No. _____

In the

Supreme Court of the United States

_____

Robert Eugene Stallings,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether *Counterman v. Colorado*, decided after the decision below, shows that 18 U.S.C. §1038(a) should be read to require proof that the defendant intended to make a reasonably believable threat?

Whether a defendant's concession that the evidence suffices to overcome a *Jackson v. Virginia* challenge as to a single element of the crime necessarily implies that procedural error cannot affect substantial rights?

PARTIES TO THE PROCEEDING

Petitioner Robert Eugene Stallings, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Eugene Stallings seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Stallings*, No. 19-11300, 2023 WL 3534445, (5th Cir. May 18, 2023)(unpublished). It is attached as pages 2-31 of the Appendix. The one sentence order denying a petition for panel rehearing issued June 23, 2023, was not reported, and is attached as page 32 of the Appendix.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit issued on May 18, 2023. The order denying timely petition for panel rehearing issued June 23, 2023. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, RULES AND STATUTE

The First Amendment to the United States Constitution provides:

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

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1038(a) of Title 18 provides:

(1) In general.—Whoever engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation of chapter 2, 10, 11B, 39, 40, 44, 111, or 113B of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), or section 46502, the second sentence of section 46504, section 46505(b)(3) or (c), section 46506 if homicide or attempted homicide is involved, or section 60123(b) of title 49, shall—
(A) be fined under this title or imprisoned not more than 5 years, or both;
(B) if serious bodily injury results, be fined under this title or imprisoned not more than 20 years, or both; and
(C) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

Federal Rule of Criminal Procedure 52 provides:

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

I. Overview

After a series of unpleasant disputes with his bank about his ability to withdraw money without a picture ID, Petitioner Robert Eugene Stallings entered the bank, and asked to speak to a manager to apologize. Before she arrived, he walked across the street, leaving two bags behind. He didn't make any reference to the contents of these bags, and didn't say anything threatening. The bags were unremarkable. They bore no writing and had nothing about them that would suggest the presence of explosives. Nonetheless, the bank's calls to the police eventually resulted in the arrival of a bomb squad, which found that the bags contained nothing of consequence or value, save documents that identified Petitioner by name. Petitioner left the immediate area by city bus, boarding in full view of a police officer. The driver asked him about the accumulation of emergency vehicles, and he either said that he left a bomb there, or that someone thought he left a bomb. Although the driver eventually told the police about this statement, she testified that she didn't take it seriously.

On these facts, the government secured a conviction for violation of 18 U.S.C. §1038(a), a statute that criminalizes "False information and hoaxes" regarding certain terrorist activity. It requires an intent to speak falsely, and it requires that the defendant's "information may reasonably be believed." In district court and in the court of appeals, Petitioner contended that the statute also requires an intent to make a statement that may be reasonably believed, rather than one that is clearly

implausible. Both courts below rejected that reading of the statute. The court of appeals thus held that he was properly denied an instruction to that effect.

After the decision below, however, this Court issued *Counterman v. Colorado*, ___U.S.___, 143 S.Ct. 2106 (June 27, 2023), which holds that the First Amendment requires at least recklessness as to whether a defendant's communications will be taken as a "true threat." *Counterman* offers a very good reason to prefer Petitioner's reading of §1038(a) – which requires an intent to communicate a reasonably believable threat, that is, a true threat – over the reading of the courts below – which require no mental state as to the threat's believability. Because *Counterman* brings the canon of constitutional avoidance to bear on the instant case, it may well change the view of the court below as to the requested jury instruction. If it does nothing else, this Court should grant certiorari, vacate the judgment below, and remand in light of *Counterman*.

But the opinion also contains another error that merits this Court's intervention. The court below found that the prosecutor made a clearly or obviously improper remark during closing, and that the argument carried a high risk of prejudice. Specifically, it held that the prosecutor improperly said without foundation that the defendant was "snickering" for 25 minutes while he watched the emergency response at the bank from across the street. Though if found this remark clearly improper, and likely to inflame the jury, it affirmed for **the sole reason** that Petitioner had (ostensibly) conceded the sufficiency of the evidence to prove his intent to communicate a bomb threat. This concession as to a hypothetical *Jackson v.*

Virginia, 443 U.S. 307 (1978), claim on a **single** element of the statement, the court thought, **necessarily** defeated any claim that the prosecutor's improper closing argument affected Petitioner's substantial rights.

That analysis – which, again, was the sole reason for affirming against this improper argument claim -- is very obviously incorrect. Minimally sufficient evidence to convict under *Jackson* does not remotely imply that no error could affect substantial rightds. Were it otherwise, there would be no reason to review procedural trial error – any prejudicial error would be mooted by the defendant's acquittal on appeal for insufficient evidence. The approach of the court below, which, remarkably, is not unique to the instant case, is in direct and obvious contradiction to the precedent of this Court and that of other courts of appeals that faithfully follow this Court's guidance. Further, it all but eliminates any incentive for prosecutors to comply with the law governing closing argument, destroying an important safeguard against unreliable convictions.

II. Facts

A. Factual summary

Throughout 2018, Petitioner possessed a Wells Fargo bank account that received his disability funds – but he lacked a photo ID. *See* (Record in the Court of Appeals, at 298, 401-405, 428-429); [Appx. 104-108, 121-122]. For that reason, he could not access much of the money in his account. *See* (Record in the Court of Appeals, at 299, 401-405, 426-428, 703-704); [Appx. 104-108, 119-121]. Nor could he obtain a debit card, since it required either presentation of photo ID to the branch, or the receipt of mail at a home address. *See* (Record in the Court of Appeals, at 426);

[Appx. 119]. All of the bank's attempts to send debit cards failed, suggesting that Mr. Stallings lacked a stable address in Dallas. *See* (Record in the Court of Appeals, at 399-401, 426); [Appx. 102-104, 119].

Mr. Stallings could receive some money. The Dallas area Wells Fargo branches would usually provide a small amount on verbal proof of his identity. *See* (Record in the Court of Appeals, at 451-455, 703-704); [Appx. 129-133]. The branch at Skillman and Abrams, however, permitted smaller withdrawals in this manner ($25) than many of its sister branches. *See* (Record in the Court of Appeals, at 426-428, 703-704); [Appx. 119-121].

The withdrawal limit at Skillman/Abrams frustrated Mr. Stallings. In the Summer of 2018, he cursed a branch employee and threw his drink. *See* (Record in the Court of Appeals, at 301-303). Then in October, he cursed, threw candy, and gestured around his crotch. *See* (Record in the Court of Appeals, at 300-301, 376-377). On the second occasion, the bank manager told him "that he was not allowed back into the branch with that kind of language." (Record in the Court of Appeals, at 377). But his account remained open. *See* (Record in the Court of Appeals, at 398); [Appx. 91].

B. Petitioner's appearance at the bank on December 8, 2018

On December 8, 2018, Mr. Stallings came into the Skillman/Abrams branch with two unmarked bags of luggage. *See* (Record in the Court of Appeals, at 295-297). He was not upset and made no verbal threats. *See* (Record in the Court of Appeals, at 322, 370). Rather, he gave an employee a holiday greeting and struck an apologetic

tone. *See* (Record in the Court of Appeals, at 305, 323). Asked, he said that he'd like to speak to the manager, after a chance to "collect his thoughts." (Record in the Court of Appeals, at 305). Before the manager came, however, he left the bank and walked across the street to a liquor store. *See* (Record in the Court of Appeals, at 384, 387, 394); [Appx. 77, 80, 87]. He wasn't running, *see* (Record in the Court of Appeals, at 457); [Appx. 135], and the bags left behind were unremarkable. They made no sound, and nothing protruded from them. *See* (Record in the Court of Appeals, at 461); [Appx. 139]. No witness reported any significant writing on them.

C. The bank and police response

Upon learning of the bags, the bank manager made four phone calls, only the third of which went to the police. *See* (Record in the Court of Appeals, at 388); [Appx. 81]. She would later explain that she called the police late in this sequence because there was no "physical threat that's happening, like physical violence with an individual." (Record in the Court of Appeals, at 466); [Appx. 144].

The manager first telephoned a local bank security resource. *See* (Record in the Court of Appeals, at 388, 456); [Appx. 81, 134]. At their direction, she telephoned the Wells Fargo "Security Response Center." *See* (Record in the Court of Appeals, at 388); [Appx. 81]. The Center told her to ask for a police trespass warning, and to move the bags herself. *See* (Record in the Court of Appeals, at 390, 456, 460); [Appx. 83, 134, 138].

The manager called the police on her own phone from inside the bank. *See* (Record in the Court of Appeals, at 388, 390, 458); [Appx. 81, 83, 136]. The police

declined to send an officer without Mr. Stallings present, a fact that frustrated the bank manager. *See* (Record in the Court of Appeals, at 459); [Appx. 137]. After the manager emphasized the presence of the bags, however, the police sent officers. *See* (Record in the Court of Appeals, at 460-462); [Appx. 138-140]. Finally, the manager called her supervisor. *See* (Record in the Court of Appeals, at 388).

Before the police arrived, the bank employees permitted customers to enter and conduct business. *See* (Record in the Court of Appeals, at 325, 370, 461-462); [Appx. 139-141]. They even let a little old lady remain at the teller stand, and they let a man stand right next to the bags. *See* (Record in the Court of Appeals, at 456); [Appx. 134]. At least one employee remained on the outside of the branch's bulletproof barrier while they waited. *See* (Record in the Court of Appeals, at 461); [Appx. 139].

When police arrived, they evacuated the location. *See* (Record in the Court of Appeals, at 462, 473); [Appx. 140, 151]. They made no attempt to locate Mr. Stallings, even though they possessed a physical description and his last known movements. *See* (Record in the Court of Appeals, at 391-392); [Appx. 84-85]. One officer at the bank saw Mr. Stallings board a bus but made no attempt to contact him. *See* (Record in the Court of Appeals, at 479).

After a long time, the police sent a bomb squad. *See* (Record in the Court of Appeals, at 462, 631); [Appx. 140]. A bomb squad officer approached the bags and X-rayed them, finding no evidence of dangerous items. *See* (Record in the Court of Appeals, at 634-639). When police opened the bags, they contained vodka, sunglass frames, Christmas decorations, a plastic bag, a jacket, a glasses case, rope, batteries,

a dental hygiene kit, razors, butane liters, a condom, alphabet letters, an apron, tarp, thank you cards, envelopes, empty photo albums, a santa hat, a plug in freshener, a book, a silver notebook with loose papers including receipts, and papers including Mr. Stallings' social security number and other identifying information. *See* (Record in the Court of Appeals, at 490-506, 516).

D. The bus

After police arrived at the bank, Mr. Stallings boarded a bus a few blocks away. *See* (Record in the Court of Appeals, at 549); [Appx. 160]. The record shows clearly that he talked to the driver in earshot of her juvenile son. It also shows that the driver called the police a little more than an hour after their conversation. *See* (Record in the Court of Appeals, at 577); [Appx. 188]. But it does not clearly show what Mr. Stallings actually said.

When Mr. Stallings boarded, the driver adverted to the mounting police presence at the bank, asking if he knew what was going on. *See* (Record in the Court of Appeals, at 552); [Appx. 163]. According to her trial testimony, he responded, "I think they're looking for me, because I left a bomb over across the street at the bank." (Record in the Court of Appeals, at 553); [Appx. 164].

The driver's juvenile son would also testify about the defendant's statements on the bus. According to this testimony, too, Mr. Stallings claimed to have placed a bomb. But that testimony was offered only in response to leading questions. Thus:

> Q. Do you remember a man getting on the bus who said something about a bomb?
> A. Yes.

(Record in the Court of Appeals, at 595); [Appx. 106]. And:

> Q. Do you remember that gentleman talking about something that happened at a bank?
> A. Yes. He mentioned that someone in the bank wasn't giving him the money he was asking for, and that **he was just annoyed** with the whole situation.
> Q. **And what did he say specifically as you recall about a bomb?**
> A. He came on the bus, and my mom had asked him what was going on at the bank, because there was cops around it. And he said that they -- that he thinks they are looking for him and that he left a bomb in the bank.

(Record in the Court of Appeals, at 596)(emphasis added); [Appx. 596].

More importantly, this testimony differed significantly from the son's original statements. Specifically, in the son's first account, he said, in sum, "I left my bags at the bank. The people who work there think I left a bomb." (Record in the Court of Appeals, at 733)(emphasis added); [Appx. 227].[1] This change in the statement followed "countless" conversations with his mother, (Record in the Court of Appeals, at 602); [Appx. 213], and extensive conversation with authorities, *see* (Record in the Court of Appeals, at 600, 603, 733); [Appx. 211, 214, 227].

Regardless, the record clearly shows that the driver did not take Mr. Stallings' statement seriously. *See* (Record in the Court of Appeals, at 553-555, 576); [Appx. 227]. She agreed that she "didn't find them believable," and that they were "non-sense." (Record in the Court of Appeals, at 586-587); [Appx. 197-198].

E. The arrest

[1] The quotation marks appear in the record. The undersigned counsel does not mean to suggest that anyone recorded an exact quote of the son's statement to police, which went unrecorded. See (Record in the Court of Appeals, at 734-734).

Two days later, Mr. Stallings appeared at another Wells Fargo branch and asked for help locating his bags, claiming that he suffered from memory problems. *See* (Record in the Court of Appeals, at 672, 693). Employees had been asked to remain on the look-out for him, (Record in the Court of Appeals, at 669), and the manager called the police, (Record in the Court of Appeals, at 673). The police arrested Mr. Stallings, and took a statement recorded on body-camera. *See* (Record in the Court of Appeals, at 713). In that statement, he denied ever having made threats at the bank.

III. Proceedings in District Court

A. Pretrial proceedings

Prosecutors secured a one count indictment against Mr. Stallings for violating 18 U.S.C. §1038(a). It alleged that he:

> did intentionally convey false and misleading information by placing two bags in the lobby of the Wells Fargo Bank … under circumstances where an imminent threat to personal safety may reasonably have been believed and that indicated that an activity had taken place, was taking place, and would take place, specifically, an explosive device had been placed in the bank, that would constitute a violation of 18 U.S.C., Chapter 40, specifically, a violation of 18 U.S. C. § 844(i), prohibitions with respect to explosives…

(Record in the Court of Appeals, at 151); [Appx. 52].

Electing trial by jury, Mr. Stallings submitted a detailed written request for jury instructions on the statute's intent element. Among them, he asked for the following instruction:

> In order to convict the defendant, you must find beyond a reasonable doubt that he intended that the information he communicated – namely the occurrence of a violation of 18 U.S.C. 844(i) or 18 U.S.C. 2332f(a)(1) – be reasonably believable.

(Record in the Court of Appeals, at 104-105); [Appx. 50-51]. Thus, he argued, conviction required an intent to communicate a credible bomb threat. *See* (Record in the Court of Appeals, at 104-105); [Appx. 50-51]. Instead, the court's recitation of the elements required that the defendant's threat be reasonably believable, but did not require that he intend as much. (Record in the Court of Appeals, at 164; [Appx. 63]

B. Trial testimony

At trial, the government called four bank employees from the Skillman/Abrams Branch, a host of responding police officers, the bus driver and her son, and witnesses to Mr. Stallings' arrest.

Three bank witnesses testified to the concerns they felt upon seeing the bags. In response to leading questions, two said they'd worried about explosives. *See* (Record in the Court of Appeals, at 341, 397, 471-472); [Appx. 90, 149-150]. A third recounted unspecified concerns about the bags' contents, before finally testifying that she thought it might be something "like a bomb threat." *See* (Record in the Court of Appeals, at 305-307, 327). But these witnesses also confirmed that they didn't know what was in the bags at the time, and that they might have contained some other dangerous item. *See* (Record in the Court of Appeals, at 325-326, 347, 460-461); [Appx. 138-139].

The defense moved for judgment of acquittal following the government's case, arguing, *inter alia*, that no reasonable person would have thought the bags contained a bomb. *See* (Record in the Court of Appeals, at 720-722). The court denied the motion. *See* (Record in the Court of Appeals, at 722). It had earlier offered *sua sponte* to treat

the motion as automatically renewed and denied after the defense case. *See* (Record in the Court of Appeals, at 613-614). The defense called the case agent, who testified to the prior statement of the bus driver's son. *See* (Record in the Court of Appeals, at 733-734); [Appx. 227-228].

C. Closing, verdict, and sentencing

During an aggressive rebuttal closing argument, the prosecutor claimed that Petitioner watched the bank's response from the liquor store, "enjoying every minute of it." (Record in the Court of Appeals, at 782); [Appx. 236]. This vivid image of the defendant laughing smugly at the bank—conjured entirely from the prosecutor's imagination -- would be echoed later. Extolling the bravery of the bomb squad officer, the prosecutor said:

> Nobody out there knew what was in those bags except for the man that got on the bus, the man that walked away, **snickering the whole way**.

(Record in the Court of Appeals, at 794)(emphasis added); [Appx. 248]. Although the defense lodged numerous objections throughout closing, it let this one slip by. (Record in the Court of Appeals, at 794); [Appx. 248]. The jury convicted, (Record in the Court of Appeals, at 819);[Appx. 66], the district court denied another renewed motion for acquittal, *see* (Record in the Court of Appeals, at 823), and Petitioner received 48 months imprisonment, *see* (Record in the Court of Appeals, at 835); [Appx. 68].

IV. Appellate Proceedings

A. The appeal

Petitioner appealed his conviction and sentence on four overarching grounds: 1) he argued that the evidence did not suffice to convict because his act of leaving

bags in a bank would not convey a reasonably believable bomb threat to the reasonable observer, 2) he argued that the district court erred in denying his requested jury instructions, including his request for an instruction stating that he could not be convicted unless the jury believed that he intended to communicate a reasonably believable threat, 3) he argued that the prosecutor's closing argument violated his rights, including when it falsely stated that he was "snickering the whole way" as he watched the police response, and 4) he challenged the use of a bare arrest record at sentencing. *See* Initial Brief in *United States v. Stallings*, No. 19-11300, 2020 WL 1933891, at *14-15 (5th Cir. Filed April 17, 2020)("Initial Brief").

As he argued the sufficiency of the evidence to show that a reasonable person would believe the bag might contain a bomb, Petitioner offered the following in the Initial Brief:

> [I]t is of no moment whether Mr. Stallings told a busdriver [*sic*] and her son that he left a bomb in the bank. That evidence is disputed, but we may assume it would defeat a sufficiency challenge on the defendant's intent. It does not, however, speak to the objective element: how a reasonable person would view the act of placing unmarked bags in a lobby at the time he left them there.

Initial Brief, at *22-23. Later, when arguing the prejudice attendant to a claimed error in the jury instructions, he said that:

> The defendant's intent to communicate a bomb threat specifically was a critical and hotly disputed issue in the case, and one that could have easily been resolved either way.

Initial Brief, at *29.

B. The opinion

The court of appeals affirmed. As respects the jury instruction, it held that 18 U.S.C. §1038(a) does not require that the defendant intend to communicate "information (that) may reasonably be believed." *United States v. Stallings*, No. 19-11300, 2023 WL 3534445, at *6 (5th Cir. May 18, 2023)(unpublished); [Appx. 13-14]. To hold otherwise, it said, would improperly "import[] the *mens rea* requirement from the first part of the statute—'intent to convey false or misleading information'—to the second part of the statute—'where such information may reasonably be believed.'" *Stallings*, 2023 WL 3534445, at *6 (quoting §1038(a)); [Appx. 13].

Although the court of appeals rejected most of Petitioner's claims of improper jury argument, it agreed that the prosecutor rendered clearly or obviously improper argument when she said that "[n]obody out there knew what was in those bags except for the man that got on the bus, the man that walked away, snickering the whole way." *id.* at *13; [Appx. 28]. Further, it said that this comment carried "a high risk of prejudice." *id*. (quoting *United States v. Mendoza*, 522 F.3d 482, 495 (5th Cir. 2008); [Appx. 28]. Applying the plain error standard, however, it affirmed for one reason alone. It said:

> given that Stallings concedes the sufficiency of the evidence on the intent element of § 1038(a), Stallings cannot demonstrate that the prosecutor's statements affected the outcome of the district court proceedings and thus affected Stallings's substantial rights.56 Therefore, Stallings cannot prevail under the plain error standard.

Id.; [Appx. 28-29]; *see also id.* & n.56 (citing *United States v. Alaniz*, 726 F.3d 586, 615 (5th Cir. 2013), for the proposition that "[t]o determine whether a remark prejudiced the defendant's substantial rights, we assess the magnitude of the

statement's prejudice, the effect of any cautionary instructions given, and the strength of the evidence of the defendant's guilt.")(quoting *United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999)) (internal quotation marks omitted by opinion below); [Appx. 29].

C. Rehearing

On June 1, 2023, Petitioner timely sought panel rehearing, pointing out that the sufficiency of the evidence and the prejudice standard of plain error review are very different things.. *See* Petition for Panel Rehearing in No. 19-11300 (5th Cir. Filed May 18, 2023). The Petition also noted that a concession as to one element of the offense does not imply a concession as to the offense as a whole. *See id.* The court of appeals denied the Petition without comment on June 23, 2023. [Appx. 33].

REASONS FOR GRANTING THE PETITION

I. *Counterman v. Colorado*, ___U.S.___, 143 S.Ct. 2106 (June 27, 2023), issued after the decision below, and after the denial of rehearing, is an intervening development that would likely change the outcome below were the court permitted to consider it.

A. In prosecutions for making a threat, *Counterman* requires a showing of at least recklessness as to whether a defendant's statements will be taken as a true threat.

The First Amendment says that "Congress shall make no law … abridging the freedom of speech…." Despite the breadth of this language, it has been held to admit of several exceptions: incitement, defamation, obscenity, and threats. *See Counterman v. Colorado*, ___U.S.___, 143 S.Ct. 2106 (June 27, 2023)(citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Gertz v. Robert Welch,*

Inc., 418 U.S. 323, 340, 342789 (1974); *Miller v. California*, 413 U.S. 15, 24 (1973); *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

In *Counterman v. Colorado*, ___U.S.___, 143 S.Ct. 2106 (June 27, 2023), this Court considered the exception to the First Amendment for threatening speech. Although the First Amendment permits prosecution for threatening speech, they be "true threats," that is "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" *Id.* at 2114 (quoting *Black*, 538 U.S. at 359)(brackets added by *Counterman*). "The 'true' in that term distinguishes what is at issue from jests, 'hyperbole," or other statements that when taken in context do not convey a real possibility that violence will follow (say, 'I am going to kill you for showing up late')." *Id*. (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

Counterman dealt with a state criminal prosecution for threatening speech. *See Counterman* 143 S.Ct. at 2112. Balancing the competing interests at issue in such prosecutions, this Court held that the First Amendment required proof of recklessness before conviction might be had. *See id*. at 2119. Specifically, this Court held that defendants may not be convicted of threatening speech absent evidence "that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" *Id.* at 2117 (quoting *Elonis v. United States*, 575 U.S. 723, 746 (2015) (Alito, J., concurring in part and dissenting in part)). It found that Counterman's conviction represented "a violation of the First Amendment" because "[t]he State had to show only that a reasonable person would understand his

statements as threats," but "did not have to show any awareness on his part that the statements could be understood that way. *Id.* at 2119.

B. *Counterman* supports Petitioner's reading of 18 U.S.C. §1038(a), and suggests that his requested jury instruction was necessary to avoid grave doubt as to the constitutionality of that statute.

As relevant here, Section 1038(a) of Title 18 punishes:

> [w]hoever engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation of [certain specified terrorism offenses, including 18 U.S.C. §844(i)]…

Petitioner asked for and was denied the following instruction:

> In order to convict the defendant, you must find beyond a reasonable doubt that he intended that the information he communicated—namely the occurrence of a violation of 18 U.S.C. 844(i) ...—be reasonably believable.

[Appx. 50-51]; *United States v. Stallings*, No. 19-11300, 2023 WL 3534445, at *6 (5th Cir. May 18, 2023); [Appx. 13]. In plain terms, the intent to communicate **a reasonably believable threat** is an intent to communicate a **true threat**, one that the reader will take as a serious warning of impending harm, rather than one that the listener should not expect actually to occur.

In the absence of Petitioner's requested instruction, the jury instructions contained no requirement of mental state as to the believability of the threatening communications. After *Counterman* this omission brings the statute into conflict with the First Amendment. The instructions said:

> For you to find the defendant guilty of this crime, the government must prove beyond a reasonable doubt each of the following essential elements:
>
> First, that the defendant intentionally conveyed false or misleading information;
>
> Second, that the information was conveyed under circumstances where an imminent threat to personal safety could have been believed by a reasonable person; and
>
> Third, that such information indicated that an activity had taken, was taking, or would take place that would constitute a violation of Title 18, Chapter 40, specifically, a violation of 18 U.S.C. § 844(i), prohibitions with respect to explosives.

(Record in the Court of Appeals, at 164); [Appx. 63].

None of these three elements required an intent to communicate information another would actually believe. The second element requires that the threat actually be believable by a reasonable person, but does not require an intent to communicate a believable or true threat. Indeed, the court below rejected the defendant's requested instruction on the ground that the statute does not require such an intent. *See Stallings*, 2023 WL 3534445, at *6; [Appx. 13-14].

To be clear, of course, *Counterman* does not hold that a defendant prosecuted for threatening speech must intend a true threat, but only recklessness. For that reason, the government could have prosecuted Petitioner for recklessly communicating information that implied an imminent terrorist attack, had Congress drafted such a statute. Section 1038(a), however, is not such a statute. It says nothing about recklessness, nor any conscious awareness of risk, and cannot reasonably be read to imply this standard.

The statute may, however, be given a "reasonable construction" that requires an actual intent to communicate a true threat. *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). The statute, again, requires the defendant to act "with intent to convey false or misleading information under circumstances where such information may reasonably be believed…" §1038(a). It is at least "fairly possible," if not immediately obvious, that when the statute refers to "such information," it means the "information the defendant intended to convey," and not merely "the information the defendant actually conveyed." The word "such" means "Standing predicatively at the beginning of a sentence or clause, and referring summarily to a statement or description just made," *Oxford English Dictionary Online*, entry = such, *last visited September 19, 2023*. Accordingly, when the statute says that "such information" must be reasonably believable, it means the information the defendant **intended** to communicate. Alternatively, when the statute says that the defendant must act with intent to convey false information under circumstances where it may reasonably be believed, it can be read to say that the circumstances making the threat believable must be part of the defendant's intent. "[E]ven if [this] reading were not the best one, the interpretation is at least fairly possible—so the canon of constitutional avoidance would still counsel us to adopt it." *United States v. Hansen*, 599 U.S. 762, ____, 143 S.Ct. 1932, 1946 (2023)(internal quotations omitted)(quoting *Jennings v. Rodriguez*, 583 U. S. ——, ——, 138 S.Ct. 830, 842, 200 L.Ed.2d 122 (2018)).

There are two reasonable constructions of §1038(a) that may made of its language: the one adopted below, which requires an objectively believable threat, but no mental statute with respect to the threat's plausibility, and Petitioner's, which requires an intent to communicate a true threat. Though Petitioner's exceeds the constitutional minimum articulated by *Counterman* – requiring intent rather than mere recklessness as respects the effect on the listener – it is the only constitutional alternative available in §1038(a). Because this reading of the statute is at least "fairly possible," *Counterman* shows that this Court should favor it under the canon of constitutional avoidance. *Hansen*,143 S.Ct. at 1946.

Even under the view of the court below, §1038(a) does require an intent to speak falsely regarding very serious matters (the possibility of imminent terrorist violence). But mere falsehood, even known falsehood, does not eliminate First Amendment protection. *See United States v, Alvarez*, 567 U.S. 709, 722 (2012). And the unrestricted sweep of §1038(a) is especially likely to reach two kinds of statements that are literally false – hyperbole and jest – which have been cited as within the protection of the First Amendment. *Counterman*, 143 S.Ct. at 2114. Jests and hyperbole are important components of the country's political and social discourse, as they are effective means to convey messages of intense and legitimate social concern. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988).

For better or worse, hyperbole certainly figures heavily in our contemporary political discourse, even when they pertain to extremely serious matters. No one would think it at all out of place to hear a contemporary politician say, for example,

"if America does not start projecting strength, our enemies will attack us tomorrow." Without a requirement that the defendant intend a true threat, that statement could subject the speaker to prosecution under §1038(a).

In short, *Counterman* reveals a grave constitutional problem in Petitioner's statute of conviction: it permits conviction without requiring at least recklessness as to the presence of a true threat. The instruction proposed by Petitioner could have rectified this constitutional problem, without doing violence to the wording of the statute. There is, in other words, a reasonable probability that the court below would find error in the district court's rejection of this jury instruction if it were to reconsider in light of *Counterman*.

C. There is a reasonable probability that a court examining the record would find the denial of Petitioner's requested jury instruction changed the outcome.

There is also a reasonable probability, at the very least, that a court properly applying the doctrine of harmless error would find it necessary to reverse the conviction. A reasonable jury would have serious doubt as to whether Petitioner intended a true threat. The defendant, after all, repeatedly failed to receive a debit card for want of a stable address. *See* (Record in the Court of Appeals, at 399-401, 426); [Appx. 93-95, 119]. His dispute with the bank arose from his persistent inability to acquire a picture ID. *See* (Record in the Court of Appeals, at 299, 401-405, 426-428, 703-704); [Appx. 94-98, 119-121]. His interactions with the bank thus presented him as a homeless or transient man who lacked the wherewithal even to acquire a picture ID, hardly someone with the knowledge and resources to build a bomb. A reasonable

jury could accordingly doubt that he actually expected anyone to think he'd acquired an explosive device.

The opinion below contains the following passage:

> Sometime after police arrived, Stallings boarded a bus a few blocks away. As he boarded, the bus driver asked the boarding passengers if they knew what was "going on" at the bank. Stallings responded, "I think they're looking for me, because I left a bomb over across the street at the bank."

[Appx. 5]. *Stallings*, 2023 WL 3534445, at *2. That is probably not what happened, and was disputed to say the least. Further, the jury need not have believed this statement to convict.

In fact, one of the witnesses who related this testimony – the son of the bus driver -- told the police a very different story. His testimony, answering leading questions, told the jury that Petitioner claimed to leave a bomb at the bank. *See* (Record in the Court of Appeals, at 595-596); [Appx. 206-207]. But in his first account to the police, he said, in sum, "I left my bags at the bank. **The people who work there think I left a bomb**." (Record in the Court of Appeals, at 733); (emphasis added); [Appx. 227].[2] This modification occurred after "countless" conversations with his mother, (Record in the Court of Appeals, at 602); [Appx. 213], and lots of contact with authorities, *see* (Record in the Court of Appeals, at 600, 603, 733); [Appx. 211, 214, 227]. If the jury took the first story as true, it would have harbored doubt about Petitioner's intent to communicate a true threat. By the time Petitioner said anything on the bus, emergency vehicles had already begun to congregate in the lot of the bank.

[2] Again, this passage is quoted from the record, but does not represent a direct quote of the witness. It quotes a summary.

See (Record in the Court of Appeals, at 552); [Appx. 163]. In this context, "they think I left a bomb," is not a reflection of Petitioner's intended reception at the time he left the bags, but a simple inference from the scene evolving before him, made in response to a question from the bus driver which specifically adverted to the presence of the emergency vehicles.

The bus driver herself did say that Petitioner claimed to leave a bomb. But the record clearly shows that she did not take Mr. Stallings' statement seriously. *See* (Record in the Court of Appeals, at 553-555, 576); [Appx. 164-166]. She agreed that she "didn't find them believable," and that they were "non-sense." (Record in the Court of Appeals, at 586-587); [Appx. 197-198]. Given her perception of the statement, a reasonable jury could and would doubt whether Petitioner intended it to be taken seriously.

The proper course in this Court is to grant certiorari, vacate the judgment below, and remand in light of *Counterman*.

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996).

Counterman post-dates the opinion below and the denial of rehearing. It provides good reason to think the district court erred in denying Petitioner's requested instruction regarding an intent to communicate a true threat. And there is

a reasonable probability that the government would fail to carry its burden to show the error harmless.

II. The opinion below affirmed Petitioner's conviction in spite of what it acknowledged to be clearly improper closing argument, on the sole ground that Petitioner purportedly conceded the sufficiency of the evidence on a single element of the statute. This very obviously botches the controlling law in at least two ways: it conflates the prejudice inquiry found in Federal Rule of Criminal Procedure 52 with an inquiry into the legal sufficiency of the evidence to convict, and it inexplicably generalizes a purported concession as to a single element to the offense as a whole. In doing so, it did not merely deprive Petitioner of a fair trial and encourage repetition of a serious threat to the reliability of criminal convictions. It also obviously contradicted well-settled precedent of this Court and that of the other courts of appeals, which treat the prejudice inquiry of Rule 52 and the sufficiency of the evidence to convict as entirely different things. Remarkably, the Fifth Circuit's error echoes its own prior decisions, meaning it is likely to be repeated.

A. The opinion below obviously botched its analysis of a dispositive issue.

Federal Rule of Criminal Procedure 52(b) states that plain errors affecting substantial rights may be noticed on appeal notwithstanding the absence of objection. The Rule implies a four-part test for reversal when an appealing party fails to preserve error. The appealing party must show:1) error, 2) that is clear or obvious, 3) that affects the party's substantial rights, and 4) that seriously affects the fairness, integrity, and public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). The same "substantial rights" test is applied by Rule 52(a)

in the case of preserved error, though it is the proponent of the judgment who bears the burden of showing that the error did not affect substantial rights. *See Olano*, 507 U.S. at 734-735.

Extolling the bravery of a bomb squad that examined Petitioner's bags, the prosecutor said in rebuttal closing:

> Nobody out there knew what was in those bags except for the man that got on the bus, the man that walked away, **snickering the whole way**.

(Record in the Court of Appeals, at 794)(emphasis added); [Appx. 248]. The court below found that this remark was clearly or obviously improper. *See United States v. Stallings*, 2023 WL 3534445, at *13 (5th Cir. May 18, 2023)(unpublished); [Appx. 28]. As such, it advanced this claim of error through the first two prongs of plain error review. *See Stallings*, 2023 WL 3534445, at *13; [Appx. 28]. Further, it acknowledged that the remark "created a strong risk of prejudice." *See id*. at *13, & n. 55 (quoting *United States v. Mendoza*, 522 F.3d 482, 495 (5th Cir. 2008)); [Appx. 28). Yet it denied relief on the **sole ground**[3] that the defendant had conceded the legal sufficiency of the government's case on the intent element. After passing the error through the first two requirements, and finding a strong risk of prejudice, the court below said:

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[3] The court below did not consider the fourth prong of the plain error test, but its precedent would clearly support reversal. It has repeatedly found that improper closing arguments affect the defendant's substantial rights and constitute reversible plain error. *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979); *United States v. Corona*, 551 F.2d 1386, 1391, n 5 (5th Cir. 1977); *Ginsberg v. United States*, 257 F.2d 950, 955 (5th Cir. 1958).

> However, given that Stallings concedes the sufficiency of the evidence on the intent element of § 1038(a), Stallings cannot demonstrate that the prosecutor's statements affected the outcome of the district court proceedings and thus affected Stallings's substantial rights.

id. at *13; *see also id.* at n. 56 (citing *United States v. Alaniz*, 726 F.3d 586, 615 (5th Cir. 2013) (quoting *United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999))); [Appx. 28-29]. This analysis is very obviously wrong for at least two reasons.

First, the reasoning of the opinion below incorrectly conflates the prejudice inquiry occasioned by procedural error, including plain error, with review for evidentiary sufficiency. In deciding whether clear or obvious error has affected the defendant's substantial rights, this Court has instructed the courts of appeals to decide whether there is a reasonable probability of a different result in the absence of the error. *See United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). "[T]he reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *Dominguez Benitez*, 542 U.S. at 83, n.9 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)); *see also Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)(offering the same caution in the ineffectiveness context)

This same reasonable probability standard governs the materiality inquiry in *Brady* cases and the prejudice inquiry in ineffective assistance cases. *See Dominguez Benitez*, 542 U.S. at 83 (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.), and *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). In the *Brady* context, this Court has explicitly cautioned that the reasonable probability test "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434.

Addressing a harmless error question governed by a predecessor statute that also used the "substantial rights" language,[4] this Court cautioned "that the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error," and that "[i]t is rather, even so, whether the error itself had substantial influence." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Even a cursory review of the two different standards – the reasonable probability prejudice standard and evidentiary sufficiency – reveals their obvious differences. The reasonable probability standard asks what the jury actually would have done in the absence of the error, requiring the appealing party to show a realistic likelihood of a different outcome, though not a different outcome by a preponderance of the evidence. By contrast, sufficiency review asks whether a conviction was rational, or indeed, "whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 313 (1979)(emphasis in original). Unlike prejudice analysis, sufficiency review is a

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[4] ***Compare*** Fed. R. Crim. P. 52(b) ***with*** 28 U.S.C. §391(1945)("…the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"), *see also Kotteakos*, 328 U.S. at 757, n.9 (noting that Rule 52(a) had its origins in this statute); *Olano*, 507 U.S. at 734 (citing *Kotteakos* as illustrative of the proper analysis employed when applying Rule 52(a)).

safeguard only against verdicts that rest on obviously inadequate foundations or legal misunderstanding as to the requirements for conviction. *See Musacchio v. United States*, 577 U.S. 237, 243 (2016) ("On sufficiency review, a reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires….")(citing *Jackson*, 443 U.S. at 314–315). And in conducting sufficiency review, the reviewing court must, as noted above, "view[] the evidence in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 313; *accord Cavazos v. Smith*, 565 U.S. 1, 7 (2011). This requires it to resolve all credibility disputes in favor of the prosecution. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("…under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review."); *McDaniel v. Brown*, 558 U.S. 120, 133 (2010)(reversing finding of insufficient evidence because jury could have credited state's witness and discredited defendant's); *Parker v. Matthews*, 567 U.S. 37, 44 (2012)(same).

While the prejudice inquiry of Rule 52 asks what the average jury **would have done** but for an error, sufficiency review asks what a rational jury **could have done** without forfeiting reason. ***Compare*** *Olano*, 507 U.S. at 734 (requirement "that the plain error 'affec[t] substantial rights,'… is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings.")(quoting Fed. R. Crim. P. 52(b)), ***and*** *Greer v. United States*, ___U.S.___, 141 S. Ct. 2090, 2097 (2021)(declining to find an effect on substantial rights attendant to an instructional error as to required mens rea, because "…a jury **will usually find** that a defendant

knew he was a felon based on the fact that he was a felon.")(emphasis added)***, with*** *Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("…the *Jackson* inquiry does not focus on whether the trier of fact made the *correct* guilt or innocence determination, but rather whether it made a **rational** decision to convict or acquit.")(emphasis in original). And while sufficiency review resolves every credibility question or ambiguous inference in favor of conviction, Rule 52 does no such thing, because the average jury is not expected to believe everything every witness says in favor of the case, while discounting everything that helps the other.

Particularly when one recalls that the reasonable probability standard of Rule 52(b) requires proof of a different result by less than a preponderance of the evidence, it is clear that there are many, many cases where the evidence is close enough for an error to affect substantial rights, but not so weak as to merit reversal for insufficient evidence alone. Were it otherwise, there would be no need to conduct plain error review of procedural error – the defendant could simply obtain an acquittal by pointing out the legal insufficiency of the evidence. This Court has never suggested any such thing, but to the contrary has consistently applied plain error review, including the reasonable probability standard for assessing prejudice, to procedural error at trial. *See United States v. Young*, 470 U.S. 1, 16-21 (1985); *Olano*, 507 U.S. at 734-735; *Greer*, 141 S. Ct. at 2097.

The nature of the purported concession in this case well illustrates the point. Arguing sufficiency of the evidence, Petitioner's brief said:

> it is of no moment whether Mr. Stallings told a busdriver [*sic*] and her son that he left a bomb in the bank. That evidence is disputed, but **we**

> **may assume** it would defeat a sufficiency challenge on the defendant's intent. It does not, however, speak to the objective element: how a reasonable person would view the act of placing unmarked bags in a lobby at the time he left them there.

Initial Brief in *United States v. Stallings*, No. 19-11300, 2020 WL 1933891 at *22 (5th Cir. Filed April 17, 2020)("Initial Brief")(emphasis added and removed).[5] Later, however, the brief argued that an instructional error prejudiced the defendant, arguing:

> The defendant's intent to communicate a bomb threat specifically was a critical and hotly disputed issue in the case, and one that could have easily been resolved either way.

Initial Brief, at *29. While one might concede a sufficiency point by arguing that an element was "hotly disputed" and "could have easily been resolved either way," it hardly concedes prejudice. To the contrary, a case with an element that "could have easily been resolved either way" is one particularly amenable to reversal for prejudicial error.

The second flaw in the analysis of the court of appeals is that it inexplicably generalizes the purported concession on a single element to every element in the case. Again, the decision below held it impossible to show prejudice "given that Stallings concedes the sufficiency of the evidence **on the intent element** of § 1038(a) …" *Stallings*, 2023 WL 3534445, at *13 (emphasis added); [Appx. 28-29]. Assuming that Petitioner had conceded his intent to communicate the presence of a bomb, this would not show that he had no plausible routes to acquittal. A defendant, after all, cannot

[5] It is doubtful that a party concedes anything by accepting a claim arguendo, as this passage does.

be convicted absent proof beyond a reasonable doubt of every element of the offense, not just one of them. *See In re Winship*, 397 U.S. 358, 361 (1970)(reasonable doubt standard "'is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.'")(quoting C. McCormick, *Evidence* s 321, pp. 681—682 (1954)).

In addition to the intent element, the government also had to prove beyond a reasonable doubt that Petitioner made an objectively reasonable bomb threat, something that had nothing to do with his intent. *See* 18 U.S.C. §1038(a); *United States v. Castagna*, 604 F.3d 1160, 1165 (9th Cir. 2010)(same); *United States v. Brahm*, 520 F. Supp. 2d 619, 624 (D.N.J. 2007)(same); *United States v. Baldwin*, No. 117CR00276ELRJFK, 2018 WL 4520210, at *8 (N.D. Ga. May 30, 2018)(same), *report and recommendation adopted*, No. 1:17-CR-00276-ELR, 2018 WL 3388137 (N.D. Ga. July 12, 2018). A reasonable jury might well have entertained reasonable doubt on that element. Notably, Petitioner lacked the wherewithal to obtain a picture ID and acquire his disability benefits. So a reasonable jury could very plausibly harbor a reasonable doubt about the believability of his purported bomb threat – if Petitioner could make a bomb, he could probably figure out how to obtain government identification. But it would be substantially less likely to afford him the benefit of the doubt on this issue after hearing the prosecutor's false and inflammatory statement that Petitioner watched the bank for twenty-five minutes while "snickering."

B. This Court's intervention is merited.

Of course, this Court's goal is ordinarily not error simple correction, but rather achieving and maintaining the uniformity of federal law. *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622, 207 L. Ed. 2d 1150 (2020) (Sotomayor, J., dissenting)(citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 5–45 (11th ed. 2019)). For several reasons, however, a grant of certiorari, whether plenary or attendant to summary reversal, would serve the goal of uniformity in federal law.

First, as noted above, in conflating sufficiency review with the prejudice inquiry of Rule 52(b), the opinion below quite obviously contradicts the controlling, settled precedent of this Court. *See Kyles*, 514 U.S. at 434; *Kotteakos*, 328 U.S. at 765. This is a stated basis for granting certiorari in this Court's rules. *See* Sup. Ct. R. 10. And where a court of appeals appears disinclined to follow this Court's clear guidance, this Court has recognized that summary reversal may be appropriate. *See Spears v. United States*, 555 U.S. 261 (2009); *Nelson v. United States*, 555 U.S. 350 (2009).

At some point, uniformity of federal law cannot be achieved simply by stating it; it also must be enforced. Unfortunately, that appears to be the case here, as the analytical error of the court below appears to be recurring. *See United States v. Munoz-Hernandez*, 94 F. App'x 243, 245 (5th Cir. 2004)(unpublished)("**As the evidence is sufficient to support Munoz's conviction**, Munoz has **failed to demonstrate that the prosecutor's statements affected his substantial rights** and amounted to plain error.")(emphasis added), *cert. granted, judgment vacated on other grounds*, 543 U.S. 1102, 125 S. Ct. 999, 160 L. Ed. 2d 1009 (2005), *and opinion*

reinstated, 148 F. App'x 221 (5th Cir. 2005)(unpublished); *United States v. Jefferson*, 432 F. App'x 382, 392 (5th Cir. 2011)(finding that Fifth Circuit precedent disregards clearly improper closing argument on plain error review so long as "a **reasonable jury could have concluded** beyond a reasonable doubt that [the defendant] was guilty as charged," after discounting any testimony directly affected by the improper closing)(citing *United States v. Ramirez–Velasquez*, 322 F.3d 868, 875 (5th Cir.2003)); *see also id.* at 391 ("If 'absent the jury's crediting of the agents' testimony [Jefferson] could not have been found guilty beyond a reasonable doubt on the paucity of other evidence' then we are compelled to reverse.")(quoting *United States v. Gracia*, 522 F.3d 597, 604 (5th Cir.2008)(brackets added by *Jefferson*).

Second, unsurprisingly, given the clarity of this Court's precedent, other courts of appeals have treated sufficiency review and Rule 52's prejudice inquiry as two very different things. *See United States v. Capers*, 20 F.4th 105, 128 (2d Cir. 2021)("At the same time, we note that, as we have held above, the evidence presented here was sufficient to permit a properly instructed jury to convict on Count Five. We vacate the conviction on that count not because Capers necessarily should be exonerated as a matter of law of the crime charged, but rather because an erroneous jury instruction makes it impossible to be confident that the jury convicted him on an appropriate set of findings."); *United States v. Lopez*, 762 F.3d 852, 865 (9th Cir. 2014) ("The other evidence of Lopez's physical removal introduced at trial was **not only legally sufficient** to support the jury's verdict, **it was also strong enough that there is not a reasonable probability** that but for Agent Harris's testimony, the outcome

of the trial would have been different.")(emphasis added). The courts of appeals accordingly apply different rules to the third prong than does the court below where evidence suffices to meet the *Jackson* threshold.

Third, the opinion below sends a message to prosecutors in the Fifth Circuit that they need not comply with the law governing their conduct at closing argument. Restrictions on improper argument are important safeguards against erroneous convictions, confining the jury to the evidence actually admitted and tested at trial, and avoiding the presentation of arguments and information that may result in conviction on bases other than guilt. *See Young*, 470 U.S. at 18–19. But in the Fifth Circuit, a prosecutor who has presented minimally sufficient evidence of conviction need not heed this Court's admonishment, delivered in respect to closing argument, that "while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). If the evidence meets the low bar of the *Jackson* standard, he or she may say what he or she likes.

For all of these reasons, a grant of certiorari would substantially advance this Court's mission of ensuring the uniformity of federal criminal law. And of course the decision below deprived Petitioner of a fair trial. That matters too.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 21 day of September, 2023.

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