No. 23-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN RUSSELL HOWALD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This appeal is from a final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The district court entered final judgment on June 13, 2023. 1-ER-2-8. Defendant filed a timely notice of appeal. 4-ER-873-875. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

A jury convicted defendant-appellant John Russell Howald of attempting, through the use of firearms and other dangerous weapons, to cause bodily injury to persons, and attempting to kill one woman in particular, because of their sexual orientation, in violation of 18 U.S.C. 249(a)(2). The jury further convicted Howald of violating 18 U.S.C. 924(c)(1)(A)(ii) and (iii) for brandishing and discharging a firearm during and in relation to a crime of violence, specifically, his Section 249 offense. Howald raises the following issues on appeal:

1. Whether Section 249(a)(2) is constitutional, both facially and as applied to Howald's conduct.

2. Whether Howald's Section 249(a)(2) conviction constitutes a crime of violence where he attempted to kill and injure his neighbors through the use of firearms and other weapons.

STATEMENT OF THE CASE

A. Factual Background

On Sunday, March 22, 2023, John Russell Howald embarked on a self-proclaimed mission to "rid [Basin, Montana] of the fucking lesbians [and] queers" by "killing them motherfuckers." GX 120, at 2:56-3:10, 5:48-5:58.[1] He began at the home of K.J., a woman who had lived in Basin for more than 40 years and who is known to identify as a lesbian. 1-ER-67. He approached K.J.'s house on Basin's main road and, while standing in front of her parked car, shot at her home seven times with an AK-style semi-automatic rifle. 2-ER-152-153, 350; 3-ER-352. One bullet entered K.J.'s home, traveled through four rooms, and lodged into her kitchen ceiling. 2-ER-136-140. At the time, K.J. was showering in a bathroom adjacent to the kitchen. 2-ER-121-122, 136-140.

After shooting into K.J.'s home, Howald continued walking down the main road in the direction of the homes of at least four other gay and lesbian residents. 2-ER-157, 174; 3-ER-574-577. As he passed the Basin Community Church, Howald encountered Ron and Stacy Hale, two of his childhood friends, and their son B.H., on their way out of the church's Sunday service. 2-ER-62-63. Ron and Stacy knew immediately that Howald was "in a bad way," because he was carrying

[1] Pending before this Court is the United States' motion to transmit Exhibit 120 as part of its supplemental excerpts of record. *See* Motion, C.A. Doc. 16 (filed Dec. 13, 2023).

a rifle in each hand and had another strapped to his back. 2-ER-63-65; 3-ER-560-561, 564. Howald began shouting that "he was going to clean up the town once and for all" of the "lesbians and gays and people that do bad." 2-ER-66-67. Howald specifically mentioned K.J.'s first name and said that he was going to make the lesbians "leave, and . . . make Basin better again." 2-ER-67; 3-ER-565.

While the Hales engaged with Howald, Floyd Oliver, the pastor of the church, approached them. 2-ER-201. Pastor Oliver regularly recorded his sermons on a cell phone in his pocket; because he forgot to turn off the audio recording after delivering the sermon, he inadvertently recorded his interaction with the Hales and Howald that day. 2-ER-83-85, 202; GX 120.

As the Hales and Pastor Oliver tried to persuade Howald to abandon his mission, Howald resisted. He told them that it was "too late to stop it now" because he "might have killed a fucking lesbian, I hope," and immediately began laughing. GX 120, at 4:45-4:53. He ranted that he was going to "get rid of the sickness of the world" that he associated with gay and lesbian people, that he "do[es]n't want kids to grow up that way," and that he wanted the gay and lesbian residents to "leav[e] this town . . . [because] it's [his] town, [he] loves this town" and he wants it to be "awesome again." GX 120, at 2:56-6:20.

As Howald's neighbors tried to calm him, Howald yelled in response that he was going to hell "because [he was] killing them motherfuckers"; while yelling, he

lifted one of his rifles and fired several rounds. GX 120, at 5:49-5:58; 2-ER-206-207. Howald told the Hales and Pastor Oliver that he had warned people in the street to bring their children inside because he did not want to "kill an innocent kid" during his rampage. GX 120, at 7:05-8:05.

After several minutes, law enforcement arrived. 3-ER-579. A sheriff's officer drew his handgun, directed everyone to move away from Howald, and directed Howald to drop his weapons. 2-ER-231-232. Howald yelled back "no," and pointed one of his rifles at the officer. 2-ER-231-232. The officer retreated to his car to get his rifle because he judged that his handgun would be ineffective against Howald's weapons and would risk the bystanders' safety. 2-ER-232. While the officer withdrew, Howald "t[ook] off between the houses . . . along the creek." 2-ER-231-232.

Officers apprehended Howald the following day and ultimately seized, *inter alia*, an AR-style rifle with an obliterated serial number, an AK-style rifle that Howald used to point at the officer and shoot into K.J.'s home, a Mossberg hunting rifle, and many rounds of ammunition. 2-ER-234, 239-248; 3-ER-436-445, 505, 513-514, 522-523. All the ammunition, as well as the Mossberg hunting rifle and several critical and non-critical parts of the AK-style rifle, traveled in interstate or international commerce. 3-ER-503-535.

B. Procedural Background

1. Pretrial Proceedings

A grand jury charged Howald with two felonies for his attempt to "rid" Basin of its gay and lesbian community. In Count 1, the grand jury charged Howald with violating 18 U.S.C. 249(a)(2) by willfully attempting, through use of firearms and dangerous weapons, to cause bodily injury to Basin residents because of their sexual orientation. 4-ER-864. The grand jury further alleged that Howald employed firearms and weapons that traveled in foreign and interstate commerce; that Howald's offense otherwise affected interstate and foreign commerce; and that Howald's offense included an attempt to kill K.J. 4-ER-864. In Count 2, the grand jury charged Howald with violating 18 U.S.C. 924(c)(1)(A) by knowingly brandishing and discharging a firearm during the commission of a crime of violence, specifically Section 249(a)(2). 4-ER-864-865.

Howald moved to dismiss both counts. He argued that the district court lacked jurisdiction over Count 1 because Congress exceeded its Commerce Clause authority when it enacted Section 249(a)(2). SER-90-92. As to Count 2, Howald argued that Section 249(a)(2) was not a crime of violence and therefore could not serve as a predicate offense for purposes of Section 924(c). SER-71-73.

The district court rejected both arguments. 1-ER-16-46. It found that Section 249(a)(2)'s jurisdictional element limiting the statute's reach to those

offenses that affect foreign or interstate commerce rendered it facially constitutional. 1-ER-38-42. It further found that Section 249(a)(2) could be constitutionally applied to Howald's conduct because he used a firearm and ammunition that had traveled in foreign and interstate commerce.[2] 1-ER-42-46. In considering whether Section 249(a)(2) could serve as a predicate offense for purposes of convicting and punishing Howald under Section 924(c)(1)(A), the court determined that Section 249(a)(2) was divisible and that the offense that the grand jury charged Howald with violating—that is, attempting to kill someone with a firearm because of their sexual orientation—qualified as a crime of violence. 1-ER-19-33.

2. Trial

After a four-day trial, a jury convicted Howald on both counts. SER-67-68. The jury further found on a special verdict form that Howald's conduct included an attempt to kill K.J. and that Howald both brandished and discharged a firearm during and in relation to his Section 249(a)(2) offense. SER-68-69.

[2] Because the allegations that Howald's weapons and ammunition traveled in foreign and interstate commerce sufficed to grant the court jurisdiction, the court declined to decide if Howald's actions "otherwise affect[ing] interstate commerce" independently sufficed under the Commerce Clause. 1-ER-45-46.

3. Post-Trial Proceedings

Howald filed a joint Rule 29 and 33 motion after trial. As relevant here, he argued that there was insufficient evidence to satisfy Section 249(a)(2)'s commerce element. SER-5-10. Specifically, Howald asserted that the government failed to present evidence that his crime had any economic impact, and he argued that his use of weapons that had traveled in foreign and interstate commerce was insufficient as a matter of law. SER-7-9. While largely couched as a sufficiency challenge, Howald asked the district court to "reconsider its prior ruling on his motion to dismiss" and to hold that Section 249(a)(2) is "unconstitutional as applied to [him]." SER-9-10.

The district court denied Howald's motion. *See* 1-ER-9-15. It found that the government presented "ample evidence"—which Howald "never [] disputed"—that Howald used "multiple firearms, firearm components, and ammunition" that had "traveled in interstate and/or foreign commerce." 1-ER-11-12. That evidence, the court explained, was sufficient to satisfy Section 249(a)(2)'s requirement that the "defendant employ[] a [weapon] that has traveled in interstate or foreign commerce." 18 U.S.C. 249(a)(2); *see* 1-ER-11-12. Concluding that it was unnecessary to decide whether the government proved that Howald's offense "otherwise affect[ed]" interstate commerce, the court declined to address that issue and denied Howald's motion. 1-ER-12.

At sentencing, the district court imposed consecutive terms of 96 months' imprisonment and 120 months' imprisonment for Howald's violations of Sections 249(a)(2) and 924(c), respectively. 1-ER-3.

SUMMARY OF ARGUMENT

This Court should hold that Section 249(a)(2) is constitutional, facially and as applied to Howald's conduct, under the Commerce Clause. The Court should further hold that the specific Section 249(a)(2) offense charged and proven here—that is, an attempt to cause bodily injury through the use of a firearm or dangerous weapon that includes an attempt to kill—is a crime of violence and a valid predicate offense for purposes of convicting and punishing Howald under Section 924(c)(1)(A).

When enacting Section 249(a)(2), Congress intentionally included a jurisdictional element that ensures that the statute reaches only those offenses that are sufficiently tied to interstate commerce. Both the Supreme Court and this Court have ruled that jurisdictional elements like the one included in Section 249(a)(2) defeat facial challenges to a statute's constitutionality, and this Court should rule similarly here.

This Court should also hold that Section 249(a)(2) is constitutional as applied to Howald's attempt to "rid" Basin, Montana of its gay and lesbian residents by attempting to kill them with firearms and weapons that have traveled

in interstate and foreign commerce. This Court has repeatedly held that it is constitutional under the Commerce Clause to prosecute defendants who use such firearms and weapons, and none of Howald's arguments to the contrary warrants departing from that precedent. This Court may also conclude that Howald's offense otherwise substantially affected interstate commerce because the government proved that had Howald succeeded in his plan to kill LGBTQ residents or compel that community to flee Basin, there would be a sufficient effect on interstate commerce.

Finally, this Court should affirm Howald's Section 924(c) conviction because the charged Section 249(a)(2) offense is a crime of violence. Section 249(a)(2) contains multiple offenses, and the offense that the jury convicted Howald of violating—*i.e.*, attempting to kill and cause bodily injury to individuals because of their sexual orientation and through the use of firearms and dangerous weapons—categorically requires the use, attempted use, or threatened use of physical force.

ARGUMENT

I. Section 249(a)(2) is constitutional under the Commerce Clause both facially and as applied to Howald's conduct in this case.

A. Standard of review

This Court reviews "a district court's denial of a motion to dismiss an indictment on constitutional grounds *de novo*." *United States v. Alderman*, 565

F.3d 641, 644 (9th Cir. 2009) (citation and internal quotation marks omitted). "Due respect for the decisions of a coordinate branch of Government demands that [courts] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). The Court may strike down an act of Congress as being outside its Commerce Clause authority only if the statute bears no rational relation to interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

Further, to succeed on a facial challenge to a statute, an appellant must demonstrate that "no set of circumstances exist[] under which the statute would be valid." *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203 (9th Cir. 2022) (citation omitted). This "heavy burden" renders facial challenges "the most difficult challenge to mount successfully." *United States v. Peeples*, 630 F.3d 1136, 1138 (9th Cir. 2010).

B. Section 249(a)(2) is a valid exercise of Congress's Commerce Clause authority.

1. Congress used the full scope of its Commerce Clause power when it enacted Section 249(a)(2).

As relevant here, Section 249(a)(2) makes it a crime to willfully attempt to kill or injure a person with a firearm or other dangerous weapon because of any person's sexual orientation and where the offense is in or affects foreign or interstate commerce. 18 U.S.C. 249(a)(2)(A)(ii)(II) and (a)(2)(B). Congress

enacted Section 249(a)(2) through its Commerce Clause authority, seeking to invoke "the full scope" of that power. H.R. Rep. No. 86, Pt. 1, 111th Cong., 1st Sess. 15 (2009) (H.R. Rep. No. 86).

To ensure that Section 249(a)(2) reaches only those acts of bias-motivated violence that have "the requisite connection to interstate commerce," Congress required "the Government [to] prove beyond a reasonable doubt, as an element of the offense, a nexus to interstate commerce in every prosecution." H.R. Rep. No. 86, at 15. Specifically, the United States must prove in any Section 249(a)(2) prosecution one of four statutory "circumstances," often referred to as a jurisdictional "element" or "hook":

> (i) the conduct . . . occurs during the course of, or as the result of, the travel of the defendant or the victim – (I) across a State line or national border; or (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
>
> (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct . . . ;
>
> (iii) . . . the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
>
> (iv) the conduct . . . – (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce.

18 U.S.C. 249(a)(2)(B).

These elements "comport with" the broad categories of activity that the Supreme Court has held Congress may regulate under its Commerce Clause power:

(1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities that substantially affect interstate commerce. H.R. Rep. No. 86, at 15 (citing *United States v. Lopez*, 514 U.S. 549, 558-559 (1995); *Morrison*, 529 U.S. 598). Section 249(a)(2)'s jurisdictional requirement also reflects the congressional findings that bias-motivated violence affects interstate commerce in several ways, including by the use of "[c]hannels, facilities, and instrumentalities of interstate commerce . . . to facilitate the commission of such violence," and through the use of "articles that have traveled in interstate commerce." 34 U.S.C. 30501(6)(D)-(E).

Through this deliberate inclusion of a jurisdictional element, Congress enacted a statute that reaches only those acts of bias-motivated violence that it permissibly can regulate through the exercise of its Commerce Clause power.

2. Congress acted within its Commerce Clause authority when it required proof of an interstate-commerce nexus for any Section 249(a)(2) conviction.

Section 249(a)(2)'s jurisdictional element ensures that each prosecution under the statute is sufficiently tied to interstate or foreign commerce. Both this Court and the Supreme Court have so found, and nothing Howald argues defeats that precedent.

a. In *United States v. Alderman*, this Court recognized that the Supreme Court has already determined that an element requiring a weapon to travel in interstate commerce suffices to bring a federal statute within the reach of Congress's commerce power. 565 F.3d at 645. There, this Court considered whether 18 U.S.C. 931, which prohibits the possession of body armor that has been "sold or offered for sale in interstate or foreign commerce," was constitutional. *Id.* at 642-648. Relying on *Scarborough v. United States* and an earlier Ninth Circuit decision applying it, this Court found that "the resolution to this [question was] found in . . . precedent that addresse[d] a jurisdictional element nearly identical to the one that applies to [Section] 931." *Alderman*, 565 F.3d at 643 (citing *Scarborough*, 431 U.S. 563, 575, 577 (1977); *United States v. Cortes*, 299 F.3d 1030, 1037 n.2 (9th Cir. 2002)).

In *Scarborough*, the Supreme Court considered whether a predecessor to the current felon-in-possession statute could be satisfied by evidence that the firearms had traveled in interstate commerce before the defendant possessed them. 431 U.S. at 567-577. The statute at issue prohibited those who had been convicted of felonies from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm." *Id.* at 564 (fourth alteration in original). The Supreme Court held that nothing more than the "minimal nexus that [a] firearm ha[d] been, at some time, in interstate commerce" was required to sustain a

conviction. *Id.* at 575. And, while *Scarborough* "did not address" the statute's jurisdictional element "from a constitutional perspective, it implicitly assumed the constitutionality of the 'in commerce' requirement." *Alderman*, 565 F.3d at 645.

Post-*Scarborough*, this Court has consistently held that elements requiring proof of movement through interstate or foreign commerce suffice to withstand a facial challenge to a statute enacted under the Commerce Clause. In *Cortes*, this Court upheld the federal carjacking statute because "[a]s *Scarborough* holds, such a jurisdictional element provides the necessary connection between each instance of carjacking . . . and interstate commerce." 299 F.3d at 1037. In *United States v. Jones*, this Court reached the same conclusion, holding that the jurisdictional hook in a felon-in-possession statute "[e]nsures, on a case-by-case basis, that a defendant's actions implicate interstate commerce to a constitutionally adequate degree." 231 F.3d 508, 514 (9th Cir. 2000); *see also, e.g.*, *United States v. Hanna*, 55 F.3d 1456, 1462 (9th Cir. 1995) (holding that *Scarborough* requires "only the minimal nexus that the firearm[s] have been, at some time, in interstate commerce") (internal quotation marks and citation omitted).

This Court should reach the same conclusion here. Like the statute in *Scarborough*—and in each of its Ninth Circuit progeny—Section 249(a)(2)(B)(iii) requires proof that the defendant "employ[ed] a firearm, dangerous weapon, . . . or other weapon that has traveled in interstate or foreign commerce." That

requirement ensures that prosecutions under this subsection succeed only if the government can prove beyond any reasonable doubt that the constitutionally required connection to commerce exists. As this Court has repeatedly held, this showing defeats a facial constitutional challenge, and it accordingly defeats Howald's challenge here.

b. Holding that Section 249(a)(2)'s jurisdictional element defeats Howald's challenge is consistent with the holdings of courts that have addressed this issue. Courts have held that Section 249(a)(2)(B)'s specific commerce element guarantees that Section 249(a)(2) does not invade the States' general police power but is instead limited to those circumstances that Congress may constitutionally regulate. *See, e.g.*, *United States v. Mason*, 993 F. Supp. 2d 1308, 1314-1318 (D. Or. 2014); *United States v. Jenkins*, 909 F. Supp. 2d 758, 772 (E.D. Ky. 2012); *United States v. Genco*, 584 F. Supp. 3d 515, 537-539 (S.D. Ohio 2022). Courts have held the same when considering other statutes that proscribe bias-motivated violence. *See, e.g.*, *United States v. Allen*, 341 F.3d 870, 879-883 (9th Cir. 2003) (holding that 18 U.S.C. 245(b)(2)(B), which prohibits race-based violence committed because someone is exercising their rights, is within Congress's commerce power); *United States v. Hari*, 67 F.4th 903, 907-910 (8th Cir. 2023) (same as to 18 U.S.C. 247), *cert. denied*, No. 23-5815, 2023 WL 8007570 (S. Ct. Nov. 20, 2023). And the same is true for when considering other federal criminal

legislation that Congress enacted through its Commerce Clause power. *See, e.g.*, *United States v. Bishop*, 66 F.3d 569, 585-588 (3d Cir. 1995) ("jurisdictional element . . . independently refutes appellants' arguments that the [carjacking] statute is constitutionally infirm"); *United States v. Coleman*, 675 F.3d 615, 619-621 (6th Cir. 2012) (same as to the Sex Offender Registration and Notification Act); *United States v. Chesney*, 86 F.3d 564, 568 (6th Cir. 1996) (same as to the felon-in-possession statute).

Notably, even those statutes that the Supreme Court struck down as facially unconstitutional in *Lopez* and *Morrison* have since been deemed constitutional, including by this Court, now that they include a jurisdictional hook like that included in Section 249(a)(2)(B). *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1045-1046 (9th Cir. 2005), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009) (upholding Gun-Free School Zone Act, as amended, because it "require[d] [the defendant's] possession of the firearm [to] have a[] concrete tie to interstate commerce" (second alteration in original)); *United States v. Al-Zubaidy*, 283 F.3d 804, 812 (6th Cir. 2002) (same as to Violence Against Women Act's criminal provisions); *United States v. Danks*, 221 F.3d 1037, 1038-1039 (8th Cir. 1999); *see also United States v. Hill*, 927 F.3d 188, 206 (4th Cir. 2019).

As the district court aptly recognized, the law is settled that Congress may prohibit conduct when it requires proof of a nexus to interstate commerce, such as

the defendant employing a firearm or weapon that had traveled in interstate commerce. This Court should hold, consistent with established precedent, that Section 249(a)(2)'s jurisdictional element defeats Howald's facial challenge.

c. None of Howald's arguments counsels otherwise. Howald contends that Section 249(a)(2) fails because it criminalizes non-economic activity (Br. 27-30) and because its jurisdictional element does not guarantee the requisite effect on commerce (Br. 31-33). Both arguments confuse the issue.

First, in each of Howald's arguments, he relies upon the premise that *Lopez* and *Morrison* dictate a different outcome here. Not so. As this Court held in *Alderman*, when courts consider statutes that require proof of a weapon traveling in interstate commerce—a requirement missing from the statutes considered in *Lopez* or *Morrison*—they "need not engage in the careful parsing of post-*Lopez* case law that would otherwise be required." *Alderman*, 565 F.3d at 648. The requirement brings such statutes within *Scarborough*'s reach, and this Court need not go further to evaluate Section 249(a)(2) under *Lopez* and *Morrison*, especially given congressional findings regarding the effect of bias-motivated violence on interstate commerce. *See ibid.*; *see also* 34 U.S.C. 30501(6) (detailing the various ways bias-motivated violence affects commerce).

Second, even if Section 249(a)(2) were governed by *Lopez* and *Morrison*, the jurisdictional element sufficiently ties any prosecution thereunder to interstate

and foreign commerce. This Court's opinion in *Dorsey* demonstrates this point. *See* 418 F.3d at 1046. There, this Court held that the "new version of [the statute at issue in *Lopez*] resolves the shortcomings that the *Lopez* Court found in the prior version . . . because it incorporates a 'jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.'" *Ibid.*

And this holding makes sense. As this Court has held, the "possession [or use] of [even] a homemade machine gun manufactured intrastate could substantially affect interstate commerce in machine guns." *United States v. Latu*, 479 F.3d 1153, 1156-1157 (9th Cir. 2007). If that "*de minimis*," entirely intrastate manufacture and possession can substantially affect interstate commerce, Section 249(a)(2)'s prohibition of certain uses of weapons that actually did travel in interstate and foreign commerce surely can. *Ibid.*

C. Section 249(a)(2) is constitutional as applied to Howald's attempt to kill and injure Basin residents because of their sexual orientation and through the use of weapons that traveled in interstate and foreign commerce.

1. The United States constitutionally prosecuted Howald for his attempt to kill K.J. and injure others because of their sexual orientation through use of firearms and dangerous weapons, by showing that Howald employed firearms and other weapons, including ammunition, that previously traveled in interstate and foreign commerce. Implicit in *Scarborough*, and as this Court has held multiple

times post-*Scarborough*, a defendant who commits prohibited acts with a weapon that has traveled in interstate or foreign commerce can be prosecuted federally. *See Scarborough*, 431 U.S. at 575; *Alderman*, 565 F.3d at 645-646, 648.

Here, Howald's prosecution is constitutionally sound. The uncontested evidence demonstrates that Howald used ammunition that originated from Russia, an AK-style rifle that has a Romanian serial number and has critical and noncritical parts that originated from Romania, and a Mossberg hunting rifle that originated in Connecticut and was assembled in Texas. 3-ER-504-535. Howald brandished these firearms and used the AK-style rifle to shoot Russian bullets into K.J.'s front yard and home; he then proceeded onward down Basin's main road intending to harm other residents. 3-ER-504-535. Howald therefore "employ[ed]" a firearm or other weapon in connection with his attempted bias-motivated rampage, bringing his conduct within Section 249(a)(2)'s reach.

2. Again, Howald's contrary arguments miss the mark. He argues that Section 249(a)(2) is unconstitutional as applied to him because there was no evidence of an actual effect on interstate commerce and that without such evidence his case fails under *Lopez*. Br. 36-37. Even if this Court examines Howald's argument—and it need not, considering *Scarborough*—he is wrong.

First, the United States charged and proved that Howald's offense substantially affected interstate commerce and thus comported with *Lopez*. While

Howald focuses on whether his crime *actually* affected interstate commerce, the government did not need to prove his attempt at mass murder had an actual effect. Rather, "[i]t is enough that [Howald's] scheme, if successful, would have affected commerce." *United States v. Bagnariol*, 665 F.2d 877, 894 (9th Cir. 1981).

Courts have consistently held that the inchoate versions of offenses that require a nexus with interstate commerce do not impose the same burden on the government as completed offenses. *See, e.g.*, *United States v. Campbell*, 770 F.3d 556, 572 (7th Cir. 2014) (holding that because a statute criminalizes attempts, it is sufficient that "the conduct (here, the conspiracy to extort) had the potential to impact commerce"); *United States v. Jannotti*, 673 F.2d 578, 592-594 (3d Cir. 1982) (Where Congress has used its full commerce power, conspiracy offense did not require actual effect on interstate commerce.); *United States v. Hanigan*, 681 F.2d 1127, 1131 n.6 (9th Cir. 1982) (listing similar cases). As this Court has observed, "[a]ll of the circuits which have considered the question [of whether an actual effect on commerce is required] have ruled that proof of a probable or potential effect is sufficient in attempt or conspiracy cases." *Hanigan*, 681 F.2d at 1131 n.6. Just as a defendant may be prosecuted for conspiracies that, if completed, would affect interstate commerce, so too can the government prosecute Howald for an attempt that would affect interstate commerce.

And here, the government provided sufficient proof of that potential (and thwarted) effect. Howald stated numerous times that his purpose was to "clean house," "to get rid of the fucking lesbians, and . . . fucking queers," to force them to "leav[e] now," that he was going to "start a fucking revolution" to this end, and that Basin is "[his] town . . . [he] love[s] this town . . . . They're gonna die, they're gonna leave, and it's going to be awesome again." 3-ER-568-572. Howald attempted to carry out his plan to "clean house" by shooting into K.J.'s occupied home before continuing farther down the road toward the homes of at least four other lesbian and gay residents. The government also introduced testimony that, had Howald succeeded at killing the people he targeted, at least one resident would have left Basin in response. 3-ER-636.

This is one of the exact harms to interstate commerce that Congress sought to prevent in enacting Section 249(a)(2). *See* 34 U.S.C. 30501(6)(A) (listing "members of [targeted] groups are forced to move across State lines to escape the incidence or risk of such violence" as an effect on interstate commerce). Accordingly, Howald intended to affect interstate commerce and his actions had the requisite potential of doing so. Even under *Lopez*'s "substantially affects" category, Section 249(a)(2) is thus constitutionally applied to Howald's failed efforts to force Basin residents to either die or sell their homes, leave their jobs, and relocate in some other area of the state or country.

Second, this case is not like *Lopez*. In *Lopez*, the Supreme Court did not consider whether a statute could be constitutionally applied to the defendant because it found that the statute was facially unconstitutional. *Lopez*, 514 U.S. at 551. And, as explained already, this Court has distinguished the statute at issue in *Lopez* from the Gun-Free School Zone Act, as amended, which added a jurisdictional element. *See* p. 16, *supra*. Ignoring this critical distinction, Howald offers no explanation for why Section 249(a)(2) cannot constitutionally be applied to his use of firearms, weapons, and ammunition that had traveled from Romania, Russia, Connecticut, and Texas to terrorize the lesbian and gay community in Basin, Montana.

The element requiring proof of an interstate-commerce nexus saves Section 249(a)(2) from being facially unconstitutional, and Howald's undisputed use of weapons that had traveled in interstate and foreign commerce (let alone his intended but foiled effect on interstate commerce) easily allow Howald's prosecution. Accordingly, this Court should uphold Howald's conviction on Count 1, because Section 249(a)(2) is constitutional both facially and as applied to Howald.

II. Section 249(a)(2) is a crime of violence.

Howald next challenges his conviction on Count 2 for brandishing and discharging a firearm during a crime of violence. He argues that Section 249(a)(2)

is not a crime of violence and that therefore there was no valid predicate offense for his Section 924(c)(1)(A) conviction. Howald is wrong.

A. Standard of review

This Court reviews "de novo whether a criminal conviction is a crime of violence under [Section] 924(c)(3)." *United States v. Buck*, 23 F.4th 919, 923 (9th Cir. 2022) (internal quotation marks omitted) (citing *United States v. Dominguez*, 954 F.3d 1251, 1256 (9th Cir. 2020)).

B. Courts apply the categorical and modified categorical approaches to determine whether a statute is a crime of violence.

As relevant here, Section 924(c)(1)(A) prohibits brandishing or discharging a firearm during and in relation to a crime of violence. 18 U.S.C. 924(c)(1)(A)(i)-(iii). "Crimes of violence" are those felonies that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A).

To determine whether an offense satisfies that definition and qualifies as a crime of violence under Section 924(c), courts apply the categorical approach. *See United States v. Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995). Under that approach, a court compares the elements of the predicate offense with the text of Section 924(c)(3)(A) to determine whether the former necessarily matches the latter. *See Descamps v. United States*, 570 U.S. 254, 257 (2013); *United States v. Sahagun-Gallegos*, 782 F.3d 1094, 1098 (9th Cir. 2015). A court "may look only

to 'the elements of the [offense], not to the facts of [the] defendant's conduct.'" *Mathis v. United States*, 579 U.S. 500, 501 (2016) (alterations in original; internal quotation marks omitted) (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

When a statute "list[s] elements in the alternative," as opposed to different means through which a single offense may be committed, it "thereby define[s] multiple crimes," and the court shifts to apply "the modified categorical approach." *Mathis*, 579 U.S. at 505; *see also Sahagun-Gallegos*, 782 F.3d at 1098. Such a statute "renders opaque which element played a part in the defendant's conviction" and is therefore divisible. *Descamps*, 570 U.S. at 270. Consider, for example, a statute that lists different factors which, if proven beyond a reasonable doubt, increase the penalty a defendant may receive. Those factors are elements that create different, aggravated offenses, and courts use the modified categorical approach to determine which offense (whether standard or aggravated) the jury found that the defendant committed. *See Mathis*, 579 U.S. at 515-516 (citing *Descamps*, 570 U.S. at 266, 272). To "divide" the statute and identify which offense the defendant was convicted of, courts "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy)." *Mathis*, 579 U.S. at 505. A court "then compare[s] that crime, as the

categorical approach commands," with the text of Section 924(c)(3)(A). *See id.* at 506.

C. Section 249(a)(2) is divisible, so the modified categorical approach applies.

Here, the jury convicted Howald of violating Section 924(c)(1)(A) because he used, carried, brandished, or discharged multiple firearms during and in relation to his charged Section 249(a)(2) offense. SER-68. Section 249(a)(2) encompasses multiple offenses that carry different punishments. It states that:

> (A) In general.—Whoever, . . . in any circumstance [connected to interstate commerce], willfully causes bodily injury to any person, or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—
>
> (i) shall be imprisoned not more than 10 years . . . and
>
> (ii) shall be imprisoned for any term of years or for life . . . if—(I) death results from the offense; or (II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

18 U.S.C. 249(a)(2)(A).

Section 249(a)(2) thus "comprises multiple, alternative versions of the crime." *Descamps*, 570 U.S. at 262. This is so because it lists multiple elements disjunctively and it provides alternatives that carry different punishments. *See Mathis*, 579 U.S. at 505, 517.

1. Section 249(a)(2) can be divided along at least two sets of distinct elements. First, it criminalizes both an attempt and a completed offense. This Court has concluded that a similar statute was divisible between its completed and attempted versions. *See United States v. Linehan*, 56 F.4th 693, 700 (9th Cir. 2022), *cert. denied*, No. 23-5076, 2023 WL 6378674 (S. Ct. Oct. 2, 2023).

In *Linehan*, this Court considered a defendant's argument that 18 U.S.C. 844(d) could not serve as a predicate offense for a Section 924(c) charge because the attempt provision of Section 844(d) was not categorically a crime of violence. 56 F.4th at 699. Section 844(d) prohibits "transport[ing] or receiv[ing], or attempt[ing] to transport or receive" certain items in interstate commerce. The Court found that the inclusion of an attempt in the statute did not doom the government's reliance on the statute as a predicate offense because the Court had "little difficulty concluding that, at the very least, [Section] 844(d) is divisible into completed and attempted offenses." *Id.* at 700. This Court was guided by the Supreme Court's decision in *Taylor*, which considered the attempt and completed offenses of Hobbs Act robbery independently, inherently implying that the offense was divisible along those lines. *Ibid.* ("Whatever one might say about *completed* Hobbs Act robbery, *attempted* Hobbs Act robbery does not satisfy the [crime of violence definition]." (quoting *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022))).

Like Section 844(d), Section 249(a)(2) lists both a completed and attempted offense. One can complete the offense by "willfully caus[ing] bodily injury to any person *or*," one can "attempt" the offense, "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device." 18 U.S.C. 249(a)(2)(A) (emphasis added). Just as the Supreme Court and this Court have acknowledged, statutes so worded are divisible.

Second, and bolstering this conclusion, Section 249(a)(2) expressly includes elements that must be proven to convict a defendant of the attempt offense that are not required to convict a defendant of the completed offense. To commit an attempted Section 249(a)(2) violation, a defendant must attempt to cause bodily injury "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device." 18 U.S.C. 249(a)(2)(A). Commission of the completed offense does not require the use of fire, firearms, dangerous weapons, or explosives. *See ibid.* Section 249(a)(2)'s inclusion of this unique element in its attempt offense reinforces the conclusion that Section 249(a)(2) is divisible between completed and attempted offenses. *See Buck*, 23 F.4th at 925-926 (concluding that inclusion of a dangerous weapon element for some, but not all offenses listed by statute, caused the statute to be divisible).

Finally, Section 249(a)(2) includes an aggravating element that increases the statutory maximum sentence in certain circumstances. Section 249(a)(2)(A)(ii)(II)

provides that where an offense includes, *inter alia*, an attempt to kill, the offense is punishable for "any term of years or for life," rather than the ten-year maximum that otherwise applies to Section 249(a)(2) offenses. As the Supreme Court held in *Apprendi v. New Jersey*, factors that increase a defendant's statutory maximum sentence are separate *elements* of a distinct offense that must be pled in the charging document and that a jury must unanimously find proven beyond a reasonable doubt. 530 U.S. 466, 490 (2000). While factors that are elements require unanimity beyond a reasonable doubt, means do not. *See, e.g.*, *Richardson v. United States*, 526 U.S. 813, 817 (1999). Accordingly, this sentence-aggravating factor is an element that further renders Section 249(a)(2) divisible. *See Buck*, 23 F.4th at 925-926 (holding that "[t]he basic and aggravated offenses in [a statute] are plainly different crimes with different punishments, making these two sets of offenses divisible from each other").

2. Howald's contrary arguments do not compel a different conclusion. Howald avoids conducting the textual analysis required for assessing a statute's divisibility and instead relies upon out-of-circuit and inapt cases to urge this Court to conclude, improperly, that Section 249(a)(2) is indivisible. *See* Br. 38-39.

Howald points to the Seventh Circuit's description of Section 249(a)(2) in *United States v. States* as "includ[ing] attempted conduct as an element of a completed crime" and argues that the description is dispositive here. Br. 38 (citing

States, 72 F.4th 778, 786-787 (7th Cir. 2023)). But, contrary to Howald's assertion, that court did not decide whether Section 249(a)(2) was divisible. *See States*, 72 F.4th at 786-787. Rather, it simply (and briefly) commented on Section 249(a)(2)'s inclusion of an attempt offense in the statutory language. *See ibid.* And while the Fourth Circuit in *United States v. Roof*, upon which *States* relied and to which Howald cites (Br. 38), commented on the divisibility of Section 249(a)(1)—but not (a)(2)—it did so in dictum without conducting the analysis that the divisibility inquiry requires. *See* 10 F.4th 314, 401 & n.63 (2021) (per curiam), *cert. denied*, 143 S. Ct. 303 (2022).[3] These misleading comments likely resulted from each court opining on issues and statutes not squarely before it, as Section 249(a)(2)'s attempt provision was not at issue in either case. *See States*, 72 F.4th at 784 (considering whether an attempted murder offense was a crime of violence); *Roof*, 10 F.4th at 401 n.63, 403 n.66 (discussing Section 247 and 249(a)(1) attempts not involving death briefly before disregarding both as not at issue in the case). Regardless, neither *States* nor *Roof* controls here. This Court cannot ignore the statutory text, as Howald seeks.

[3] The Fourth Circuit did conclude, however, that Section 249(a)(1) was divisible because it included elements that, if present, increased the defendant's statutory maximum sentence. *See Roof*, 10 F.4th at 400; p. 27-28, *supra*.

Howald argues that because a defendant can violate Section 249(a)(2) by committing a completed hate crime or attempting to do so, the statute is indivisible. Br. 39. He includes no citation to support this claim, which is not surprising given that whether a statute prohibits both completed offenses and certain types of attempts has never been determinative of whether the statute is divisible. If the fact that a defendant could violate a single statute while committing two distinct offenses rendered the statute indivisible, there would be no divisibility doctrine. The doctrine assumes that some statutes include multiple, distinct offenses. That Section 249(a)(2) lists both an attempt and a completed offense proves nothing on its own; the required divisibility analysis shows that Section 249(a)(2) contains distinct offenses given the additional element the government must prove for attempts.

3. Because Section 249(a)(2) is divisible, this Court should employ the modified categorical approach to "determine the statutory basis for [Howald's] conviction." *Dorsey v. United States*, 76 F.4th 1277, 1282 (9th Cir. 2023). Courts do so by "consulting the trial record, including the indictment and the jury instructions." *Ibid.* Here, the indictment, jury instructions, and verdict form are clear that the grand jury charged, and the petit jury found, that Howald violated Section 249(a)(2) by willfully, through the use of firearms and dangerous weapons,

attempting to cause bodily injury to others, and attempting to kill K.J., because of their sexual orientation. 4-ER-5; SER-18-33, 67-68, 87.

D. Willfully attempting to kill someone with a firearm or dangerous weapon is categorically a crime of violence.

1. Having identified the applicable predicate offense for Howald's Section 924(c) conviction, the question is whether that offense categorically matches the crime of violence definition. Specifically, to satisfy Section 924(c)(3)(A), "the predicate crime must require purposeful or knowing acts and have as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Dorsey*, 76 F.4th at 1282-1283 (internal quotation marks omitted) (quoting *Buck*, 23 F.4th at 927). Howald's offense of conviction matches that definition.

First, the requirement that the government prove that Howald, "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device," willfully attempted "to cause bodily injury to any person," and that his offense included "an attempt to kill," 18 U.S.C. 249(a)(2)(A)(ii)(II), easily renders his offense a crime of violence. Among other elements, to obtain a conviction for that offense, the government had to prove beyond a reasonable doubt that Howald (1) intended to kill K.J. and (2) took a substantial step toward killing her, such that his actions "unequivocally demonstrate[ed] that" the killing would take place "unless interrupted by independent circumstances." SER-33.

"Even if [the defendant] took only a slight, nonviolent act with the intent to cause [the victim's] death, that act would pose a threat of violent force sufficient to satisfy the definition of a crime of violence." *Dorsey*, 76 F.4th at 1283 (internal quotation marks and citation omitted). This Court has consistently held as much when considering whether attempts to kill qualify as a crime of violence. *See, e.g.*, *ibid.* (holding that attempt to commit first-degree murder was a crime of violence (citing *United States v. Studhorse*, 883 F.3d 1198, 1206 (9th Cir. 2018))). Because Howald cannot attempt to kill K.J. without attempting or threatening the use of force, his conviction is categorically a crime of violence.

Second, Section 249(a)(2)'s requirement that any attempt offense include the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, also ensures that "even the least culpable" acts qualify as crimes of violence. *Dorsey*, 76 F.4th at 1281. "The use of a dangerous weapon, especially when deployed to put the victim's life in jeopardy, reflects force that is capable of causing death or serious injury." *Buck*, 23 F.4th at 927 (internal quotation marks and citation omitted). "[E]ven the least touching with a deadly weapon or instrument is violent in nature," and using a "dangerous weapon" in this way "transforms the force into violent physical force." *Ibid.* (quoting *Knight v. United States*, 936 F.3d 495, 500 (6th Cir. 2019)); *see also Graves v. City of Coeur D'Alene*, 339 F.3d 828, 843 n.19 (9th Cir. 2003), *abrogated on other grounds by*

Hiibel v. Sixth Jud. Dist. Ct. of Nevada, 542 U.S. 177 (2004) (discussing the inherently dangerous nature of explosives); *United States v. Spencer*, 724 F.3d 1133, 1141 (9th Cir. 2013) (same as to fire). Thus, Howald's conviction for attempting to kill and cause bodily injury to Basin residents with a firearm or dangerous weapon constitutes a crime of violence under Section 924(c)(3)(A).

2. Howald does not to attempt challenge this conclusion. *See* Br. 37-48. Rather, he considers only whether all of Section 249(a)(2)—with its different elements and penalty provisions—categorically matches Section 924(c)(3)(A)'s crime-of-violence definition. By failing to address whether his offense of conviction categorically is a crime of violence, Howald waives any argument to the contrary. *See Turtle Island Restoration Network v. United States Dep't of Com.*, 672 F.3d 1160, 1166 n.8 (9th Cir. 2012). This Court should affirm.

E. Even if Section 249(a)(2) were indivisible, it is still a crime of violence.

1. Assuming that Howald is correct that the statute is indivisible—and he is not—Section 249(a)(2) is categorically a crime of violence because, even when considering the completed Section 249(a)(2) offense, the statute requires proof that the defendant willfully caused bodily injury to any person. As this Court has held, that showing "necessarily [requires that the defendant] committed an act of force in causing the injury." *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290 (9th Cir. 2017).

This Court has found as much more than once. In *Calvillo-Palacios*, the Court reaffirmed that it had "already rejected" the argument that a requirement of bodily injury was insufficient to render an offense a crime of violence, stating that this Circuit has "repeatedly [held] that threat and assault statutes necessarily involve the use of violent, physical force." 860 F.3d at 1290.

Accordingly, Section 249(a)(2)'s prohibition on willfully causing bodily injury to any person (here, because of that person's sexual orientation) matches the force required of a crime of violence and thus is a valid predicate offense for Howald's Section 924(c)(1)(A) conviction even if Section 249(a)(2) is indivisible.

2. Howald's arguments to the contrary are unsound.

a. Howald argues that the Supreme Court's requirement in *Johnson v. United States*, 559 U.S. 133 (2010), demonstrates a mismatch between Section 249(a)(2) and Section 924(c)(3). In *Johnson*, the Court defined "physical force" as "force capable of causing physical pain or injury." *Johnson*, 559 U.S. at 140. Howald argues that because a bruise suffices for purposes of Section 249(a)(2)'s "bodily injury" element, the requisite force is insufficient to meet *Johnson*'s definition. Br. 43, 46.

This, however, ignores subsequent Supreme Court precedent. In *Stokeling v. United States*, decided nine years after *Johnson*, the Court rejected a similar argument and concluded that the "physical force" *Johnson* requires is "the force

necessary to overcome a victim's physical resistance," however slight that resistance might be. 139 S. Ct. 544, 552 (2019). Bodily injury that bruises someone is consistent with force necessary to overcome a victim's resistance. *See id.* at 554 (suggesting that "force as small as hitting, slapping, [or] grabbing," *i.e.*, things that might cause a bruise, meet the requisite level of force); *see also Ward v. United States*, 936 F.3d 914, 919 (9th Cir. 2019) (recognizing that this Court's "prior distinction between 'substantial' and 'minimal force' . . . cannot be reconciled with the Supreme Court's clear holding in *Stokeling*").

Howald's argument about bodily injury committed through omissions (Br. 44-46) is also defeated by Supreme Court case law. In *United States v. Castleman*, the Court specifically renounced the claim that *Johnson*'s force requirement could not be satisfied by "indirect" means. *Castleman*, 572 U.S. 157, 170-171 (2014) (rejecting the argument that poisoning someone would not constitute "physical force," because whether one causes a physical harm to "occur[] indirectly, rather than directly (as with a kick or punch), does not matter" for the force analysis); *see also Stokeling*, 139 S. Ct. at 550.

Finally, Howald's argument that Section 249(a)(2) does not require force at all has also been rejected. This Court consistently has held that a statute's requirement of bodily injury is equivalent to a requirement of sufficient force. *See, e.g.*, *Calvillo-Palacios*, 860 F.3d at 1290; *see* p. 33, *supra*.

b. Howald also argues that the Supreme Court's *Taylor* opinion dictates that an *attempted* Section 249(a)(2) offense cannot categorically be a crime of violence. Br. 39-41. In *Taylor*, the Court considered attempted Hobbs Act robbery, which required proof that a defendant (1) intended to unlawfully take something "by means of actual or threatened force," and (2) took a "substantial step" toward that end. *Taylor*, 142 S. Ct. at 2020. Because a defendant could "attempt" to take something by "threatened force" without ever actually attempting, threatening, or using physical force, the Court found that attempted Hobbs Act robbery is not categorically a crime of violence. *Id.* at 2020-2021. That is so because a defendant could be convicted for *attempting* to *threaten* to use force.

Section 249(a)(2), by contrast, does not include a threats offense. A defendant can violate the statute only by either attempting or succeeding in willfully causing bodily injury (or death). *See* 18 U.S.C. 249(a)(2). This distinction is critical and leaves Section 249(a)(2) out of *Taylor*'s reach. As already explained, Section 249(a)(2) also is different from attempted Hobbs Act robbery in that any attempted Section 249(a)(2) offense must include the use (as opposed to the attempted use) of fire, a firearm, a dangerous weapon, or an explosive or incendiary device.

In all, Howald ignores governing precedent from this Court and the Supreme Court that supports the conclusion that Section 249(a)(2) is categorically a crime of

violence even if this Court were to decide, contrary to precedent, that the statute is indivisible. This Court should affirm Howald's Section 924(c) conviction.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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