protection of the First Amendment merely because the extortion is effectuated by speaking. *See id.* at 244. In other words, "speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970).

To criminalize speech as "speech integral to criminal conduct," there must be an underlying criminal offense that the statute penalizes. Naturally, whenever a statute creates criminal penalties for speech, a train of circular logic could allow us to conclude that the speech is integral to criminal conduct: i.e., the criminal conduct of speaking in violation of the challenged statute. But this logic would dispose entirely of the protections of the First Amendment. The category of "speech integral to criminal conduct" refers to that speech that is itself merely a means of committing the underlying crime; in those instances, "the justifications for free speech . . . do not reach communications that are simply means to get a crime successfully committed." *Rice*, 128 F.3d

at 243 (quoting Kent Greenawalt, *Speech, Crime, and the Uses of Language* 85 (1989)).

As the majority recognizes, the underlying crime to which this speech is purportedly "integral" is the "Federal crime of violence." Majority Op. at 18-19. While the restricted speech may facilitate the Federal crime of violence, it is stretching the category beyond its historical limits to claim that the speech is "tantamount to" a federal crime of violence, or "simply a means" of committing a federal crime of violence. *Rice*, 12 F.3d at 243. The principle that the First Amendment permits "restrictions upon the content of speech in a few limited areas" is not an invitation for courts to expand the scope of these "First Amendment Free Zone[s]" to filter out speech we deem undesirable. *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ; *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

Two further differences highlight the gulf between Section 842(p)(2)(B) and every other example we have recognized of speech integral to criminal conduct. The first and clearest is that all other speech integral to criminal conduct is penalized only when the speaker has the specific intent to commit the crime. Criminal solicitation, conspiracy, extortion, and perjury each require the speaker intend to carry out the underlying criminal act. *See* Model Penal Code §§ 5.02 (solicitation); 5.03 (conspiracy); 223.4 (extortion); 241.1 (perjury). The Supreme Court has defended the "speech integral to unlawful conduct" category by noting that "[s]peech *intended* to bring about a particular unlawful act has no social value; therefore, it is unprotected." *Hansen*, 599 U.S. at 783 (emphasis

added). As I discussed above, a speaker prosecuted under Section 842(p)(2)(B) need not have any intent to commit a crime, much less an intent to carry out the underlying "Federal crime of violence" with which the statute is purportedly concerned.

This leads to the second important distinction between Section 842(p)(2)(B) and the category of speech integral to criminal conduct: unlike any other speech that falls into that category, Section 842(p)(2)(B) restricts sharing publicly available and socially valuable information. As the U.S. Department of Justice acknowledged in its 1997 report on bomb manufacturing, "anyone interested in manufacturing a bomb, dangerous weapon, or a weapon of mass destruction can easily obtain detailed instructions from readily accessible sources such as legitimate reference books, the so-called underground press, and the Internet." U.S. Dep't of Justice, *Report on the Availability of Bombmaking Information, the Extent to Which its Dissemination Is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution* 1-2 (Apr. 29, 1997). The report further recognized that any statute attempting to quell the dissemination of this information would need to leave untouched "the wholly legitimate publication and teaching of such information, or otherwise violate the First Amendment." *Id.* at 2.

The First Amendment provides strong protection for the provision of publicly available facts, such as those restricted by Section 842(p)(2)(B). The Supreme Court has long hesitated to punish speakers whose only

misdeed was providing truthful information through a new avenue. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989); *see also* Greenawalt, *Speech, Crime & the Uses of Language* at 86–87 ("A speaker may conceivably think a communication has significant value for the listener beyond the listener's immediate purpose, but, even if the speaker does not think that, perhaps a recognition of the speaker's autonomy should include allowing him ordinarily to say what he believes to be true to his acquaintances, regardless of the use he thinks they plan to make of it."). When the state criminalizes sharing information that exists in the public domain, it places a burden on the speaker to refrain from speech but does not prevent the listener from accessing that information through other, legal channels. Absent an intent to facilitate the commission of a crime, "it is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities." *Florida Star*, 491 U.S. at 535.

The categories of speech excepted from First Amendment protection are historically "limited," and the First Amendment does not permit government "to disregard these traditional limitations." *Stevens*, 559 U.S. at 468. Sharing factual knowledge with no intent to beget a crime does not fit within the category of "speech integral to criminal conduct," which is primarily concerned with speech that takes the place of a criminal act. Because Section 842(p)(2)(B) does not include a specific intent requirement, and it penalizes the distribution of publicly available information, I cannot agree that the speech it restricts

is "speech integral to criminal conduct" that receives no First Amendment protection.

IV.

As Justice Hugo Black wrote, "My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that you shall not do something to people either for the views they have, or the views they express, or the words they speak or write." *One Man's Stand for Freedom: Mr. Justice Black and the Bill of Rights* 478 (Irving Dillard ed. 1963). While there are no doubt benefits to restricting certain categories of speech, "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 559 U.S. at 470. I believe the shocking breadth of the statutory language, combined with the ease of proving knowledge and the substantial danger of chilling protected speech, justify imposing the "strong medicine" of facial invalidation for overbreadth. *Hansen*, 599 U.S. at 784. I would reverse, and therefore I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:22-CR-5-D

UNITED STATES OF AMERICA

v.

CHRISTOPHER CLARK ARTHUR,

Defendant.

Filed January 17, 2023

ORDER

On March 2, 2022, a federal grand jury in the Eastern District of North Carolina indicted Christopher Clark Arthur ("Arthur" or "defendant") and charged him with (1) distribution of information relating to explosives in violation of 18 U.S.C. §§ 842(p)(2)(B) and 884 (count one), (2) eight counts of possession of unregistered devices in violation of 26 U.S.C. §§ 5841, 5845, 5861, and 5871 (counts two through eight), and (3) possession of a firearm with an obliterated serial number in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B) (count nine). See [D.E. 23]. On

August 19, 2022, Arthur moved to dismiss count one based on the First Amendment [D.E. 41]. The same day, Arthur moved to dismiss counts two through nine based on the Second Amendment [D.E. 42]. On September 2, 2022, the government responded in opposition [D.E. 44, 45]. As explained below, the court denies defendant's motions to dismiss.

I.

The federal investigation of Arthur began following the death of Joshua Blessed ("Blessed") (né Sergeia Jourev). See [D.E. 41] 2. The Federal Bureau of Investigation ("FBI") began investigating Blessed in early 2019 based on information that Blessed was organizing and recruiting for an extremist militia group attempting to engage in an "apocalyptic battle against the United States Government." Id.; see [D.E. 30] 3–5. On May 27, 2020, New York law enforcement attempted a traffic stop on Blessed. See [D.E. 30] 5. After a two-hour police pursuit, during which Blessed fired at law enforcement, officers shot and killed Blessed. See id.

Investigators discovered that Blessed had been communicating with Arthur through the website "tackleberrysolutions.com." See [D.E. 41] 2; [D.E. 30] 3–5. In March 2020, Blessed allegedly traveled to Mount Olive, North Carolina to train with Arthur at Tackleberry Solutions. See [D.E. 41] 2; see [D.E. 30] 7. When police searched Blessed's residence in Richmond, Virginia, authorities found several improvised explosive devices ("IEDs") and numerous Tackleberry Solutions instruction manuals. See [D.E. 30] 4. Arthur allegedly authored one of these manuals:

"Quick Reaction Force-Modern Day Minuteman-Improvised Explosives." See id. at 5–6.

On May 5, 2021, FBI agents provided a confidential human source ("CHS") with devices to secretly record Arthur during a training session at Arthur's residence. See [D.E. 41] 2–3; [D.E. 30] 7–9. The CHS intimated to Arthur that Alcohol, Firearms, and Tobacco ("ATF") agents had come to the CHS's house. See [D.E. 30] 9–10. The government alleges that Arthur told the CHS about methods to evade government detection, such as supplying the government with a false address, using a "neighborhood watch," and moving around to different addresses. See [D.E. 42-2] 6–10. When the CHS informed Arthur that the CHS could not change addresses, Arthur described in detail how to booby-trap the CHS's property. See id. at 10–13.

After seeing the layout of the CHS's property, Arthur allegedly spent the next several hours discussing various strategies to "defend" the CHS's property from the ATF. See id. at 10–88. Arthur suggested that the CHS should use a "spiderweb defense" for the CHS's property because the "[s]pider defense just absolutely ass rapes them." Id. at 24. Arthur provided a drawing for the CHS demonstrating how to establish the spiderweb defense on the CHS's property. See id. at 57. Arthur suggested that the CHS use electric fences, dogs, vehicles traps, and IED traps placed near the entrance to the CHS's property. See id. at 29–31. Arthur then provided the CHS with a strategy to engage and kill ATF agents, by trapping them in a "fatal funnel." Id. at 31. Arthur explained to the CHS: "What these dumbasses are

going to do, they're going to hunker down right behind that damn armored vehicle and the other guys are going to run. And that's when you start lobbing your grenades on them with your freaking shotty . . . ." Id. Finally, Arthur demonstrated to the CHS how to make IEDs and even provided the CHS an IED Arthur made as an example. Id. at 58–60.

On January 22, 2022, authorities executed a search warrant on Arthur's property and recovered an unregistered Gem-Tech HALO firearm silencer with an obliterated serial number, an unregistered short-barreled Palmetto Stat Armory PA-15 rifle, and multiple unregistered IEDs. See [D.E. 44] 3.

II.

Rule 12 provides the defendant with the ability to file a motion alleging "a defect in the indictment or information[.]" Fed. R. Crim. P. 12(b)(3)(B). The indictment must include every essential element of the offense. See United States v. Perry, 757 F.3d 166, 171 (4th Cir. 2014); United States v. Camero-Castaneda, No. 5.20-CR-513, 2021 WL 4979406, at *2 (E.D.N.C. Oct. 26, 2021) (unpublished). "The sufficiency of an indictment is determined by practical, not technical, considerations." United States v. Sutherland, 656 F.2d 1181, 1197 (5th Cir. 1981); see United States v. Cobb, 905 F.2d 784, 790 (4th Cir. 1990). An indictment must sufficiently apprise the "defendant [of] all that he needs to show for his defense" and be sufficiently specific to protect against double jeopardy. Cobb, 905 F.2d at 790 (quotation omitted); see United States v. Missler, 414 F.2d 1293, 1297 (4th Cir. 1969). An indictment "must include every essential element of an offense" and

suffices if it sets "forth the offense in the words of the statute itself[.]" Perry, 757 F.3d at 171 (quotation omitted). If the indictment meets this standard, the indictment is valid on its face and the court may not review the sufficiency of evidence supporting the indictment. See United States v. Wills, 346 F.3d 476, 488–89 (4th Cir. 2003). "A district court may dismiss an indictment under Rule 12 where there is an infirmity of law in the prosecution; a court may not dismiss an indictment, however, on a determination of facts that should have been developed at trial." United States v. Engle, 676 F.3d 405, 415 (4th Cir. 2012) (quotation omitted). Moreover, "a court cannot grant the motion to dismiss under Rule 12 if a defendant's legal contentions are inextricably bound up with the facts of the case." United States v. Regaldo, 497 F. Supp. 3d 56, 58 (E.D.N.C. 2020) (cleaned up).

III.

A.

Arthur claims that 18 U.S.C. § 842(p)(2)(B) is facially unconstitutional under the First Amendment because it is impermissibly overbroad and incompatible with Brandenburg v. Ohio, 395 U.S. 444, 449 (1969). See [D.E. 41] 3. Arthur also appears to argue that section 842(p)(2)(B) is invalid under the First Amendment as applied. See id. at 6–8.

Under 18 U.S.C. § 842(p)(2)(B), it is unlawful for any person:

> to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to

> distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

18 U.S.C. § 842(p)(2)(B). Arthur argues that the government is improperly prosecuting him for "simply produc[ing] a writing and engag[ing] in conversations discussing his opinions on how to defend oneself' and that he "did not make an active step to assist a person knowing that person intended to utilize the information for illegal activities." [D.E. 41] 8. In support, Arthur suggests that the government is prosecuting him, in part, for training Blessed. See id. at 8–9.

Arthur is wrong. Count one alleges that Arthur committed the offense "[o]n or about May 5, 2021," the date on which the CHS allegedly trained with Arthur. [D.E. 23] 1; [D.E. 30] 7–9. Count one does not concern Arthur allegedly training Blessed in March 2020. Cf. [D.E. 30] 7.

Arthur also argues that the government cannot charge him under 18 U.S.C. § 842(p)(2)(B) for his interactions with the CHS because Arthur never stated "at any time that the CHS should kill or attempt to kill any federal agents." [D.E. 41] 9-10. The government responds that Arthur "did not speak in hypotheticals, he was speaking specifically and with the intent that the CHS follow his instructions to

fortify the CHS's property with the goal of injuring or killing ATF agents whom the Defendant insisted would come back." [D.E. 45] 8.

Whether Arthur actually knew or believed that the CHS would use Arthur's training to commit a federal crime of violence is a disputed issue of fact and not grounds for a Rule 12 dismissal. See, e.g., United States v. Pinson, No. 2:19-CR-00250, 2020 WL 2601659, at *2 (S.D.W. Va. May 21, 2020) (unpublished); United States v. Coronado, 461 F. Supp. 2d 1209, 1217 (S.D. Cal. 2006); United States v. Shabbir, 64 F. Supp. 2d 479, 481 (D. Md. 1999). In opposition, Arthur cites United States v. Rojas-Diaz, 643 F. App'x 279 (4th Cir. 2016) (unpublished). In Rojas-Diaz the United States Court of Appeals for the Fourth Circuit applied the unremarkable proposition that a defendant cannot be found guilty of "conspiracy" when he conspired only with a government agent. See Rojas-Diaz, 643 F. App'x at 283. Section 18 U.S.C. § 842(p)(2)(B), however, does not have conspiracy as an element or require the person being instructed to conspire with a defendant. See 18 U.S.C. § 842(p)(2)(B). Instead, 18 U.S.C. § 842(p)(2)(B) only requires that a defendant teach another "knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence." Id. This "knowing" requirement applies to a defendant's state of mind. Id. It does not depend on whether the other person objectively can or will actually commit a federal crime of violence. Id. Therefore, the court rejects Arthur's argument

Next, Arthur contends that 18 U.S.C. § 842(p)(2)(B) is constitutionally invalid on its face under the First Amendment as overbroad. See [D.E. 45] 6. The overbreadth doctrine constitutes a departure from traditional standing rules. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601, 612–13 (1973). An individual may "challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (cleaned up); Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 257–58 (4th Cir. 2003); Nat'l Fed'n of the Blind v. F.T.C., 303 F. Supp. 2d 707, 722 (D. Md. 2004). A court should approach using the First Amendment to strike down a statute as facially overbroad "with hesitation, and then only as a last resort." New York v. Ferber, 458 U.S. 747, 769 (1982) (quotations omitted). Thus, where conduct and not merely speech is involved, a court may invalidate a statute only where the overbreadth is "substantial" and justified by "weighty countervailing policies." Id. at 768–70.

Arthur argues that 18 U.S.C. § 842(p)(2)(B) is overbroad because it "directly restricts protected speech—the right to defend oneself' and "potentially criminalizes the myriad of published books, articles and Internet materials." [D.E. 41] 7. Arthur also argues that under section 842(p)(2)(B), a "conversation about how a person who has a lawful right to possess and use a firearm can be

criminalized." Id. at 8. Therefore, Arthur argues that the speech is protected and that 18 U.S.C. § 842(p)(2)(B) violates the First Amendment. See id.[1]

The parties have not cited relevant cases analyzing a First Amendment challenge to 18 U.S.C. § 842(p)(2)(B). However, in 1972, the United States Court of Appeals for the Fifth Circuit rejected a First Amendment challenge to 18 U.S.C. § 231(a)(1).[2] See United States v. Featherston, 461 F.2d 1119, 1121

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[1] Arthur attempts to invoke the public forum doctrine by arguing that the Internet, "where Mr. Arthur posted his manuals and trainings, is a public forum." Id. at 7. It is unclear why in a facial challenge, one that is not dependent upon the facts of the specific defendant, Arthur's use of the Internet is relevant. Moreover, Arthur seems to base this argument on the flawed premise that the government is prosecuting Arthur for training pamphlets found in the government's raid of Blessed's residence. However, count one of the indictment makes clear that only the in-person discussion with the CHS on May 5, 2021, not anything Arthur may have published on the Internet or given to Blessed, constitutes the conduct at issue in count one. See [D.E. 23] 1.

[2] 18 U.S.C. § 231(a)(1) makes it a crime for any person to:

> teach[] or demonstrate[] to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function[.]

(5th Cir. 1972). In Featherston, two defendants were convicted of giving instructions to other individuals on how to "assemble explosive and incendiary devices" in order to "prepare the members . . . for the coming revolution." Id. The two defendants argued that 18 U.S.C. § 231(a)(1), which criminalizes "teach[ing] or demonstrat[ing] to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder[,]" improperly permitted their prosecution for the dissemination of ideas without a showing of clear and present danger. Id. at 1120 n.1, 1122. The Fifth Circuit rejected the argument and held that because section 231(a)(1) required the government to prove a defendant's knowledge or intent that the "information disseminated would be used in the furtherance of a civil disorder," section 231(a)(1) did not merely target teaching ideas. See id. at 1122. The Fifth Circuit also concluded that section 231(a)(1) only targeted speech outside the protection of the First Amendment. See id. Finally, the Fifth Circuit rejected the defendants' "clear and present danger" argument, noting that "[t]he words 'clear and present danger' do not require that the government await the fruition of planned illegal conduct of such nature as is here involved." Id.

Courts have analyzed the constitutionality of 18 U.S.C. § 842(p)(2)(A), the companion provision of 18 U.S.C. § 842(p)(2)(B). Tellingly, 18 U.S.C. §§ 842(p)(2)(A) and 842(p)(2)(B) are identical except for

the mens rea requirement. Section 842(p)(2)(A) requires a person teach "with the intent that" the teaching be used in a federal crime of violence and section 842(p)(2)(B) only requires the person teaching to "know[] that the recipient intends to use the teaching in a federal crime of violence. Compare 18 U.S.C. § 842(p)(2)(A) with id. at § 842(p)(2)(B). In United States v. Coronado, 461 F. Supp. 2d 1209, 1216 (S.D. Cal. 2006), the United States District Court for the Southern District of California rejected a defendant's argument that 18 U.S.C. § 842(p)(2)(A) criminalizes protected speech and was facially invalid. The Coronado court held that "the reach of the statute is directed not to the expressive principles of teaching alone, but to conduct or a call for action where the teaching or demonstration of such destructive devices is committed with the specific intent that such teaching or demonstration be used to carry-out a federal crime of violence." Id. The Coronado court concluded that because section 842(p)(2)(A) did not criminalize protected speech, it was not overbroad. See id.

Although the Coronado court did not address section 842(p)(2)(B)'s "knowing" requirement, Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997), is instructive. In Rice, the Fourth Circuit analyzed whether the First Amendment barred civil liability for a defendant who published a book entitled, Hit Man: A Technical Manual for Independent Contractors. Rice, 128 F.3d at 241–43. A reader used the instructions in Hit Man to commit a murder, and the defendant-author stipulated that the defendant-author "intended and had knowledge that Hit Man

actually would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire." Id. at 241 (cleaned up). The Fourth Circuit analogized the defendant-author's stipulations about knowing and intending his readers to use his book to commit murder to criminal aiding and abetting. Id. at 244. Because "long-established caselaw provides that speech—even speech by the press that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment," the Fourth Circuit rejected defendant's argument that the First Amendment barred his civil liability. Id. at 242.

A plain reading of 18 U.S.C. § 842(p)(2)(B) confirms that the statute is not overbroad and does not restrict protected speech. Section 842(p)(2)(B)'s knowledge requirement effectively limits the scope of the statute. As in Rice, section 842(p)(2)(B) more closely resembles a criminal aiding and abetting statute. See Rice, 128 F.3d at 242.

As for Brandenburg, the Fourth Circuit limits "Brandenburg's protection . . . to mere or 'abstract' advocacy." United States v. Miselis, 972 F.3d 518, 533 (4th Cir. 2020), cert. denied, 141 S. Ct. 2756 (2021); cf. Brandenburg, 395 U.S. at 447–48 ("[T]he mere abstract teaching of the moral propriety . . . [of] a resort to force and violence[ ] is not the same as preparing a group for violent action and steeling it to such action." (cleaned up)). The Fourth Circuit has explained that "[s]peech taking some form other than abstract advocacy, by contrast, such as that which constitutes aiding and abetting of criminal conduct, doesn't implicate the First Amendment under our

Rice decision." Miselis, 972 F.3d at 533 (quotations omitted). Section 842(p)(2)(B) and its knowledge requirement ensure the prohibited conduct goes well beyond "abstract advocacy." Thus, Brandenburg does not help Arthur.

Arthur also argues that under 18 U.S.C. § 842(p)(2)(B), a "conversation about how a person who has a lawful right to possess and use a firearm can be criminalized." [D.E. 41] 7. Not so. Simply discussing the right to lawfully possess and use a firearm does not fit the requirement that a person "teach or demonstrate" or "distribute . . . information pertaining to" the "use of an explosive, destructive device, or weapon of mass destruction" knowing the other person intends to commit a federal crime of violence. 18 U.S.C. § 842(p)(2)(B). Thus, the court denies Arthur's motion to dismiss count one.

B.

As for counts two through nine, Arthur argues that New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), renders 26 U.S.C. §§ 5841, 5845(f), 5861(d), and 5871 unconstitutional and bars his prosecution. Under Bruen, the court must assess whether modern firearms regulations comport with the Second Amendment's text and historical understanding. See Bruen, 142 S. Ct. at 2127. In doing so, the court must determine whether modern and historical regulations impose a comparable burden on the right of armed self-defense and if that regulatory burden is comparably justified. Id. at 2127–28. However, "even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." Id.

The Court in Bruen carefully noted that it was only clarifying the test announced in Heller, not overruling it. Id. at 2126. In Heller, the Court recognized that "the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); see United States v. Hosford, 843 F.3d 161, 165 (4th Cir. 2016); Stafford v. Baker, 520 F. Supp. 3d 803, 808 (E.D.N.C. 2021). In Heller, the Court affirmed the "historical tradition of prohibiting the carrying of dangerous and unusual weapons." Heller, 554 U.S. at 627 (quotation omitted). For example, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." Id. at 625; United States v. McLaurin, 764 F.3d 372, 386 (4th Cir. 2014).

When Congress enacted 26 U.S.C. §§ 5841, 5845(f), 5861(d), and 5871, Congress criminalized the sale, transfer, or possession of firearms controlled under the National Firearms Act ("NFA") and not registered under the National Firearms Registration and Transfer Record. "The NFA is a comprehensive taxing scheme that regulates the manufacture, sale, and transfer of certain specially dangerous and concealable weapons[.]" United States v. Aiken, 974 F.2d 446, 447 (4th Cir. 1992). Several district courts have rejected the argument that the NFA is facially unconstitutional under the Second Amendment in light of Bruen. See, e.g., United States v. Holton, No.

3:21-CR-0482, 2022 WL 16701935, at *3 (N.D. Tex. Nov. 3, 2022) (unpublished); United States v. Hoover, No. 3:21-cr-22(S3), 2022 WL 10524008, at *13 (M.D. Fla. Oct. 18, 2022) (unpublished). This court joins the chorus.

It is unclear exactly why Arthur believes the NFA or 26 U.S.C. §§ 5841, 5845(f), 5861(d), and 5871 are facially unconstitutional under the Second Amendment. In fact, Arthur, concedes that the NFA's "underlying purpose was to curtail, if not prohibit, transactions in NFA firearms." [D.E. 42]. This concession supports Arthur's contention that "[w]hile the NFA was enacted by Congress as an exercise of its authority to tax, the NFA had an underlying purpose unrelated to revenue collection." Id. Alternatively, it appears Arthur believes he has an unrestricted Second Amendment right to the weapons regulated under the NFA because "Arthur was not a felon nor was he otherwise prohibited from lawfully possessing firearms." Id. at 3.

To the extent Arthur claims that the NFA is solely a tax statute without any historical analogue, the court rejects the argument. Although the NFA is in Title 26 (the Internal Revenue Code), the Supreme Court has interpreted the NFA as an act primarily concerned with regulating certain dangerous weapons. See United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517 (1992) ("[i]t is . . . clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes . . . ."). The "primary purpose of (the Firearms Act) was to make it more difficult for the gangster element to obtain certain types of weapons." Haynes v. United

States, 390 U.S. 85, 88 n.4 (1968); see United States v. Springer, 609 F.3d 885, 888 (6th Cir. 2010); United States v. Schrum, 346 F. Supp. 537, 538 (E.D. Va. 1972) ("The National Firearms Act is a strict and all-encompassing regulatory measure intended to control the availability of 'gangster type weapons' which serve no useful purpose to the general public."). Therefore, the NFA regulates certain dangerous weapons. Thompson/Ctr. Arms Co., 504 U.S. at 517.

To the extent Arthur challenges the NFA as improperly regulating certain dangerous weapons, Bruen did not "decide anything about the kinds of weapons that people may possess." Bruen, 142 S. Ct. at 2157 (Alito, J., concurring). Even under Bruen and Heller, Second Amendment protections do not cover "dangerous and unusual weapons." Bruen, 142 S. Ct. at 2143 (quotation omitted); Heller, 554 U.S. at 627. Although the Court has not provided an exhaustive list of such "dangerous and unusual weapons," the Court in Heller explained that dangerous and unusual weapons are those "not typically possessed by law-abiding citizens for lawful purposes." Heller, 554 U.S. at 625. Therefore, the court must analyze whether Bruen and Heller permit the government to prohibit a person from knowingly receiving and possessing the unregistered weapons in counts two through eight.

1.

In count two, Arthur is charged with knowingly receiving and possessing a short-barrel rifle not registered to him in the National Firearms Registration and Transfer Record in violation of 26 U.S.C. §§ 5841, 5845, 5861(d), and 5871. [D.E. 23] 1–2. Although the Supreme Court and the Fourth

Circuit have not yet described short-barreled rifles as "dangerous and unusual weapons," the weight of authority from other circuits supports the conclusion that the Second Amendment does not invalidate 26 U.S.C §§ 5841, 5845, 5861(d), and 5871. First, short-barreled rifles are analogous to the short-barreled shotguns that the Court in Heller explicitly identified as outside Second Amendment protection. See Heller, 554 U.S. at 625. This close relationship between short-barreled rifles and short-barreled shotguns, along with the inherent danger of short-barreled rifles, is why the Tenth Circuit characterized short-barreled rifles as "dangerous and unusual." United States v. Cox, 906 F.3d 1170, 1185 (10th Cir. 2018). Several other circuit courts and district courts have followed the Tenth Circuit's reasoning in Cox. See, e.g., United States v. Stepp-Zafft, 733 F. App'x 327, 329 (8th Cir. 2018) (per curiam) (unpublished); United States v. Gilbert, 286 F. App'x 383, 386 (9th Cir. 2008) (unpublished); Kaszycki v. United States, No. C19-1943, 2020 WL 2838598, at *4 (W.D. Wash. June 1, 2020) (unpublished), appeal dismissed, No. 20-35680, 2020 WL 6395503 (9th Cir. Oct. 8, 2020) (unpublished); United States v. Gonzales, No. 2:10-CR-00967, 2011 WL 5288727, at *3 (D. Utah Nov. 2, 2011) (unpublished). Arthur fails to cite any persuasive authority to the contrary.

Short-barreled rifles fit within Heller and Bruen's discussion of "dangerous and unusual weapons" or "weapons not typically possessed by law abiding citizens for lawful purposes." Bruen, 142 S. Ct. at 2143; Heller, 554 U.S. at 625. A short-barreled rifle is a "concealable weapon" that is "likely to be used for

criminal purposes." Thompson/Ctr. Arms Co., 504 U.S. at 517. Indeed, "a long gun with a shortened barrel is both dangerous, because its concealability fosters its use in illicit activity, and unusual, because of its heightened capability to cause damage." Cox, 906 F.3d at 1187 (quotation omitted). Arthur has failed to make any persuasive argument to rebut this conclusion. Thus, the court denies Arthur's motion to dismiss count two.

2.

In count three, Arthur is charged with knowingly receiving and possessing an unregistered firearm silencer in violation of 18 U.S.C. §§ 921(a)(3)(c) and (a)(24) and 26 U.S.C. §§ 5841, 5845(a)(7), 5861(d), and 5871. [D.E. 23] 2. Firearm silencers are not a weapon or arm that is eligible for protection under the Second Amendment. See Cox, 906 F.3d at 1187; United States v. Hasson, No. 19-96, 2019 WL 4573424, at *4–5 (D. Md. Sept. 20, 2019) (unpublished), aff'd, 26 F.4th 610 (4th Cir. 2022).[3] The people's right to "keep and bear Arms" under the Second Amendment is the right to "have weapons." Heller, 554 U.S. at 582. In Heller, the Court defined "arms" to mean "[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 (quotations omitted) (alterations in original).

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[3] Several statutes, including 18 U.S.C. § 921(a)(3), define "firearm" to include a "firearm silencer." Although Congress defined "firearm" to include a "firearm silencer" for some statutes, this fact does not change the constitutional analysis of the meaning of "arms" under the Second Amendment.

Firearm silencers do not fit within Heller's definition of "arms." See id. "A silencer is a firearm accessory; it's not a weapon in itself[.]" Cox, 906 F.3d at 1186. "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." Hasson, 2019 WL 4573424, at *2.

Although courts have extended Second Amendment scrutiny to certain non-weapons, these extensions are limited in scope. For example, in Heller the Court noted that the protection of the Second Amendment "implies something more than the mere keeping [of firearms]; it implies the learning to handle and use them." Heller, 554 U.S. at 618. Following this logic, courts have applied Second Amendment scrutiny to possessing ammunition, possessing magazines, and accessing firing ranges. See, e.g., Ezell v. City of Chicago, 651 F.3d 684, 710 (7th Cir. 2011) (regarding firing ranges); Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) (regarding ammunition); Duncan v. Becerra, 742 F. App'x 218, 221 (9th Cir. 2018) (unpublished) (regarding magazines). Firearm silencers, however, are not essential to using or training with firearms, especially compared with ammunition, magazines, or firing ranges. Because firearm silencers are not "so critical to firearm ownership that firearms cannot be used effectively without them[,]" the Second Amendment does not protect the possession of firearm silencers. Hasson, 2019 WL 4573424, at *5 (quotation omitted). Thus, the court denies Arthur's motion to dismiss count three.

3.

In counts four through eight, Arthur is charged with knowingly receiving and possessing "an improvised explosive device designed to detonate upon striking matchheads on a striker plate" in violation of 26 U.S.C. §§ 5841, 5845(f), 5861(d), and 5871. [D.E. 23] 2–4. The Fourth Circuit has not addressed whether an IED constitutes a dangerous and unusual weapon under Heller and Bruen. The overwhelming weight of authority, however, from other circuits classify pipe bombs and other IEDs as dangerous and unusual weapons that are outside of Second Amendment protection. See, e.g., United States v. Tagg, 572 F.3d 1320, 1326–27 (11th Cir. 2009) ("Unlike the handguns in Heller, pipe bombs are not typically possessed by law-abiding citizens for lawful purposes."); United States v. Dempsey, 957 F.2d 831, 834 (11th Cir.1992) ("[U]nlike firearms which may be used for sports, recreation or for collection, pipe bombs have no legitimate purpose[.]"); Maloney v. Singas, 351 F. Supp. 3d 222, 236 (E.D.N.Y. 2018). Arthur has not cited any persuasive authority that the Second Amendment protects pipe bombs or IEDs. Therefore, the court rejects Arthur's motion to dismiss counts four through eight.

4.

In count nine, Arthur is charged with knowingly possessing an unregistered firearm silencer with an obliterated serial number in violation of 18 U.S.C. §§ 922(k) and 924(a)(1)(B). [D.E. 23] 4. Arthur's motion to dismiss counts two through nine of the indictment, however, does not challenge 18 U.S.C. §§ 922(k) and 924(a)(2)(B). Instead, Arthur's motion solely focuses

on the constitutionality of the NFA. See [D.E. 42] 5–7. Thus, the court denies Arthur's motion to dismiss count nine.

IV.

In sum, the court DENIES defendant's motions to dismiss [D.E. 41, 42].

SO ORDERED. This 16 day of January, 2023.

/s/ James C. Dever III
JAMES C. DEVER III
United States District Judge

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4306
(7:22-cr-00005-D-1)

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

v.

CHRISTOPHER CLARK ARTHUR,

Defendant—Appellant.

FILED: August 21, 2026

O R D E R

The Court denies the petition for rehearing en banc.

A requested poll of the Court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Wynn, Thacker, Harris, Richardson, Quattlebaum, Rushing, Heytens and Berner voted to deny rehearing en banc. Judges King, Gregory, and

Benjamin voted to grant rehearing en banc. Judge Gregory wrote a dissenting statement.

Entered at the direction of Judge Agee.

For the Court

/s/ Nwamaka Anowi, Clerk

GREGORY, Circuit Judge, dissenting from denial of rehearing *en banc*:

I.

The true liberty at stake here, as in most challenges to overbroad speech restrictions, is what Justice Brennan called one of the "the cherished rights of mind and spirit." William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 3 (1965). Expansive restrictions "[c]ut a great road through the law to get after" truly nefarious speech. Robert Bolt, *A Man for All Seasons* 40 (1960). If our essential protections are "cut . . . down," who "could stand upright in the winds that would blow then?" *Id.*

At its core, the challenged statute prohibits disseminating information "pertaining . . . in part" to explosives. 18 U.S.C. § 842(p)(2)(B). In a companion provision that is not challenged here, the Government adopted the tried-and-true method of tailoring such a broad speech restriction; it conditioned liability on the speaker's *intent* to facilitate criminal conduct. *See* 18 U.S.C. § 842(p)(2)(A). By contrast, the challenged statute permits the Government to penalize speech when the speaker, knows, *but does not intend*, that some listener plans to use the information "in furtherance of a Federal crime of violence." 18 U.SC. § 842(p)(2)(B).

The Supreme Court has already determined that a "knowledge" requirement insufficiently narrows a broad speech restriction. *See Reno v. ACLU*, 521 U.S. 844 (1997). If a speaker of innocuous topics and noble purpose has reason to fear the intent of one listener, the chilling effect on constitutionally protected speech

is unavoidable. *Id.* at 880. The body of First Amendment doctrine makes the same point: when considering the constitutionality of speech restrictions, "a strong intent requirement was, and remains," a key element to ensuring that efforts to criminalize speech do not stray too far into protected speech. *Counterman v. Colorado*, 600 U.S. 66, 81 (2023). By conditioning liability on mere knowledge of another person's criminal inclination, the Government has extended the reach of its criminal laws into the hallowed ground of the First Amendment.

I am troubled by this "criminal prohibition of alarming breadth" that defies First Amendment principles and doctrine. *United States v. Stevens*, 559 U.S. 460, 474 (2010). The continued existence of 18 U.S.C. § 842(p)(2)(B) creates an issue of exceptional importance that warrants the attention of the full court.

II.

This case comes before us on a facial challenge to 18 U.S.C. § 842(p)(2)(B). Defendant Christopher Clark Arthur does not challenge the statute as applied to his case, so I will not repeat the panel majority's recitation of the facts of his conviction. *See United States v. Arthur*, 160 F.4th 597, 602–03 (4th Cir. 2025).

A typical facial challenge would require establishing that "no set of circumstances" exists under which a statute is valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). But the Supreme Court has recognized a unique avenue for raising First Amendment concerns to a statute; the "overbreadth

doctrine" requires a court to invalidate a statute "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted). Because it invalidates a law that has some constitutional applications, "invalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (cleaned up).

The overbreadth test arises out of the concern that overbroad laws "deter or 'chill' constitutionally protected speech." *United States v. Hansen*, 599 U.S. 762, 769–70 (2023). When a statute prohibiting speech is overbroad, "[t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). "For in such cases, the statutes lend themselves too readily to denial of those rights." *Id.* In part, the threat is that "the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The greater concern, however, is the "prospect of chilling fully protected expression," considering the "ordinary citizen's predictable tendency to steer wide of the unlawful zone." *Counterman*, 600 U.S. at 77-78 (internal quotation marks omitted).

III.

"The first step in overbreadth analysis is to construe the challenged statute." *Williams*, 553 U.S. at 293. The statute reads:

> It shall be unlawful for any person . . . to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

18 U.S.C. 842(p)(2)(B). The statute restricts sharing a certain set of information, and it is therefore "presumptively invalid." *Stevens*, 559 U.S. at 468 (quoting *United States v. Playboy Entertainment Grp.*, 529 U.S. 803, 817 (2000)). The Government bears the burden to rebut that presumption. *Id.*

We can divide the statute into two key parts. First, the substantive prohibition clarifies what topics of speech might induce criminal liability. At its broadest point, the statute prohibits sharing "information pertaining to . . . in part, the manufacture or use of an explosive." 18 U.S.C. § 842(p)(2)(B). Second, the *mens rea* identifies the circumstances that trigger criminal liability. Here, speech is restricted if the speaker "knows" that a recipient "intends to use the . . .

information for, or in furtherance of, . . . a Federal crime of violence." *Id.*

A.

I begin with the gallingly broad substantive prohibition in the challenged statute. Stripped of its accoutrements, the statute makes it a crime to "distribute . . . by any means, information pertaining to, . . . in part, the manufacture or use of an explosive." 18 U.S.C. § 842(p)(2)(B). Each element of the above sentence widens the scope of the statute, so I will address each in turn.

The term "explosive" is defined in the statute, and that definition does little to cabin the scope of the substantive prohibition on speech. 18 U.S.C. §§ 842(p)(1)(B), 844(j). The term "explosive" encompasses "any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units . . . in such proportions, quantities, or packing that ignition . . . [of] any part thereof may cause an explosion." 18 U.S.C. § 844(j). Plainly, the definition is not limited to weaponry—a firework, for instance, certainly qualifies as an "explosive." Nor is the text limited to devices designed to explode. The term covers anything "that contains combustible units" which "may cause an explosion." 18 U.S.C. § 844(j). That would seem to apply to a car, a computer, or perhaps a helium balloon. If these appear to be far-fetched examples, consider the fact that the statute has been held to apply to gasoline, even outside a pressurized container, *United States v. Lee*, 726 F.2d 128, 130–31 (4th Cir. 1984), as well as methane gas released into the air. *United States v. Hepp*, 656 F.2d 350, 352 (8th Cir. 1981). If the term "explosive"

includes methane gas, it does little to restrict the scope of the speech prohibition in the challenged statute.

The rest of the challenged statute's text expands the speech restriction even further. The statute makes it a criminal offense to distribute information "pertaining to, in whole or in part" the manufacture or use of an explosive. 18 U.S.C. § 842(p)(2)(B). The word "pertaining" instructs only that the speech have some relationship to explosives. *See* Black's Law Dictionary, Pertain ("To relate directly to; to concern or have to do with."); Pertain, Oxford English Dictionary ("[B]e connected to (something)"). And the information need only pertain "*in part*" to the manufacture or use of explosives. 18 U.S.C. § 842(p)(2)(B). The list of entirely innocent topics that "pertain[] . . . in part" to the "manufacture or use" of methane gas is too lengthy to reproduce here, and it represents only a small subset of the speech prohibited by the challenged statute.

Accepting the text at face value, information prohibited by the statute includes basic chemistry, mathematics, and physics, which all "pertain[] . . . in part" to explosives. Nothing in the statute even requires a proximate link to the manufacture of explosives. "That store sells batteries" or "I expect gasoline prices to fall" bear a slight, yet concrete, relationship to potential explosive devices. Outlandish though these examples may appear, I struggle to see how they do not "pertain[] . . . in part" to the manufacture of explosives, and neither the Government nor the panel majority have suggested

that the text of the statute is more limited than I describe.

If the statute contained no *mens rea* requirement, the analysis would end here, with the determination that 18 U.S.C. § 842(p)(2)(B) is blatantly unconstitutional. The shocking breadth of information criminalized by the statute would permit no other conclusion, especially since "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002). The substantive prohibition has left the statute on precarious ground, and the *mens rea* must be an exacting one indeed to make up for the capacious speech restriction.

B.

The *mens rea* falls far short. In contravention of Supreme Court precedent, and in a first among the courts of appeals, the panel majority held that mere knowledge of another person's criminal intent is sufficient to remove First Amendment protection from otherwise protected speech.

The challenged statute provides that sharing prohibited information is only a criminal offense when shared with "any person . . . knowing that such person intends to use the . . . information for . . . a Federal crime of violence." 18 U.S.C. § 842(p)(2)(B). In the Government's view, adopted by the panel majority, the "knowledge" requirement, coupled with a "specific person" requirement, sufficiently narrows the statute. *Arthur*, 160 F.4th at 613–14.

The Supreme Court already considered, and rejected, this argument in *Reno v. ACLU*, 521 U.S. 844 (1997). The statute in *Reno* made it a crime to communicate indecent material on the Internet to persons under 18 years old. *Reno*, 521 U.S. at 859. The Government presented the same argument in *Reno* as it did in *Arthur*—that the only liable speakers were those with *knowledge* that a particular recipient was under 18. *Id.* at 880 ("The Government also asserts that the 'knowledge' requirement . . . especially when coupled with the 'specific child' element . . . saves the CDA from overbreadth."). Per the Government's insistence, both in *Reno* and in *Arthur*, the speaker need only "refrain from disseminating such materials to persons they *know*" to be impermissible recipients. *Id.* (emphasis added).

The Supreme Court concluded that "[e]ven the strongest reading of the 'specific person' requirement . . . cannot save the statute." *Id*. Since the Internet is a forum that is "open to all comers," it will always be possible that someone under 18 received the prohibited materials, and that risk would dissuade adults from engaging in protected speech. *Id.* Even more insidious, the criminality of the speech hinged not upon the speaker's criminal motives, but the listener's identity. *See id.* Since the presence of a child made the speech criminal, the statute "confer[red] broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child . . . [is] present." *Id.* Holding that the knowledge requirement is

insufficient, the Supreme Court struck down the challenged statute.

I do not see why it should be any different here. It will always be possible that some listener has nefarious motives for seeking out information that "pertain[s] . . . in part" to explosives. 18 U.S.C. § 842(p)(2)(B). As the *Reno* Court noted, that possibility might dissuade a speaker from engaging in protected speech. Or, a speaker might be actively shut down by a person who claims, falsely or not, to have criminal intent. Any person can claim to be plotting a "Federal crime of violence" by way of an anonymous comment on the Internet or an unsigned note to a would-be author or teacher, and thus exercise a "heckler's veto" over the planned speech. When the underlying speech is otherwise protected, the Supreme Court has declined to permit vigilante censorship. That holding controls here.

The body of Supreme Court precedent only bolsters the point that a speaker must generally display criminal intent, beyond mere knowledge, in order to forfeit First Amendment protection. In *United States v. Hansen*, the Court evaluated the constitutionality of a law that made it a crime to "encourag[e] or induc[e]" illegal immigration. 599 U.S. at 770 (2023). The dissent, reading the provision broadly, would have struck down the statute. It explained that the language of the provision "seem[ed] to encompass any and all speech that merely persuades, influences or inspires" unlawful entry into the United States. *Id.* at 794 (Jackson, J., dissenting). Under that interpretation, the Government conceded the statute would be unconstitutionally overbroad.

The majority opinion upheld the statute—but only after noting that "'encourage' and 'induce' . . . carry the usual attributes of solicitation and facilitation," including "the traditional *mens rea*." *Id.* at 780 (majority opinion). Since only speakers with "*intent* to bring about a particular unlawful act" could be prosecuted, the statute was not overbroad. *Id.* at 771 (emphasis added); *see also Williams*, 553 U.S. at 301 (statute is not overbroad because the speaker must believe, or intend the recipient believe, that the transmitted material is child pornography).

When punishing speech on the basis that it might spark criminal activity, the Supreme Court has "demanded a showing of intent" in order to "protect mere advocacy of force or lawbreaking from legal sanction." *Counterman*, 600 U.S. at 81 (2023). To ensure the Government could not withhold First Amendment protections from those engaging in protected advocacy, the Court has long insisted that tempestuous speech must be "'intended' (not just likely) to produce imminent disorder." *Id.* at 76. No opinion from any federal appellate court has permitted the state to prosecute a speaker who knew—but did not intend—that the speech would be used in furtherance of a listener's crime.[1] In reducing

[1] The majority opinion points to a 1969 case from the Seventh Circuit that it believes permitted prosecution on the basis of the speaker's mere knowledge of a listener's criminal intent. *See Arthur*, 160 F.4th at 610 (citing *Nat'l Mobilization Committee to End War in Viet Nam v. Foran*, 411 F.2d 934 (7th Cir. 1969)). But in the Seventh Circuit's two-line analysis, it is not clear it reached that conclusion, since the indictment in that case (specified the defendants' specific

the *mens rea* required to forfeit First Amendment protection, *Arthur* stands alone.

We are left with a broad prohibition on speech, coupled with a reduced culpability standard. In an overbreadth challenge, that is a fatal combination. In *Hansen* and *Reno*, the Supreme Court has already indicated that a *mens rea* of specific intent is required for statutes like 18 U.S.C. § 842(p)(2)(B) to survive First Amendment challenge. On that basis alone, the panel majority should have found this statute to be overbroad.

C.

Principles of criminal law further emphasize that only specific intent—not mere knowledge—can tailor this statute to the requirements of the First Amendment. The panel majority equated the challenged statute to an aiding and abetting statute. *See Arthur*, 160 F.4th at 609. In criminal law, it is inadequate that the accessory defendant knew of the principal's criminal purposes. Aiding and abetting liability only attaches when the defendant acted with a purpose to assist the principal.

The Supreme Court has frequently asserted that aiding and abetting liability can only fall upon those with specific intent, i.e. purpose, to facilitate the commission of the offense. *See Borden v. United States*, 593 U.S. 420, 426 n.3 (2021); *Rosemond v. United States*, 572 U.S. 65, 71 (2014). Only a person who "actively participates in a criminal scheme

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intent, and the court's analysis determined only that "[t]he requirement of intent of course" sufficiently narrows the statute. *Foran*, 411 F.2d at 936–37.

knowing its extent and character" can be charged with aiding and abetting liability. *Rosemond*, 572 U.S. at 77. The Supreme Court has never held that aiding and abetting liability can attach to "defendants who incidentally facilitate a criminal venture rather than actively participate in it." *Id.* at 77 n.8.

No less an authority than Judge Learned Hand has explained the importance of the heightened *mens rea* requirement for an aiding and abetting offense. Though there are "indeed instances . . . where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow . . . [,] in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive." *United States v. Falcone*, 109 F.2d 579, 580 (2d Cir. 1940). Judge Hand insisted that for aiding and abetting prosecutions, "[i]t is not enough that [the defendant] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome." *Id.* In other words, for aiding and abetting liability to attach, the defendant must himself actively desire the success of the criminal venture.

Since the "opportunities of great oppression" are "very plain" in permitting mere knowledge to be a basis of aiding and abetting liability, "it is only by circumscribing the scope [of liability] that they can be avoided." *Id.*; *see also Borden*, 593 U.S. at 426 n.3 (citing *Falcone*). Judge Hand's concerns about a lesser *mens rea* for aiding and abetting liability ring with the same notes as the overbreadth doctrine. Aiding and

abetting liability requires specific intent, not mere knowledge, so that courts can be sure that we are not punishing innocent persons that happen to find themselves adjacent to criminal conduct.

For reasons unexplained, the panel majority rejected the concerns of the Supreme Court and of Judge Hand, finding the distinction between knowledge and intent irrelevant "for the purposes of the First Amendment." *Arthur*, 160 F.4th at 609. First, it concedes that "the statute's prohibitions are . . . akin to . . . aiding and abetting of criminal conduct." *Id.* (internal quotation marks omitted). It then admits that the "*only real difference* between aiding and abetting, on the one hand, and the conduct proscribed by § 842(p)(2)(B), on the other, is that the former requires the abettor to share the same criminal intent as the principal perpetrator." *Id.* But it dismisses this as a "distinction without a difference" because "practically speaking," a person who violates the challenged statute "is aiding— i.e., facilitating—the underlying crime." *Id.* The panel majority writes directly contrary to the settled principle that aiding and abetting requires a heightened *mens rea.*

But the First Amendment insists upon more protection, not less. It insists on a proper *mens rea* to "reduc[e] the honest speaker's fear that he may accidentally or erroneously incur liability." *Counterman*, 600 U.S. at 75 (cleaned up). Though a heightened *mens rea* "will shield some otherwise proscribable . . . speech because the state cannot prove what the defendant thought," *id.*, the First Amendment "reflects a judgment by the American people that the benefits of its restrictions on the

Government outweigh the costs." *Stevens*, 559 U.S. at 470. The panel majority takes it upon itself to reconsider that judgment by granting the Government unprecedented flexibility to prosecute speakers who do not intend to facilitate a crime.

D.

One additional flaw in the structure of the challenged statute is that it restricts transmission of information that is already public and readily available. The criminal act is "teach[ing] or demonstrat[ing]" prohibited *information*. 18 U.S.C. § 842(p)(2)(B). That should immediately raise red flags, given "the essential role that the free flow of information plays in a democratic society." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996). Factual information is, "after all, the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011).

The First Amendment emphasizes protection for factual information, particularly when that factual information has been lawfully obtained. This is the rule articulated in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979). In each of these cases, state laws prohibited newspapers from publishing the names of a juvenile party to a crime. *Florida Star*, 491 U.S. at 526; *Daily Mail*, 443 U.S. at 98. The Court explained in *Daily Mail*, and reaffirmed in *Florida Star*, that a newspaper which "lawfully obtains truthful information about a matter of public significance" should not be punished for publication of that

information, "absent a need to further a state interest of the highest order." *Florida Star*, 491 U.S. at 533 (quoting *Daily Mail*, 443 U.S. at 103). Because the information was readily accessible, the Court concluded that the ban on newspaper publication was not in service of such a compelling interest. *See Florida Star*, 491 U.S. at 541; *id.* at 535 ("[I]t is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities.").

The Government has acknowledged that "anyone interested in manufacturing a bomb, dangerous weapon, or a weapon of mass destruction can easily obtain detailed instructions from readily accessible sources." United States Dep't of Justice, *Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination Is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution* 1 (1997). The Internet and the so-called "underground press" provide much of this information, but so do reference works "intended for military training, agricultural and engineering use." *Id.* at 5. Applied to this case, the *Florida Star* principle militates in favor of striking down the statute for overbreadth. Even if the text of the statute only prohibited sharing information about building bombs—which it does not, *see supra* at 4–6—it would still encompass information that is easily accessible by lawful, public means.

The result is, in addition to the basic physics, chemistry, and mathematics which the statute criminalizes, even the bombmaking information is publicly available—and for good reason. Legitimate uses of explosive devices abound, from construction and demolition, to clearing agricultural land, to commercial fireworks. It is important to note that the challenged statute does not eliminate information from the public record. It imposes burdens on the individual who wishes to share public knowledge.

Florida Star and *Daily Mail* articulate the First Amendment concerns with restrictions on sharing publicly available information. Not only is it "relatively unlikely to advance the interests" of the Government to restrict sharing information already in the public domain, but it enforces "timidity and self-censorship" upon those who share truthful information. *Florida Star*, 491 U.S. at 535. These concerns lie "in addition to, of course, the overarching public interest, secured by the Constitution, in the dissemination of truth." *Id.* at 533 (internal citation omitted). When any member of the public can access information, the First Amendment rarely countenances inflicting punishment on those who share it.

E.

A sister provision ensures that 18 U.S.C. § 842(p)(2)(B) has few, if any, constitutional applications. The challenged provision, 18 U.S.C. § 842(p)(2)(B), was enacted alongside an unchallenged provision: 18 U.S.C. § 842(p)(2)(A) ("Section A"). Section A encompasses the entire "plainly legitimate sweep" of the challenged statute, but without the

constitutional infirmity. *Williams*, 553 U.S. at 292. Therefore, there is no legitimate purpose of the statute that outweighs its constitutional defects.

As discussed above, 18 U.S.C. § 842(p)(2)(B) makes it a criminal offense to provide any part of a broad spectrum of information "to any person, . . . knowing that such person intends to use" the information in furtherance of a Federal crime of violence. 18 U.S.C. § 842(p)(2)(B). Section A omits the "specific person" requirement and substitutes "intent" for "knowledge." 18 U.S.C. § 842(p)(2)(A). The difference between the two statutes can be represented as follows, with Section A in bold:

> It shall be unlawful for any person—
>
> to teach or demonstrate ~~to any person~~ the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, ~~knowing~~ **with the intent** that ~~such person intends to use~~ the teaching, demonstration, or information **be used** for, or in furtherance of, an activity that constitutes a Federal crime of violence.

18 U.S.C. §§ 842(p)(2)(B), 842(p)(2)(A). Section A suffers from none of the constitutional issues of the challenged statute, as it is well established that speech is not protected when the purpose of the speech is to incite criminal activity. *See Williams*, 553 U.S. at 298 ("Many long established proscriptions—such as laws against conspiracy, incitement, and

solicitation— criminalize speech . . . that is intended to induce or commence illegal activities.").

Reading the two provisions in tandem, the challenged statute *only* applies where the speaker *did not intend* the speech to be used in furtherance of a Federal crime of violence. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed . . . so that no part will be inoperative or superfluous, void or insignificant."). We need not wonder whether "less restrictive alternatives would be at least as effective in achieving the legitimate purpose" of the statute. *Reno*, 521 U.S. at 874. In fact, all of the challenged statute's constitutional applications survive under Section A.

By removing all of the constitutionally palatable applications from the purview of the challenged statute, Section A ensures that there is no counterweight to the constitutionality of the challenged statute. The challenged statute is relevant only for those defendants who do not intend that the listener commit a Federal crime of violence. For the reasons I have articulated above, that means the statute's entire scope is constitutionally infirm, and it is not rescued by any "plainly legitimate sweep." *Williams*, 553 U.S. at 292.

IV.

As described above, when confronted with a shockingly broad statute and an inadequate *mens rea*, the First Amendment mandates striking it down for overbreadth. The panel majority and the Government bypass this analysis. Instead, in a display of constitutional acrobatics, they assert that the First Amendment does not extend to the speech covered by

the statute. They claim that any speech punished or chilled constitutes "speech integral to criminal conduct," which has historically received no First Amendment protection. *Arthur*, 159 F.4th at 607.

But the panel majority and the Government mischaracterize the "speech integral to criminal conduct" category. This "well-defined and narrowly limited" category of unprotected speech traditionally applies to speech that cannot be separated from the commission of a crime, not speech that merely has the potential to assist another person's criminal act. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The panel majority improperly broadens this category, at the expense of socially valuable and constitutionally protected speech.

A.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). But the Supreme Court has explained that the First Amendment has "permitted restrictions upon the content of speech in a few limited areas." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Chaplinsky*, 315 U.S. at 572). These "well-defined and narrowly limited classes," *Chaplinsky*, 315 U.S. at 571–72, include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Stevens*, 559 U.S. at 468 (internal citations omitted).

Before the district court, the Government argued that 18 U.S.C. § 842(p)(2)(B) is a constitutional criminalization of incitement. *See* J.A. 129 (claiming that the statute prohibits only "speech that incites

imminent lawless action"). Changing tack on appeal, the Government insisted to this Court that the challenged statute is a better fit for the category of "speech integral to criminal conduct." Response Br. at 18. The panel majority agreed with the new classification and held that the prohibited speech receives no First Amendment protection because it is "integral to criminal conduct." *See Arthur*, 160 F.4th at 608.

The "speech integral to criminal conduct" category originated in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). In *Giboney*, a union representing door-to-door ice salesmen tried to strong-arm ice distributors into exclusively dealing with union salesmen. *Id.* at 492. Empire Storage and Ice Company, the lone holdout, continued to provide ice to nonunion sellers. *Id.* To pressure Empire to enter an exclusivity agreement, the union picketed the company, and Empire responded by seeking an injunction against the union under state law prohibiting anticompetitive agreements. *Id.* The union members appealed the injunction, claiming that it inhibited their First Amendment right to picket. *Id.* at 493.

The Court upheld the injunction. *Id.* at 498. Though the First Amendment does protect the right to picket, the Court explained constitutional protections for speech do not extend immunity to "speech or writing used as an integral part of a valid criminal statute." *Id.* A criminal act remains a criminal act, and it does not receive additional protection when the act takes the form of speech. *Id.* at 502. Therefore, even though the union acted here "through speaking and writing,"

the First Amendment does not provide a special exemption for criminal conduct "merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.*; *see Brown v. Hartlage*, 456 U.S. 4, 55 (1982) ("The fact that "an agreement to engage in illegal conduct" takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.").

Few cases have given significant attention to this category of unprotected speech, but it is typically invoked to justify the constitutionality of prohibiting crimes that are carried out by way of speech. The crime of solicitation, for instance, has a communicative element, but the speech is part and parcel of criminal behavior. *See Hansen*, 599 U.S. at 783. Perjury is inseparable from speech, *cf. United States v. Alvarez*, 567 U.S. 709, 720–21 (2012), and conspiracy and extortion are likewise rooted in speech. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (listing examples of speech-based crimes that are integral to criminal conduct). Speech is "integral to" these crimes because speech is a mechanism for carrying out criminal acts. The "unquestioned" constitutionality of these criminal laws is not inhibited by the coincidence that the criminal act takes the form of speech. *See United States v. Dunnigan*, 507 U.S. 87, 97 (1993).

In short, speech is "integral to criminal conduct" when it is "the very vehicle of the crime itself." *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970); *see Speiser*, 357 U.S. at 535–36 (Douglas, J., concurring) ("[W]hat one thinks or believes, what one utters and

says have the full protection of the First Amendment. It is only his actions that government may examine and penalize."). In *Giboney*, a violation of the state's restraint-of-trade law did not receive special constitutional protection merely because it took the form of picketing. 336 U.S. at 498. Speech that is itself tantamount to a criminal act does not receive First Amendment protection.

The Court's careful delineation of this category is evident in its approach to solicitation laws. Offering to distribute contraband is criminal solicitation, but only when the contraband is actually illegal to possess. The Court has insisted that when the Government prohibits offers to distribute a class of material, the entire class must be illegal to possess—otherwise, the offer is protected speech. For example, in *New York v. Ferber*, the Court upheld a prohibition on advertising or selling child pornography. 458 U.S. 747 (1982). The Court determined that child pornography was a "definable class of material" for which "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any." *Id.* at 763–64. Advertising and selling the material had no value except as an "economic motive for . . . the production of such materials," and thus was permissibly restricted. The Court crystallized the analysis in *United States v. Williams*, explaining that "offers to give or receive what it is unlawful to possess"—again, child pornography— "have no social value and thus . . . enjoy no First Amendment protection." 553 U.S. at 298; *see Hansen*, 599 U.S. at 783 (citing *Williams* as providing an example of speech integral to criminal conduct). When the entire category of underlying

material is illegal, efforts to distribute or sell it are "proposal[s] to engage in illegal activity" and therefore rightfully proscribed. *Williams*, 553 U.S. at 298.

But when a class of material is not entirely unlawful, laws punishing distribution of that material are overbroad. In fact, child pornography is a "special case" of material that is entirely illegal to produce or possess. *Stevens*, 559 U.S. at 471; *id.* at 472 ("Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."). While the Court has permitted prohibitions on offers to sell child pornography, it struck down prohibitions on offers to sell videos that "appear[] to be" child pornography, on the grounds that computer-generated child pornography retains First Amendment protection. *See Ashcroft*, 535 U.S. at 241, 249–50. Similarly, material that "depict[s] animal cruelty" is lawful to possess; in *United States v. Stevens*, the Court struck down a federal law prohibiting the sale of such material. *Id.* at 464, 472. The painstaking analysis of each class of materials reflects the Court's commitment to punishing speech that is only itself a criminal act.

The unprotected category of speech identified in *Giboney* has never encompassed speech that is merely helpful to facilitating a crime. It reaches only the speech that is itself criminal conduct. *See Williams*, 553 U.S. at 298 (analogizing the prohibited speech to "offers to sell illegal drugs"). As the Supreme Court has insisted, "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft*, 535 U.S. at 253; *see also Int'l*

Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 701 (Kennedy, J., concurring) ("Inconvenience does not absolve the government of its obligation to tolerate speech.").

B.

The panel majority pursues a flawed analysis of this narrow exception to First Amendment protection. Instead of identifying the thrust of this "narrow" and "historical" category of unprotected speech, the panel majority turns to authority that has minimal value in interpreting judicial opinions: the dictionary. *See Arthur*, 160 F.4th at 168. The panel opinion cites two dictionaries to suggest that speech is "integral" to criminal conduct so long as it contributes to criminal conduct. *Id.* It goes on to suggest that when a listener uses information to perpetrate a crime, the information is necessarily "integral" to the crime because the crime could not have been committed "but for" the information. *Id.*

It is common wisdom that "[t]he language of an opinion is not always to be parsed as though we were dealing with the language of a statute." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 373 (2023) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *see* Shyamkrishna Balganesh, *Relying on Restatements*, 122 Colum. L. Rev. 2119, 2124 (2022) (explaining that judicial reasoning emerges "contextually from the circumstances of the dispute," and therefore cautioning against "parsing and dissecting the language of judicial opinions in ways commonly done for statutes."). No less a textualist than Justice Scalia explained that it is "generally undesirable . . . to dissect the sentences of the United

States Reports as though they were the United States Code." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993). This distinction is the natural consequence of the fact that "the words of [judicial opinions], as opposed to their dispositions, have, strictly speaking, no legally binding effect." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 42 (2012). Use of the dictionary is frowned upon as a tool of precedential analysis, and it is no replacement for reasoned consideration of controlling dispositions.

Doctrinal analysis of "speech integral to criminal conduct" reveals no support for the expansion the panel majority effects. It is evident that speech here is not the "vehicle" of criminal conduct as it was in *Giboney* and its progeny, since the criminal act is some other person's intended Federal crime of violence. *See Arthur*, 160 F.4th at 608–09. The challenged statute is closer to those at issue in *Ashcroft* and *Stevens*—it can be connected to criminal conduct, but it is not itself part and parcel of criminal conduct.

The panel majority does not grapple with this conceptual distinction. Instead, it asserts that "but for the proscribed communications, the other person would lack the means to commit their intended crimes." *Arthur*, 160 F.4th at 608. Even that is incorrect. As discussed above, even if the text of the statute was focused solely on dangerous bombmaking information, that information is freely available from legitimate sources that the challenged statute does not purport to touch. *See supra* at 14. If the speech

prohibited here is "integral" to criminal conduct, it is integral in an entirely new manner.

The theoretical flaw with the panel majority's analysis accompanies a practical flaw: all the examples it identifies of "speech integral to criminal conduct" require the speaker to have criminal purpose. *See Arthur*, 160 F.4th at 608 (listing conspiracy, solicitation, perjury, extortion, and aiding and abetting). Each of the crimes that the panel majority identifies as members of the category "require[s] that the defendant specifically intend that a particular act be carried out." *Hansen*, 599 U.S. at 778 (solicitation and aiding and abetting); *Williams*, 553 U.S. at 298 (conspiracy); Model Penal Code §§ 223.4 (extortion), 241.1 (perjury). The panel majority offers no explanation about why that is the case. Nor does it justify expanding the "historic and traditional" category to include the challenged statute and its reduced *mens rea*. I have already discussed at length the myriad issues with the challenged statute's reduced *mens rea* requirement. *See supra* at 6–17. Suffice it to say here that those issues, particularly the Supreme Court's holding in *Reno*, remain fatal to the panel majority's analysis.

In fact, the panel majority turns *Giboney* on its head. As the *Giboney* Court explained, speech integral to a crime does not receive any more protection than conduct integral to a crime. 336 U.S. at 691. Under the new law of the Fourth Circuit, speech receives even less protection than conduct. A speaker prosecuted under 18 U.S.C. § 842(p)(2)(B) need only have knowledge of a listener's criminal intent—but a person cannot be prosecuted under federal aiding-

and-abetting law without a specific intent that matches the principal actor's. *Compare Arthur*, 160 F.4th at 609, *with Rosemond*, 572 U.S. at 71. I agree that sometimes speech should be treated on par with conduct, but I cannot accept that it should ever be treated worse.

C.

One final, powerful indication that the prohibited speech is not "integral to criminal conduct" is that the prohibited speech has tangible social value. The Supreme Court has "often described those historically unprotected categories of speech as being of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in their proscription." *Counterman*, 600 U.S. at 73–74 (quoting *Stevens*, 559 U.S. at 470) (cleaned up). Of course, courts are not the arbiters of social value, and the Supreme Court has cautioned against a First Amendment balancing test in which courts determine whether speech has sufficient worth. *Stevens*, 559 U.S. at 471. But the categories of unprotected speech derive, in part, from an understanding that some speech is "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (explaining that false and defamatory statements of fact have "no constitutional value"); *Ferber*, 458 U.S. at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."). A court rarely, if ever, withholds First Amendment protection from speech that has even slight social value.

The social value of this speech is apparent. For one, the prohibition in the text encompasses a wide range of information. As discussed above, foundational principles of mathematics, physics, and chemistry fall under the umbrella of 18 U.S.C. § 842(p)(2)(B), as information "pertaining . . . in part" to the "use of explosives." 18 U.S.C. § 842(p)(2)(B). There is no question about the social value of that information. And the Government has acknowledged that even the most dangerous information covered by the statute has important social uses. *See* United States Dep't of Justice, *Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination Is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution* 5 (1997) (describing "military training, agricultural and engineering" uses of bombmaking information).

The information does not forfeit its social value whenever some listener bears criminal intent. Even if a speaker is aware that a recipient of the information intends to commit a crime, a speaker might have her own valuable reasons for transmitting the information. *See* Kent Greenawalt, *Speech, Crime and the Uses of Language* 86-87 (1989) ("A speaker may conceivably think a communication has significant value for the listener beyond the listener's immediate purpose."). While courts have rightly concluded that communications made with criminal intent have no value, that logic does not apply neatly to communications received with criminal intent.

Consider a physics class. If one of thirty students in a physics lecture intends to put that knowledge towards nefarious purposes, why should that reduce the value to the other twenty-nine students? They might apply that same information in furtherance of any number of beneficial goals, and even if they do not, the First Amendment recognizes the inherent value in sharing knowledge. I fail to see how the social value of a physics lecture changes if the lecturer learns of one student's brewing misdeeds.

The key issue with the challenged statute is that the propriety of speech fluctuates based on the intent of the recipient. A speaker with her own, legitimate purpose might be communicating factual information to an audience with a diverse range of purposes, but 18 U.S.C. § 842(p)(2)(B) would allow one listener to tarnish the interaction. The statute threatens the rights of the speaker, of course, but also of the rest of the potential audience that is robbed of the opportunity to receive information. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). In total, the statute "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno*, 521 U.S. at 874.

V.

The right to free speech is a "fundamental and highly prized" right, that "need[s] breathing space to survive." *Gibson v. Fla. Legislative Investigation Committee*, 372 U.S. 539, 544 (1963) (citing *N.A.A.C.P v. Button*, 371 U.S. 415, 433 (1963)). The challenged statute stifles speech in an unprecedented manner. Its broad text, combined with a reduced *mens rea* requirement, grants frightening discretion to the

Government to suppress protected speech made for innocuous purposes. The Supreme Court has made clear, time and again, that the potential danger of speech freely shared is insufficient justification "to abrogate the fundamental law embodied in the First Amendment." *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

The light of free expression and truth is dimmed beneath the shadow of this statute's suppression. Out of fealty to the First Amendment, I would grant rehearing en banc.

APPENDIX D

Constitutional and Statutory Provisions Involved

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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18 U.S.C. § 842(p)

(p) Distribution of Information Relating to Explosives, Destructive Devices, and Weapons of Mass Destruction.--

(1) Definitions.--In this subsection--

(A) the term "destructive device" has the same meaning as in section 921(a)(4);

(B) the term "explosive" has the same meaning as in section 844(j); and

(C) the term "weapon of mass destruction" has the same meaning as in section 2332a(c)(2).

(2) Prohibition.--It shall be unlawful for any person--

(A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to

distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence; or

(B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-4306
(7:22-cr-00005-D-1)

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

v.

CHRISTOPHER CLARK ARTHUR,

Defendant—Appellant.

FILED: December 3, 2025

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK