No. 23-4607

In the
United States Court of Appeals
for the Fourth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

STEPHEN SIMMONS,
Appellant.

Appeal from the United States District Court
for the Southern District of West Virginia
The Honorable Robert Chambers, United States District Judge

Brief of Appellee the United States of America

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STATEMENT OF JURISDICTION

On January 4, 2023, Stephen Simmons ("Simmons") was charged by criminal complaint in the United States District Court for the Southern District of West Virginia with possession of an unregistered National Firearms Act ("NFA") weapon (machinegun), in violation of 26 U.S.C. § 5861(d). JA006-011.[1] On January 31, 2023, a federal grand jury sitting in Huntington, West Virginia, returned a single-count indictment charging Simmons with the same. JA012-013. The district court had original jurisdiction pursuant to 18 U.S.C. § 3231, which provides original jurisdiction "of all offenses against the laws of the United States." On May 11, 2023, Simmons entered a plea of guilty to the Indictment without benefit of a plea agreement. JA016. The district court entered final judgment on September 14, 2023, following a sentencing hearing held two days prior. JA044, JA103. Simmons filed a timely notice of appeal on September 27, 2023. JA111. Jurisdiction over this appeal is conferred on this Court pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

[1] Reference to the Joint Appendix shall be "JA ___."

ISSUE PRESENTED

Did *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) invalidate 18 U.S.C. § 922(g)(3) such that Simmons was improperly assigned a base offense level of 20 pursuant to U.S.S.G. §2K2.1(a)(4)(B)(ii)(I) despite being an unlawful user of various controlled substances?

STATEMENT OF THE CASE

A. Offense Investigation, Conduct And Arrest

In October 2019, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") began investigating Simmons's illegal possession of automatic machineguns — firearms regulated by the National Firearms Act ("NFA"). JA114-115. That same month, ATF agents conducted an interview with Simmons at his Saint Albans, West Virginia residence concerning his possession of certain machineguns. JA115. During the interview, agents observed a scent of marijuana emanating from Simmons's garage. JA115. When questioned about the odor, Simmons acknowledged having smoked marijuana earlier in his vehicle. JA115. He elaborated, characterizing his illegal marijuana use as "self-medicating" treatment, noting a prior addiction to prescription pills. JA115. Execution of a state search warrant at Simmons's residence, conducted concurrently with the interview, uncovered evidence of drug use including digital scales, marijuana, 60 amphetamine pills in unlabeled bottles, along with 24 firearms.

JA115. When confronted by agents, Simmons confessed that the seized marijuana belonged to him. JA115.

In May 2022, police officers were dispatched to Simmons's residence following receipt of a domestic disturbance complaint. JA116. A male subject was reportedly assaulting a pregnant woman at that location. JA116. Moreover, the suspect was purportedly under the influence of methamphetamine. JA116. Simmons's wife permitted officers to enter the residence, informing them that Simmons smokes marijuana, engages in methamphetamine use, and subjects her to violent behavior. JA116. Upon entering Simmons's residence, law enforcement officers once more detected the odor of marijuana. JA116. While searching the residence for Simmons, officers noticed sandwich bags, digital scales, and visible traces of marijuana. JA116. Numerous firearms, components, and ammunition were also observed within the residence. JA116. Officers eventually located Simmons in a bedroom. JA116. When confronted by officers, Simmons refuted his wife's allegations of violence, but ultimately was placed under arrest. JA116. During execution of a subsequent state search warrant, additional evidence of illicit drug use was uncovered inside the residence including a marijuana blunt, approximately 144 grams of marijuana, and approximately 2.8 grams of methamphetamine. JA116. Along with the aforesaid drug contraband, 15 firearms were seized from the home. JA116-117.

On January 3, 2023, ATF agents executed a search warrant at Simmons's Nitro, West Virginia residence in connection with their investigation into his illegal possession of NFA weapons. JA118. Simmons was present and detained as the search commenced. JA118. While securing Simmons, agents discovered three Suboxone strips inside his wallet. JA118. Upon entry, agents noted an odor of marijuana permeating within the residence. JA118. Inside, agents seized numerous firearms, including NFA regulated weapons, along with various tools utilized in firearm fabrication and modification. JA118. Agents also located a container of marijuana, glass smoking pipe, loaded syringe, and tie off band. JA118-121.

Among the 43 firearms seized on January 3, 2023, were six silencers, two Glock Switches, and two auto sears — all weapons regulated under the NFA. JA121. An NFA weapons expert later identified the silencers as "devices for silencing, muffling, or diminishing the report of a portable firearm[,]" thus constituting firearms as defined pursuant to 18 U.S.C. § 921(a)(3)(C) and 26 U.S.C. § 5845(a)(7). JA121. The Glock Switches were identified as devices "designed and intended to convert a semiautomatic Glock-type pistol[] into a machinegun," thus classifying them as "machineguns." JA121. Likewise, the auto-sears were identified as parts utilized in converting AR-15 type weapons into fully automatic machineguns, thus constituting "machineguns" as defined under 26 U.S.C. § 5845(b). JA121. In addition to these ten

unregistered NFA firearms, one of the 43 unlawfully possessed firearms was previously reported stolen. JA121.

During a Mirandized interview on January 3, 2023, Simmons told ATF agents that his drug abuse had resumed following the revelation of his wife's recent infidelity. JA122. He particularized the relapse, detailing his abuse of methamphetamine and Adderall over the past two to three months. JA122. He elaborated that he only purchases small amounts of methamphetamine at a time. JA122. Regarding the three Suboxone strips found in his wallet, Simmons informed agents that he was last prescribed the substance approximately seven months prior. JA122.

B. **Conviction and Sentence**

Simmons pleaded guilty to a single-count indictment on May 10, 2023, charging him with possession of an unregistered machinegun, in violation of 26 U.S.C. §§ 5861(d) and 5871. JA014-019. A draft Presentence Investigation Report ("PSR") was prepared and provided to the parties on July 6, 2023. The United States timely objected pointing out an erroneous Base Offense Level ("BOL") of 12, due in part to its miscalculation under U.S.S.G. §2K2.1(a)(7). JA034-035. In its objection, the United States argued that U.S.S.G. §2K2.1(a)(4)(B)(ii)(I) more precisely reflected Simmons's conduct in this case — NFA firearm possession contemporaneous with

unlawful use of various controlled substances — producing a resultant BOL of 20. JA035.

After the deadline for submission of draft PSR objections, the probation officer informed both parties via email that the final PSR would propose a recommended BOL of 20. JA035. The next day, Simmons submitted responsive PSR objections challenging the probation officer's inclusion of certain investigative discovery materials in its calculation of an appropriate Guideline recommendation. JA139-142. Simmons further objected to the final PSR's application of U.S.S.G. §§2K2.1(a)(4)(B)(ii)(I) and 2K2.1(b)(1)(C), characterizing both as unconstitutional infringements on protected conduct under the Second Amendment and the standard established by *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). JA142-143.

During sentencing on September 12, 2023, the district court addressed the objections set forth in Simmons's sentencing memorandum concerning the PSR's BOL determination. JA021-033; JA048-063. In support of Simmons's classification as an unlawful user of controlled substances, the United States underscored the January 3, 2023, search of Simmons's residence, emphasizing the presence of Suboxone in Simmons's wallet, marijuana and paraphernalia in the residence, and his own Mirandized statement confessing to prior Suboxone treatment, recent drug use, and

relapse back into addiction. JA057-0059. The United States also noted Simmons's drug screen, referenced in the pretrial services report and signaling positive for marijuana and methamphetamine on January 3, 2023, the date of his arrest. JA062-063. After considerable argument from both parties, the court concluded by a preponderance of the evidence, that Simmons's possession of firearms on January 3, 2023, did coexist with his unlawful use of controlled substances. JA048-065. The court's finding leaned heavily on Simmons's January 3, 2023, statement detailing a prolonged battle with drug abuse, current use of Adderall and methamphetamine, and simultaneous possession of Suboxone. JA063-064.

Supporting its application of §§2K2.1(a)(4)(B)(ii)(I) and 2K2.1(b)(1)(C), the court emphasized a differentiation between issues pertaining to sentencing calculation and the constitutional challenges to federal gun laws outlined in *Bruen* and *Heller*. JA078. The court denied Simmons's objections, observing a sufficient connection between his illegal drug use and unauthorized machinegun possession warranting application of these Guideline provisions. JA079. Following incorporation of an additional enhancement pursuant to §2K2.1(b)(4)(A), accounting for possession of a stolen firearm, the court computed an adjusted offense level of 28. JA082. Three points were subtracted for acceptance of responsibility. JA082-083. Applying a criminal history classification of I, Simmons's recommended Guideline range was

figured at 57 to 71 months. JA083. The court noted that with respect to his illegal possession of the NFA devices, Simmons demonstrated high culpability. JA096.The Court then applied a downward variance, sentencing Simmons to 36 months' imprisonment. JA096. The court noted several mitigating factors justifying its downward variance, ultimately concluding that given Simmons's lack of criminal history and limited evidence of illegal conduct apart from unregistered NFA firearm possession, application of the numerous enhancements "overstates his culpability." JA093-JA096.

SUMMARY OF ARGUMENT

U.S.S.G. §2K2.1(a)(4)(B)(ii)(I) increases the recommended felony sentence for illegal possession of an unregistered NFA weapon by a prohibited person – here an unlawful user of controlled substances. In so doing, this Guideline provision defines "unlawful user" by reference to 18 U.S.C. § 922(g)(3). The district court's Guideline calculation at sentencing pursuant to §2K2.1(a)(4)(B)(ii)(I) was not procedural error because § 922(g)(3)'s prohibition of gun possession by an unlawful user of controlled substances accords with Second Amendment precedent under *Bruen*.

Constitutional safeguard of "the right of the people to keep and bear Arms,", "is not unlimited" and such protection only extends to "law abiding, responsible" citizens — a classification incompatible with Simmons's unlawful drug use. The

barring of firearm possession by abusers of illicit drugs, as envisioned in § 922(g)(3), aligns with this Nation's longstanding tradition of restricting firearms from intoxicated, dangerous, and mentally ill individuals.

Section 922(g)(3)'s incorporation of the term "unlawful user" does not render it facially unconstitutional. The statute effectively identifies proscribed conduct and appropriately deters arbitrary enforcement. Furthermore, the district court's Guideline calculation pursuant to §2K2.1(a)(4)(B)(ii)(I), with reference to § 922(g)(3), was constitutionally applied at sentencing herein. Self-confessed methamphetamine and Adderall use alongside undisputed firearm possession — both recent, consistent, and coexistent — sufficiently evidences Simmons's unlawful use of controlled substances, and resultant classification as a prohibited person. For these reasons the district court's sentence should be affirmed.

ARGUMENT

I. Section 922(g)(3) Remains Constitutional Under *Bruen*

A. Standard Of Review

"In reviewing the application of the Sentencing Guidelines, "[i]f the issue turns primarily on a factual determination, an appellate court should apply the 'clearly erroneous' standard." *United States v. Daughtrey*, 874 F.2d 213, 217 (4th Cir. 1989). "However, a question relating to the legal interpretation of the Guidelines is subject

to *de novo* review." *United States v. Dowell*, 771 F.3d 162, 170, (4th Cir. 2014); *see also*, *United States v. Schaal*, 340 F.3d 196, 198 (4th Cir. 2003). Here, Simmons challenges the constitutionality of U.S.S.G. §2K2.1(a)(4)(B)(ii)(I) based upon its reference to 18 U.S.C. § 922(g)(3) in defining the term "prohibited person" to include unlawful users of controlled substances. "This court reviews a challenge to the constitutionality of a federal statute *de novo*." *United States v. Malloy*, 568 F.3d 166, 171 (4th Cir. 2009). Because Simmons argues that § 922(g)(3) is unconstitutional on its face, he "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

B. The Second Amendment, *Heller*, And *Bruen*

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects the right of "law-abiding, responsible citizens" to keep firearms in their homes for self-defense. 554 U.S. 570, 635 (2008). The Court thus found two District of Columbia laws unconstitutional as they effectively prohibited handgun possession in homes and mandated that all firearms be kept inoperable, rendering them unavailable for self-defense. *Id.* at 628–34.

Heller clarified that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626.[2] It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* And it said that "nothing in [its] opinion should be taken to cast doubt" on certain "presumptively lawful regulatory measures," such as "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27; *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786 (2010). *Heller* described these regulations as "presumptively lawful" measures. 554 U.S. at 627 n.26.

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[2] *See also Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 626). Supporting this statement, the Justices who made up the majority understood the opinion to "decide[] nothing about who may lawfully possess a firearm." *Id.* at 2157 (Alito, J., concurring); *see also id.* at 2162 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations.") (*citing Heller*, 554 U.S. at 636); *id.* ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . [which are] only examples [and] . . . does not purport to be exhaustive.") (quoting *Heller*, 554 U.S. at 626–27 & n.26; *citing McDonald v. Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion)).

In *Bruen*, the Court "made the constitutional standard endorsed in *Heller* more explicit." 142 S. Ct. at 2134. It elaborated on the test *Heller* and *McDonald* set forth to determine whether a government regulation infringes on the Second Amendment right to possess and carry guns for self-defense: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. Only after the government makes that showing "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2130.

Bruen recognized that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791." *Bruen*, 142 S. Ct. at 2132. Thus, when considering "modern regulations that were unimaginable at the founding," the historical inquiry will "often involve reasoning by analogy." *Id.* In "determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation," courts must determine "whether the two regulations are relevantly similar," which will involve considering "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-33 (quotation marks omitted). Thus, "whether modern and historical regulations impose a

comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." *Id.* at 2133 (emphasis and quotation marks omitted).

The Court emphasized that this "analogical reasoning . . . is neither a regulatory straightjacket nor a regulatory blank check." *Bruen*, 142 S. Ct. at 2133. "On the one hand, courts should not 'uphold every modern law that remotely resembles a historical analogue' . . . ." *Id.* (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)). "On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin." *Id.* "[E]ven 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* found unconstitutional a New York licensing regime that allowed an applicant to obtain a license to carry a gun outside their home only upon proving "proper cause exists." *Id.* at 2123. First, the Court held the Second Amendment's plain text covered the conduct at issue. *Id.* at 2134–35. The petitioners were "ordinary, law-abiding, adult citizens" who sought to carry handguns publicly for self-defense. *Id.* at 2134. This, the Court concluded, fell within "the right to keep and bear arms." *Id.*

The Court then surveyed historical data from "medieval to early modern England" through "the late-19th and early-20th centuries" to determine whether the licensing law squared with historical tradition. *Id.* at 2135–56. After a "long journey through the Anglo-American history of public carry, [the Court] conclude[d] that respondents ha[d] not met their burden to identify an American tradition justifying the State's proper-cause requirement." *Id.* at 2156. "Apart from a few late-19th-century outlier jurisdictions," the Court summarized, "American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense" or required a showing of special need for public carry. *Id.*

Bruen rejected the means-end scrutiny framework most courts had relied upon to assess the constitutionality of gun regulations. *Id.* at 2127. But it did not, as Simmons claims, invalidate § 922(g)(3). Nor did it entirely abrogate the Fourth Circuit's post-*Heller* Second Amendment precedent. After *Heller*, the Fourth Circuit explained that the first question when addressing a Second Amendment claim "is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," a "historical inquiry seek[ing] to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010), abrogated on other grounds by *Bruen*, 142 S. Ct. 2111 (quotation marks omitted).

Bruen described such an inquiry as "broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history." 142 S. Ct. at 2127. A review of the Second Amendment's plain text alongside that history compels a conclusion that § 922(g)(3) is constitutional.

C. Unlawful Users Of Controlled Substances Are Not Part Of "The People" To Whom Second Amendment Protection Extends.

Under *Bruen*, the initial inquiry when considering the constitutionality of a firearm regulation is whether "the Second Amendment's plain text covers an individual's conduct." *Bruen, 142 S. Ct. at 2126.* Expounding on this analysis, the *Bruen* Court clarified its initial step by posing three questions. First, it inquired whether individuals governed by the provision were "part of 'the people' whom the Second Amendment protects." *Id.* at 2134. Next, it inquired whether the regulated firearms "are weapons in common use today" for lawful purposes. *Id.* Lastly, the Court questioned whether the parties' "proposed course of conduct" fell within that protected by the Second Amendment. *Id.*

Application of *Bruen's* first question is decisive here in determining the constitutionality of § 922(g)(3). Supreme Court interpretation of the plain text establishes that an unlawful user of controlled substances is not "part of 'the people' whom the Second Amendment protects." *Id.* Indeed, *Heller* defined the right to bear arms as belonging to "law-abiding, responsible" citizens. *Heller*, 554 U.S. at 635. And

Bruen echoed that definition, stating no fewer than fourteen times that the Second Amendment protects the rights of "law-abiding" citizens. *Bruen*, 142 S.Ct. at 2122, 2125, 2131, 2133, 2134, 2138, 2150, 2156.

Violators of § 922(g)(3) are, by definition, not law-abiding, responsible citizens. This statute applies only to an individual who "is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." For § 922(g)(3)'s prohibition to apply, a defendant's illegal drug use must be "sufficiently consistent, prolonged and close in time to his gun possession to put him on notice that he qualified as an unlawful user under the terms of the statute." *United States v. Hasson*, 26 F.4th 610, 615-616 (4th Cir. 2022)(citing *United States v. Sperling*, 400 Fed. App. 765,767 (4th Cir. 2010)). A consistent, prolonged user of federally controlled substances can hardly be termed "law-abiding" or "responsible." *Bruen*, 142 S.Ct. at 2131. Hence, a reasonable conclusion can be drawn that restriction of gun possession from such individuals, as contemplated in § 922(g)(3), aligns with the Second Amendment's plain text.

D. Section 922(g)(3) Aligns With Historical Analogues Restricting Firearm Possession By Individuals Demonstrating Intoxication, Dangerousness, And Mental Illness.

Even if § 922(g)(3) is deemed to burden the rights of "law-abiding, responsible citizens," it still passes constitutional muster because it is consistent with the

Nation's historical tradition of firearm regulation with respect to intoxicated, dangerous, and mentally ill individuals.[3]

1. **Restrictions On Intoxicated Individuals**

The Founding generation recognized that those who regularly became intoxicated threatened the social and political order. *See, e.g.*, Benjamin Rush, *An Inquiry into the Effects of Ardent Spirits Upon the Human Body and Mind* 6 (1812) (describing drunkenness as a "temporary fit of madness"). A 1658 Massachusetts law, for example, allowed constables to apprehend those "overtaken with drink" and keep them "in close custody" until brought before a magistrate. *The Charters & General Laws of the Colony and Province of Massachusetts Bay* 82 (1814). Founding-era legislatures also adopted specific measures to separate firearms and alcohol, including regulating firearm use by individuals deemed likely to become intoxicated. A 1655 Virginia law prohibited "shoot[ing] any gunns at drinkeing [events],"

[3] Regarding this argument, as well as others in the United States' brief, defendant claims the United States has raised improper new arguments not previously before the district court. However, the Fourth Circuit has recognized that when "the district court had an opportunity to evaluate [a party's] specific objection," the party was free to add "more weight to his argument on appeal." *United States v. Hope*, 28 F.4th 487, 495 (4th Cir. 2022). The United States clearly preserved its claim that § 922(g)(3) remains constitutional under *Bruen*, and the arguments raised in its brief were permissibly "adding a finer point to [its] objection raised below." *Id.* The Supreme Court has similarly held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

regardless of whether attendees became intoxicated. 1 William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia* 401-02 (1823). A 1771 New York law similarly barred firing guns during the New Year's holiday, a restriction that "was aimed at preventing the 'great Damages . . . frequently done on [those days] by persons . . . being often intoxicated with Liquor." *Heller*, 554 U.S. at 632 (quoting 5 *Colonial Laws of New York* 244-46 (1894)). And a 1731 Rhode Island law forbade firing guns or pistols in any tavern at night. *See Acts & Laws of the English Colony of Rhode-Island & Providence-Plantations* 120 (Hall, 1767).

Militia laws from the 1700s likewise reflect early legislatures' judgments about the dangers of allowing intoxicated individuals to carry firearms. New Jersey, Pennsylvania, and South Carolina disarmed or authorized the confinement of intoxicated militia members. *See* 2 Arthur Vollmer, U.S. Selective Serv. Sys., *Military Obligation: The American Tradition*, pt. 8, New Jersey, at 25-26 (1947) (1746 law disarming those who appeared "in [a]rms disguised in [l]iquor"); *id.* pt. 11, Pennsylvania, at 97 (1780 law disarming those "found drunk"); *id.* pt. 13, South Carolina, at 96 (1782 law allowing officers to be cashiered or "confined till sober"). Similar laws persisted into the 1800s, *see, e.g.*, James Dunlop, *The General Laws of Pennsylvania* 405-06 (2d ed. 1849) (1822 law) — by which time at least three states

outright excluded "common drunkards" from the militia, *see* 1844 R.I. Pub. Laws 503; 1837 Me. Laws 424; 1837 Mass. Acts 273.

During the 19th century, as social norms surrounding, and attitudes about, alcohol changed, and as firearms became less cumbersome, *see, e.g.*, Randolph Roth, *"Why Guns Are and Are Not the Problem,"* in Jennifer Tucker, *et al.*, *A Right to Bear Arms?: The Contested Role of History in Contemporary Debates on the Second Amendment* 116-17 (2019); Mark Edward Lender & James Kirby Martin, *Drinking in America: A History* 14-16 (1987), limits (including criminal penalties) on the carry, use, and receipt of firearms or pistols by intoxicated individuals proliferated to cover the general public. Lender, *Drinking in America*, at 45-46. Multiple states passed laws prohibiting members of the general public from carrying firearms while drunk. *See, e.g.*, 1867 Kan. Sess. Laws 25 (prohibiting those "under the influence of intoxicating drink" from carrying a pistol or other deadly weapon); 1878 Miss. Laws 175-76 (prohibiting selling weapons to a "person intoxicated"); Mo. Rev. Stat. § 1274 (1879) (prohibiting carrying "any kind of firearms" "when intoxicated or under the influence of intoxicating drinks"); 1883 Wis. Sess. Laws 290 (prohibiting person in "state of intoxication" from going "armed with any pistol or revolver"); 1909 Idaho Sess. Laws 6 (prohibiting "hav[ing] or carry[ing]" any "deadly or dangerous weapon" when "intoxicated, or under the influence of intoxicating drinks"). Such statutes

were considered "in perfect harmony with the constitution" and "a reasonable regulation of the use of such arms" even where state constitutions were understood to secure an individual's right to bear arms. *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886).

These historical laws show a clear and longstanding tradition of limiting firearm possession and use during periods of intoxication — when people are less likely to use firearms responsibly. And they support modern-day application of § 922(g)(3) to do the same.

2. **Restrictions On Individuals Identified As Dangerous**

Section 922(g)(3)'s facial constitutionality is further justified by historical laws and practices of disarming those who would pose a threat to the safety of others if armed. English common law established the government's authority to disarm those who posed a threat to the safety of others. The Statute of Northampton codified the common-law prohibition on "go[ing] armed to terrify the King's subjects." *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B. 1686); Statute of Northampton, 2 Edw. 3, c.3 (1328). The Militia Act of 1662 later authorized crown officers to seize the arms of those "judge[d] dangerous to the Peace of the Kingdom.'" 13 & 14 Car. 2, c.3, § 13 (1662). The 1689 English Bill of Rights declared subjects' right to possess arms, but limited the right to Protestant subjects,

1 W. & M. c.2, § 6, and did not purport to repeal the Militia Act, which was employed into the 18th century, *see, e.g., Calendar of State Papers, Domestic: William III, 1700-1702*, at 233-34 (Edward Bateson ed., 1937). Before, contemporaneous with, and after the Bill of Rights' enactment, Parliament also enacted statues disarming Catholics in England and Ireland. 3 Jac. I, c.5, §§ 16-18 (1605-06); 1 W. & M. c.15, §§ 3-4 (1688); 7 Will. III c.5 (1695) (Ireland). And in the early 1700s, statutes disarmed Scottish individuals believed to be loyal to James II. *See, e.g.*, 1 George I, c.54 (1715); 11 George I, c.26 (1724); 19 George II, ch. 39 (1746).

The tradition continued in early American legislatures. Some laws disarmed those who carried arms in a manner that spread fear or terror. *See* 1692-1694 Mass. Acts 11-12; 1696-1701 N.H. Laws 15. Others disarmed entire groups deemed dangerous or untrustworthy, including those who refused to swear allegiance to the colony[4] or the Revolution's cause.[5] Precursors to the Second Amendment proposed

[4] 1 *Records of Governor & Company of the Massachusetts Bay in New England* 211-12 (Nathaniel B. Shurtleff ed., 1853) (1637 order disarming Anne Hutchinson's followers).

[5] *See, e.g.*, 4 *Journals of the Continental Congress* 201-06 (1906) (1776 resolution); 1775-1776 Mass. Acts 479; 1777 Pa. Laws 63; 1777 N.C. Sess. Laws 231; 1776-1777 N.J. Laws 90; 9 William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia* 281-83 (1821) (1777 Va. law); 15 *The Public Records of the Colony of Connecticut from May, 1775, to June, 1776, Inclusive* 193 (Charles J. Hoadly ed., 1890) (1775 law).

in state ratifying conventions likewise confirmed that legislatures may disarm certain categories of individuals, including for "real danger of public injury." 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665 (1971) (discussing Pennsylvania proposal). Accordingly, as one early scholar wrote, the government may restrict a person's right to carry firearms when there is "just reason to fear that he purposes to make an unlawful use of them." William Rawle, *A View of the Constitution of the United States of America* 126 (2d ed. 1829). That understanding persisted after the Civil War. In 1866, for example, a federal Reconstruction order applicable to South Carolina provided that, although the "rights of all loyal and well-disposed inhabitants to bear arms will not be infringed," "no disorderly person, vagrant, or disturber of the peace, shall be allowed to bear arms." Cong. Globe, 39th Cong., 1st Sess. 908-09 (1866).

These historical sources "support the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous," *Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting), including unlawful users of illegal drugs. The reasons are clear: common sense establishes a clear link between drug use and dangerous firearm misuse. For example, drug users may mishandle firearms — or use firearms to commit crimes — because of "drug-induced changes in physiological functions, cognitive ability, and mood." *Harmelin*

v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *see Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 332 (2012) ("The use of drugs can embolden [individuals] in aggression."). Illegal drug users may also use firearms to "commit crime in order to obtain money to buy drugs," *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring in part and concurring in the judgment), or to commit "violent crime" that "may occur as part of the drug business or culture," *id.* And because of the unlawful nature of their activities, armed drug users are more likely to have dangerous confrontations with law enforcement officers. *United States v. Carter*, 750 F.3d 462, 469 (4th Cir. 2014).

The Fifth Circuit, in *Daniels*, likewise recognized that historical precursors to § 922(g)(3) establish "an undeniable throughline" of taking "guns away from persons perceived to be dangerous." *United States v. Daniels*, 77 F.4th 337, 352 (5th Cir. 2023); *see id.* at 353 (explaining that "[t]ogether," these historical sources "suggest a public understanding that when a class of individuals was thought to pose a grave danger to public peace, it could be disarmed"). That historical tradition supports disarming, at a minimum, drug users whose drug use "predisposes [them] to armed conflict" or who have a "history of violent behavior." *Id.* at 354.

3. Restrictions On The Mentally Ill

Limitations historically imposed on the mentally ill also justify disarming unlawful drug users under § 922(g)(3). At the Founding "those afflicted with mental diseases were generally treated as though they had been stripped of all . . . their rights and privileges." Albert Deutsch, *The Mentally Ill in America: A History of their Care and Treatment from Colonial Times* 41 (1949). Indeed, "'in eighteenth-century America, justices of the peace were authorized to "lock up" "lunatics" who were "dangerous to be permitted to go abroad."'" *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (per curiam) (quoting Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1377 (2009), in turn quoting Henry Care, *English Liberties, or the Free-Born Subject's Inheritance* 329 (6th ed. 1774)).

The Second Amendment's ratifiers understood that just as mental illness could deprive individuals of reason, so could intoxicating substances. Indeed, Benjamin Rush, a signatory of the Declaration of Independence and a prominent physician, equated drunkenness with a "temporary fit of madness." Rush, *supra*, at 6; *see also* Carl Erik Fisher, *Urge: Our History of Addiction* 47 (Penguin 2022) (noting that "eighteenth-century writers" understood "habitual drinking" as a form of "insanity"). And Thomas Jefferson placed "drunkards" in the same category as

"infants," "maniacs" and others who "cannot take care of themselves." Nat'l Archives, *Letter from Thomas Jefferson to Samuel Smith*, 3 May 1823, https://perma.cc/2CJB-N7RS. It is "beyond dispute that illegal drug users," like those with mental illnesses, "are likely . . . to experience altered or impaired mental states that affect their judgment and that can lead to irrational or unpredictable behavior." *Wilson v. Lynch*, 835 F.3d 1083, 1094 (9th Cir. 2016).

4. Modern Restrictions On Gun Possession By Drug Users, Including § 922(g)(3), Follow A Path Of Historic Precedent

In a testament to the strength of this historical tradition, prohibitions on firearms possession by drug users remain prevalent today. In recent times, at least twenty-six states and the District of Columbia "have restricted the right of habitual drug abusers or alcoholics to possess or carry firearms." *Yancey*, 621 F.3d at 684 (collecting examples). Section 922(g)(3) thus stands in stark contrast to the "outlier[]" laws the Supreme Court invalidated in *Bruen* and *Heller*. *Bruen*, 142 S.Ct. at 2156; *see id.* at 2161 (Kavanaugh, J., joined by Roberts, C.J., concurring) (emphasizing the "unusual" nature and "outlier" status of the New York law in *Bruen*); *Heller*, 554 U.S. at 629 (noting that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban"). Unlike those exceptional laws, § 922(g)(3) reflects a historical tradition that stretches from the Founding to the present, and it therefore comports with the Second

Amendment. Although none of the pre-twentieth century historical analogues is a "dead ringer" or "historical twin" for 18 U.S.C. § 922(g)(3), *Bruen*, 142 S.Ct. at 2133, they nevertheless show that § 922(g)(3) is "analogous enough" to historical laws "to pass constitutional muster," *id.*

Bruen explains that in determining "whether…two regulations are relevantly similar," courts must examine "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-33. Thus, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when in engaging in an analogical inquiry." *Id.* at 2133 (emphasis and quotation marks omitted). § 922(g)(3) temporarily bans gun possession while an individual's illegal drug use is "sufficiently consistent" and "prolonged." *United States v. Sperling*, 400 F. App'x 765, 767 (4th Cir. 2010) (quoting *United States v. Purdy*, 264 F.3d 809, 812 (9th Cir. 2001). Therefore, gun rights of unlawful users, such as Simmons, are reestablished simply by terminating their own illicit drug use. The statute therefore imposes a burden "comparable" to, or even less severe than, the historical laws discussed above. *Bruen*, 142 S.Ct. at 2133. As for "why" such laws were enacted, the reason such laws existed is the same as for the present law, namely, "to keep firearms

out of the hands of presumptively risky people." *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 113 n.6 (1983).

Here, § 922(g)(3)'s prohibition on firearm possession applies only to those in violation of the drug laws. Societal risk was a key consideration in Congress's adoption of the statute which was aimed at keeping guns out of the hands of illegal drug users. *See, e.g.*, S. Rep. No. 1097, 1968 U.S. CODE CONG. & AD. NEWS 2112, *2114, 1968 WL 4956 (Leg. Hist.) (the ready availability of firearms for "***narcotic addicts***, mental defectives, ... and others whose possession of firearms is similarly contrary to the public interest ... is a matter of serious national concern") (emphasis added).[6] Accordingly, the burdens imposed by § 922(g)(3) and the referenced historical analogues are "comparably justified." *Bruen*, 142 S.Ct. at 2133.

Just as historical laws disarmed people based on their intoxication, potential dangerousness, or mental illness, the same reasoning justifies disarming individuals who are habitually breaking the law by using mind-altering substances. "Ample academic research confirms the connection between drug use and violent crime."

[6] As the Supreme Court has concluded: "Congress' intent in enacting [18 U.S.C. § 922(g)] was to keep firearms out of the hands of presumptively risky people." *Dickerson*, 460 U.S. at 113 n.6. *See also Abramski v. United States*, 573 U.S. 169, 172 (2014) (federal firearms laws serve "to prevent guns from falling into the wrong hands" and, pursuant to 18 U.S.C. § 922(g), "certain classes of people — felons, ***drug addicts***, and the mentally ill, to list a few — may not purchase or possess any firearm") (emphasis added).

Yancey, 621 F.3d at 686-87 (discussing research). Congress was entitled to categorically conclude that those who violate the law by being unlawful users of controlled substances cannot be trusted to use firearms in a safe and responsible way. Because this satisfies the "how" and "why" metrics explicitly set forth in *Bruen*, § 922(g)(3) is "analogous enough" to these historical laws "to pass constitutional muster." 142 S.Ct. at 2133.

II. Section 922(g)(3) Is Not Unconstitutionally Vague

Simmons not only challenges § 922(g)(3) as violative of the Second Amendment under *Bruen*, but separately contends that the statute is unconstitutionally vague both on its face and as applied herein. Appellant's Br. 046-047. These challenges should be denied because § 922(g)(3) provides fair notice, avoids the potential for arbitrary enforcement, and Simmons's own conduct squarely satisfies the definition of "unlawful user" as interpreted by this Court.

A. Section 922(g)(3) Withstands Constitutional Challenge For Facial Vagueness

Simmons argues that § 922(g)(3)'s lack of certainty in defining the term "unlawful user" and ambiguity as to the conduct classifying an individual as such both yield impermissible vagueness. Appellant's Br. 046. This he claims, in turn, denies fair notice to defendants and invites arbitrary enforcement by judges. *Id.* The vagueness doctrine does necessitate that criminal statutes clearly define prohibited

conduct in a way that ordinary individuals can comprehend, while also avoiding arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Though true, § 922(g)(3) does not expressly define the term "unlawful user," the legal meaning of such nonetheless is evident in this Court's precedent. With respect to § 922(g)(3), the Fourth Circuit, in *United States v. Sperling*, found "[t]o sustain a conviction, the government must prove that the defendant's drug use was sufficiently consistent, prolonged, and close in time to his gun possession to put him on notice that he qualified as an unlawful user under the terms of the statute." 400 F. App'x 765, 767 (4th Cir. 2010). Hence, for purposes of § 922(g)(3), an "unlawful user" is an individual whose consistent and prolonged unlawful drug use coincides in time with their possession of a firearm. Despite Simmons's characterization of this definition as lacking a precise description of proscribed conduct, it does provide an average person with sufficient notice to discern the legality of their planned actions. *United States v. Demott*, 45 F. App'x 230, 233 (4th Cir. 2002) ("In order to survive a vagueness challenge, a statute or regulation need only give fair warning such that people of common intelligence will know whether their contemplated conduct is forbidden."). Simmons's facial challenge should be denied.

B. Section 922(g)(3) Is Not Unconstitutionally Vague As Applied

Simmons additionally challenges his classification as an "unlawful user" in the district court's application of U.S.S.G. §2K2.1(a)(4)(B)(ii)(I) at sentencing. Specifically, he characterizes his own admissions to drug abuse, provided during a Mirandized statement on January 3, 2023, as uncorroborated and insufficient to establish consistent intoxication or an impairment to safe and contemporaneous firearm possession. Appellant's Br. 047.

For purposes of sentence enhancement under §2K2.1(a)(4)(B)(ii)(I), "prohibited person" is defined by 18 U.S.C. § 922(g) to include "any person who is an unlawful user of or addicted to any controlled substance[.]" With respect to the term unlawful user, in the context of § 922(g)(3), the drug use must be "sufficiently consistent, prolonged, and close in time to his gun possession to put him on notice that he qualified as an unlawful user under the terms of the statute." *United States v. Hasson*, 26 F.4th 610, 615-616 (4th Cir. 2022). Despite his claim to the contrary, Simmons's own admissions, corroborated by evidence seized during search warrant execution and arrest, establish a persistent, unlawful use of and addiction to controlled substances contemporaneous with firearm possession.

Simmons's conduct on January 3, 2023, was clearly proscribed under § 922(g)(3). Substantial evidence of Simmons's illicit drug use and addiction supports

ample justification for his classification as an unlawful user. Admissions made during the January 3, 2023, interview described a lifetime of marijuana abuse, and further detailed recent Adderall and methamphetamine use spanning the two-to-three-month period leading up to this instant arrest. JA122; JA131. Law enforcement officers seized a quantity of marijuana, glass smoking pipe, loaded syringe, tie-off band, four machine gun conversion devices, six silencers, and numerous other firearms — clear evidence of illegal drug use coexistent with gun possession — from Simmons's residence on that same date. JA118-121. Officers also seized three Suboxone strips in Simmons's wallet for which he claimed to have a valid prescription. JA118; JA122. Regardless, this medically assisted treatment, whether legally obtained or not, demonstrates treatment of a drug addiction or alternatively evidences unprescribed drug use, and either way further supports his designation as a prohibited person.

Sections 922(g)(3) and 2K2.1(a)(4)(B)(ii)(I) are not unconstitutionally vague as applied to Simmons's conduct. The indisputable facts of this case entail recent and ongoing drug abuse, coupled with firearm possession, revealed through a search of Simmons's residence and his own statement outlining both the drug use and gun possession. An ordinary person would fairly understand such conduct as characteristic of being a prohibited unlawful user of controlled substances envisioned

under § 922(g)(3) and in line with §2K2.1(a)(4)(B)(ii)(I). As noted in Simmons's PSR, he has obtained two bachelor's degrees and a master's degree in social work. JA131. Prior to his arrest, Simmons was employed as a licensed clinical social worker specializing in trauma, cognitive behavioral therapy, and drug abuse counseling. *Id.* Certainly, based upon his extensive education and professional experience regarding drug abuse, Simmons possessed, at a minimum, "common intelligence" necessary to appreciate the illegality of his conduct. *Demott*, 45 F. App'x at 233.

III. Any Alleged Mistake In Computing The Advisory Guidelines Range Was Inconsequential And Therefore Harmless

The district court's application of U.S.S.G. §§2K2.1(a)(4)(B)(ii)(I) and 2K2.1(b)(1)(C) was not erroneous. Still, any alleged error in its calculation was rendered inconsequential and harmless by the court's downward variance. At sentencing, the district court made findings with respect to the relevance of these specific Guideline provisions. JA063-064; JA077-079. Following extensive argument from both sides addressing defendant's objections to the PSR guideline calculation, the court first determined, based on a preponderance of the evidence, that Simmons was an unlawful user of controlled substances contemporaneous with possession of machinegun conversion devices. JA063-064. The court based its decision largely on Simmons's personal statement outlining a long-lived struggle with drug abuse, present

use of Adderall and methamphetamine, and possession of Suboxone on his person concurrent with his arrest on January 3, 2023. JA063-064.

The district court's focus next turned to applicability of §2K2.1(b)(1)(C). JA065. It began the analysis, first noting a distinction between matters related to sentencing relevant in the instant case and those challenges to federal gun laws underlying the framework in *Bruen* and *Heller*. JA078. The court noted a correlation between Simmons's illicit drug use and unlawful possession of machineguns, considering such as basis for heightened culpability and public safety concern. JA079. The court found application of this enhancement to be appropriate, in turn denying Simmons's objection with respect to inclusion of non-NFA firearms in calculating an accurate total. JA079.

In accordance with the aforementioned findings, the district court started with a base offense level ("BOL") of 20 pursuant to §2K2.1(a)(4)(B)(ii)(I). JA082. The court added additional levels based upon enhancements under §§2K2.1(b)(1)(C) and 2K2.1(b)(4)(A). JA082. The result of such was an adjusted offense level of 28. JA082. Two points were subtracted for acceptance of responsibility. The United States moved for an additional one-point reduction resultant to Simmons's timely entry of a guilty plea. JA082-083. The court noted Simmons's one criminal history point, detailed in the PSR as relating to prior simple drug possession and DUI convictions. JA125;

JA083. Based upon these calculations, Simmons's advisory Guideline range was fixed at 57 to 71 months. JA083. Simmons raised no objection to the court's calculated Guideline range beyond that already presented earlier in the preceding. JA083.

Simmons's sentence of 36 months constituted a downward variance from the calculated advisory Guideline range. JA096. Had Simmons's *Bruen*-based objection to §2K2.1(a)(4)(B)(ii)(I) as violative of the Second Amendment been sustained, his BOL would have appropriately been determined pursuant to §2K2.1(a)(5). This is undisputed by the defendant for he acknowledged his possession of a firearm as described in 26 U.S.C. § 5845(a), electing not to challenge statutory regulation of such. JA021-022. Calculation under this alternative provision would have reduced Simmons's BOL by two resulting in an offense level 18. Furthermore, as set forth in the PSR, ten weapons seized from Simmons's residence on January 3, 2023, constituted NFA firearms. JA121. Simmons concedes throughout his sentencing argument that these NFA firearms are appropriately attributable as relevant conduct. JA049; JA069-070. Application of the firearm quantity enhancement under §2K2.1(b)(1)(B), limited strictly to those ten NFA firearms, would have produced a four-level increase. Assuming arguendo that a two-level enhancement pursuant to §2K2.1(b)(4)(A) would not apply if Simmons had prevailed in his *Bruen*-based objections, the total offense level prior to adjustment for acceptance would have been

22. Three-level reduction for acceptance, as was granted at sentencing, would have formed a total offense level of 19.

The defendant's Category I criminal history classification considered conjointly with a total offense level of 19 equate to an advisory Guideline range of 30 to 37 months. Simmons's sentence of 36 months' incarceration thus falls within the advisory Guideline sentence range that would have resulted had his *Bruen*-based objections been granted. An appellate court may apply a presumption of reasonableness to a within-Guidelines sentence. *See United States v. Rita*, 551 U.S. 338, 351 (2007); *United States v. Wright*, 594 F.3d 259, 268 (4th Cir. 2010). Because this presumption would interpret Simmons's current 36-month sentence as reasonable even if he had prevailed in his objections as explained above, any error on part of the district court in applying §§2K2.1(a)(4)(B)(ii)(I) and 2K2.1(b)(1)(C) is harmless.

The analysis above, alone, lends a presumption of harmlessness to any assumed sentencing error in the instant case. The district court's alleged fault is likewise deemed harmless under the "assumed error harmlessness inquiry." *United States v. Savillon-Matute*, 636 F.3d 119, 123-24 (4th Cir. 2011). Under such inquiry, a sentence can be affirmed "without reaching the merits of the claimed guideline error." *Id.* at 124. The assumed error harmlessness inquiry "requires (1) 'knowledge that the district court would have reached the same result even if it had decided the guidelines issue

the other way,' and (2) 'a determination that the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor.'" *Id.* at 123 (quoting *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)).

With respect to the first prong of the inquiry, a district court does not have to "specifically state that it would have imposed the same sentence without the enhancement" when "its comments throughout the sentencing hearing showed that it would have done so." *United States v. Hargrove*, 701 F.3d 156, 162 (4th Cir. 2012). Here the district court conducted an extensive and detailed analysis in reaching its sentencing decision. The court explained its rationale emphasizing that sentencing in the matter was "largely driven by the defendant being a drug user" in possession of "illegal silencers and similar devices." JA094. "You caught him with…all these devices…[and] at the same time…he was a drug user." JA094. "[I]t doesn't seem to me that his conduct really goes beyond that." JA094. On account of this determination, the district court found "that the [advisory] guideline overstate[d] the seriousness…and the nature of [Simmons's] offense." JA094-095. "[A]dding all these points overstates his culpability." JA095. The court emphasized its certainty that Simmons understood the illegality of possessing machinegun devices, but it did not believe that "driv[ing] up the offense level" based on other factors was justified. JA096. In other words, while the court properly considered the advisory Guideline range, the court's analysis of the

relevant sentencing factors under 18 U.S.C. § 3553(a) — factors that would be unaffected by the contested Guideline enhancements — drove the court's sentencing calculus.

The district court's commentary and correlated 36-month downward variance suggest that the same sentence would have resulted even if every contested Guideline issue had been decided in Simmons's favor. In applying the aforesaid rationale, the court appeared to employ a four-level enhancement, focusing solely on the ten NFA-regulated firearms, in place of a six-level enhancement that also would provide consideration for the non-NFA firearms. The court as well appears to have removed the two-level enhancement for a stolen firearm. The end effect of these adjustments, with acceptance, would be an adjusted offense level of 21 and resultant Guideline range of 37 to 46 months. Still, the court's decision to impose a 36-month sentence indicates that it likely also took into account a lower BOL of 18 under §2K2.1(a)(5), effectively eliminating the enhancement for unlawful drug use altogether. The result — a final adjusted offense level of 19 in place of an otherwise properly calculated 25, with a correspondingly lower advisory range of 30 to 37 months. The court's statements that it is "disturbed anyone would possess this many firearms," emphasizing the defendant's "high culpability," and underscoring that "he deserves to

be punished" evidence the likelihood that the same 36-month sentence would have resulted even if Simmons's objections had been granted. JA095-096.

Pursuant to the assumed error harmlessness inquiry, the imposed 36-month sentence is next assessed for reasonableness. Given the fact that 36 months is within this advisory Guideline range, it can be presumed reasonable under *Rita* and *Wright*. Indeed, it is noteworthy that during sentencing, Simmons asserted the reasonableness and adequacy of a 36-month term of imprisonment, in achieving a "deterrent result" and that "three years in prison [will] get the point across to him." JA085; JA087. Put another way, Simmons got the sentence he asked for. As noted in *Keene*, "it would make no sense to set aside [a] reasonable sentence and send the case back to the district court since it has already told us that it would impose exactly the same sentence, a sentence we would be compelled to affirm." *Keene*, 470 F.3d at 1350. Accordingly, Simmons's sentence should be affirmed both pursuant to the presumption of reasonableness under *Rita* and according to the assumed error harmlessness inquiry without need to address the merits of the claimed Guideline error.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm the judgment of the district court.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 7963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).

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Date: January 17, 2024

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, I electronically filed the foregoing "BRIEF OF APPELLEE THE UNITED STATES OF AMERICA" with the Clerk of court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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