No. 25-6429

IN THE SUPREME COURT OF THE UNITED STATES

GEORGIY CHIPUNOV, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

A. TYSEN DUVA
Assistant Attorney General

WILLIAM G. CLAYMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's contention that the indictment and jury instructions omitted an essential element of the offense under 18 U.S.C. 1038(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is available at 2025 WL 1098556.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2025. A petition for rehearing was denied on September 15, 2025 (Pet. App. B1). The petition for a writ of certiorari was filed on December 15, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conveying false information regarding the possibility of specified illegal activity, in violation of 18 U.S.C. 1038(a)(1)(A). Judgment 1. The district court sentenced petitioner to time served, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A4.

1. In 2022, petitioner called 911, stated that "there's a bomb at the courthouse," and hung up. Presentence Investigation Report (PSR) ¶ 5. Petitioner called 911 again a few minutes later, stated that "the Sheriff's department has threatened [him] because [he's] Russian, so [petitioner was] gonna * * * shoot them," and hung up again. Ibid. After tracing the location of the caller to El Cajon, California, law enforcement dispatched officers to alert the Sheriff's Department and to inspect the El Cajon Courthouse. PSR ¶¶ 6, 18.

Law enforcement linked the caller's phone number to petitioner and dispatched officers to petitioner's residence, where they found petitioner. PSR ¶¶ 6-7. The officers asked if petitioner knew why they were there, and he responded, "yes." PSR ¶ 7. The officers asked if petitioner had plans to carry out what he said on the 911 calls, and he responded, "no." Ibid. Petitioner then told the officers that the cellphone that he used to make the

calls was charging in his garage. Ibid. The officers arrested petitioner. Ibid.

Subsequent investigation revealed that petitioner had engaged in similar conduct in the past. In 2012, for example, petitioner had been convicted in San Diego County for falsely reporting that there was a bomb in the El Cajon Courthouse. PSR ¶ 28. According to court records, petitioner, while on probation after a conviction for evading the police and driving under the influence of alcohol, sent an e-mail to the courthouse's webmaster account stating that the courthouse would be "destroyed" by "explosives" and that judges and law-enforcement officers would be killed. Ibid. And in 2017, petitioner was convicted in San Diego for giving false information about a bomb. PSR ¶ 29. According to court records, petitioner posted several messages on the Facebook pages of the San Diego County Probation and Police Departments, and sent multiple e-mails to the Sheriff's Department, in which he stated that there was a bomb in the El Cajon Courthouse and that he planned to "kill" law-enforcement officers. Ibid.

2. A grand jury in the Southern District of California returned a superseding indictment charging petitioner with conveying false information regarding the possibility of specified illegal activity, in violation of 18 U.S.C. 1038(a)(1)(A). Superseding Indictment 1-2. The indictment alleged that petitioner "knowingly engage[d] in conduct with the intent to convey false and misleading information, under circumstances where such information might

reasonably be believed," and that "such information indicated that an activity had taken place, and would be taken, that would constitute a violation of" 18 U.S.C. 844(i), which makes it a crime to maliciously damage or destroy property by means of an explosive. Superseding Indictment 1-2. Specifically, the indictment alleged that petitioner called 911 "with the intent to convey the false and misleading information that there was a bomb" in "the El Cajon Courthouse." Id. at 1.

Petitioner moved to dismiss the indictment on the theory that "Section 1038 does not contain a specific intent to threaten" element and therefore "is overbroad as it regulates beyond the true threats exception to full First Amendment protections." D. Ct. Doc. 41, at 16 (Feb. 13, 2023); see id. at 15-17. Alternatively, petitioner asserted that Section 1038(a)(1) does contain a subjective-intent-to-threaten element and that the indictment failed to state an offense because it did not allege that element of the crime. Id. at 15-17. The district court denied the motion. 22-cr-1268 Docket entry No. 44 (Feb. 27, 2023).

At trial, the district court instructed the jury that the government was required to prove beyond a reasonable doubt that, inter alia, petitioner "knowingly and intentionally conveyed false or misleading information * * * under circumstances in which the information may reasonably have been believed," and that the false information indicated that property had been or would be damaged

or destroyed "by means of an explosive." C.A. E.R. 7; see id. at 253-254. The jury found petitioner guilty. Judgment 1.

The next month, this Court held in Counterman v. Colorado, 600 U.S. 66 (2023), that in a prosecution for making "[t]rue threats of violence," the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements," and that "a mental state of recklessness is sufficient" to satisfy that requirement. Id. at 69. Invoking Counterman, petitioner moved for a new trial on the theory that the jury instructions failed to require a finding that he subjectively understood the threatening nature of his false statement. D. Ct. Doc. 76, at 2-3 (Aug. 7, 2023). The district court, looking to both the instructions that it provided and the nature of the evidence, denied the motion. D. Ct. Doc. 88, at 2-5 (Sept. 8, 2023).

The district court sentenced petitioner to time served (about 16 months), to be followed by three years of supervised release. Judgment 2-3; see D. Ct. Doc. 88, at 6.

3. On appeal, petitioner contended that the indictment "omit[ted] an essential element" of the offense by failing to allege that he had a subjective understanding of the threatening nature of his false statements, Pet. C.A. Br. 18, 24, 26; see id. at 20-26, and that the jury instructions were deficient for "the same" reason, id. at 26; see id. at 26-30.

The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. A1-A4. The court found that the indictment "properly mirrored the language of the statute" and that, "[b]ecause petitioner d[id] not challenge the constitutionality of 18 U.S.C. § 1038(a)(1)," his attempt to invoke Counterman "fail[ed]." Id. at A2-A3 (citing United States v. Castagana, 604 F.3d 1160, 1165 (2010)). The court also found that petitioner's "challenge to the jury instructions fail[ed] for the same reasons as his challenge to the indictment." Id. at A3.

4. Petitioner filed a petition for panel rehearing or rehearing en banc. He acknowledged the court of appeals' finding that he had not raised a constitutional challenge to the statute on appeal, Pet. for Reh'g 5, and he conceded that he "did not bring a facial challenge," id. at 8. But he contended that the court had "overlook[ed] the fact that [petitioner] did raise an as-applied First Amendment claim," not "a pure matter of statutory interpretation." Id. at 1, 6. In response, the government defended the court of appeals' decision and noted -- as it had at the panel stage -- that petitioner had "waived" any constitutional challenge to the law on appeal, "includ[ing] any claim that the law violated the First Amendment as applied to him." Opp. to Pet. for Reh'g 2, 5, 8; see Gov't C.A. Br. 14. The court of appeals denied rehearing. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 5-9) that the court of appeals erroneously held that a defendant must bring a facial, rather than as-applied, First Amendment challenge to a criminal statute under true-threats doctrine. In fact, however, the court found only that petitioner's appeal did not raise any kind of First Amendment challenge to the statute of conviction, and it rejected petitioner's contention that the indictment and jury instructions in this case omitted an essential element of the offense under 18 U.S.C. 1038(a)(1). The court's factbound, unpublished and nonprecedential memorandum disposition does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Contrary to petitioner's core premise, the court of appeals found not just that petitioner had failed to raise a facial challenge to 18 U.S.C. 1038(a)(1), but that petitioner's appeal "d[id] not challenge the constitutionality of 18 U.S.C. § 1038(a)(1)" at all. Pet. App. A2. The government argued to the appellate panel that while petitioner had "cite[d] cases" involving the First Amendment, "'[he] ha[d] raised no such First Amendment claim'" in the appeal, making his argument akin to the argument that the court of appeals found to have been "waived" in its prior decision in United States v. Castagana, 604 F.3d 1160 (2010). Gov't C.A. Br. 14 (quoting Castagana, 604 F.3d at 1165) (second set of brackets in original); see id. at 17 (stating that

petitioner "has waived any constitutional challenge"). And the court apparently agreed: It noted (Pet. App. A1-A3) that petitioner had cited Counterman v. Colorado, 600 U.S. 66 (2023), which involved the First Amendment, but found that petitioner's invocation of that decision "fail[ed]" because petitioner, like the defendant in Castagana, had "'raised no such First Amendment claim' regarding the statute" here. Pet. App. A2-A3 (quoting Castagana, 604 F.3d at 1165).

Petitioner himself acknowledged that finding below. In his petition for rehearing, he recognized that the court of appeals "rejected" his claim on the ground that he "'d[id] not challenge the constitutionality of 18 U.S.C. § 1038(a)(1),'" Pet. for Reh'g 5 (citation omitted), and that in so doing, the court analogized this case to Castagana, "a case of pure statutory interpretation" in which the court "did not 'concern itself' with whether the defendant's conduct was 'subject to First Amendment protection'" because the defendant "did not bring any First Amendment claim at all," id. at 1, 9 (quoting Castagana, 604 F.3d at 1165 n.4) (brackets omitted). And while petitioner claimed that the panel had "overlook[ed] the fact that [he] did raise an as-applied First Amendment claim" (id. at 1), the government's response observed that "the only time [petitioner] mentioned the words 'as applied' [was] in a description of one of [the court of appeals'] cases in his reply brief." Opp. to Pet. for Reh'g 8. The court denied rehearing. Pet. App. B1.

Because the court of appeals did not consider him to have raised any First Amendment challenge at all, petitioner errs in contending (Pet. 5-9) that the court held that a "defendant is required to bring a facial challenge to an entire statute before a court considers an as-applied Counterman claim." Pet. 5. The court never mentioned the distinction between facial and as-applied challenges, much less articulated the holding that petitioner now attributes to it. See Pet. App. A1-A4. Petitioner appears to suggest that the court implicitly "requir[ed] a facial challenge," Pet. 6, when it found that petitioner "does not challenge the constitutionality of 18 U.S.C. § 1038(a)(1)," Pet. App. A2 (emphasis added). But such phrasing commonly encompasses both as-applied and facial challenges, as here. See, e.g., Elgin v. Department of the Treasury, 567 U.S. 1, 16 n.5 (2012) (discussing claims that "do not challenge the constitutionality of a federal statute either facially or as applied"); McConnell v. FEC, 540 U.S. 93, 244 (2003) (parties may "challenge the constitutionality of § 504 [of the statute] as applied"). Particularly in the context of the briefing below, the court of appeals' decision is best read to adopt the government's argument that "any constitutional challenge [was] waived" in the case-specific posture of petitioner's appeal. Gov't C.A. Br. 14 (emphasis added).

2. The decision below does not conflict with any decision of this Court or another court of appeals. As a threshold matter, the court of appeals' decision is "not precedent" and thus made no

law binding in any future case. 9th Cir. R. 36-3(a). Moreover, petitioner does not identify any other court of appeals that would have deemed him to have raised an as-applied constitutional claim in the circumstances here. And the court of appeals' determination that he failed to do so turns on this case's "specific facts" and does not warrant this Court's review. See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925); Sup. Ct. R. 10.

Moreover, contrary to petitioner's suggestion (Pet. 5), the Ninth Circuit does consider as-applied challenges to prosecutions based on the true-threats doctrine, including after Counterman, so long as those claims are properly raised. See, e.g., United States v. Martis, No. 22-10056, 2024 WL 957522, at *2 (Mar. 6, 2024); United States v. Isho, No. 22-10150, 2024 WL 135247, at *1 (Jan. 12, 2024), cert. denied, 144 S. Ct. 1469 (2024); United States v. Weiss, No. 20-10283, 2021 WL 6116629, at *1-*2 (Dec. 27, 2021). More broadly, the Ninth Circuit has extensive precedent considering properly raised as-applied challenges to criminal prosecutions under other First Amendment doctrines. See, e.g., United States v. Sineneng-Smith, 982 F.3d 766, 775-776 (2020), cert. denied, 142 S. Ct. 117 (2021); United States v. Osinger, 753 F.3d 939, 946 (2014); United States v. Alvarez, 617 F.3d 1198, 1201 (2010), aff'd, 567 U.S. 709 (2012).

The unpublished decision below could not, and did not purport to, abrogate those circuit precedents recognizing a defendant's ability to bring an as-applied First Amendment challenge to his

criminal prosecution under a variety of statutes. And any purported intra-circuit conflict on that issue would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

A. TYSEN DUVA
Assistant Attorney General

WILLIAM G. CLAYMAN
Attorney

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